[2022] JMSC. CIV 185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV01774

BETWEEN	**TYRONE GEORGE MARTIN**	**CLAIMANT**
AND	**JP TROPICAL FOODS LIMITED**	**1st DEFENDANT**
AND	**AGRI SERVICES LIMITED**	**2nd DEFENDANT**
AND	**JAMAICA PRODUCERS GROUP LIMITED**	**3rd DEFENDANT**
AND	**AGUALTA VALE LIMITED**	**4th DEFENDANT**

IN CHAMBERS

Mr. Richard Reitzin instructed by Reitzin and Hernandez Attorneys-at-Law for the Claimant

Mr. Nickardo Lawson instructed by Samuda and Johnson Attorneys-at-Law for the Defendants

Heard: April 20, 2022 and July 12, 2022

Interim payment – Part 17 of the Civil Procedure Rules – the principles to be considered by the court – requirement of a higher burden of proof – Claimant to show that he would succeed at trial

ORR, J (AG)

BACKGROUND TO THE APPLICATON

[1] This Application for an Interim Payment filed by the Claimant on November 8, 2021, arose out of an incident which he says occurred while he was exposed to a

hazardous chemical, MOCAP, while in the employment of one or more of the defendants.

[2] Mr. Tyrone Martin seeks an interim payment in the sum of seven million dollars on the basis that this amount is a reasonable proportion of the likely amount of the final judgment. To ground his application, he relies on CPR 17.6(1)(d), that if the claim went to trial he would obtain judgment for substantial damages against the Defendants or one or more of them.

[3] The authority to grant an order for an interim payment is found in the Judicature (Supreme Court) Validation and Amendment Act, 2012 and rule 17.5 of the CPR.

[4] The Court must be guided by the conditions and matters set out in CPR 17.6 as the court has no inherent jurisdiction to grant an interim payment. (***Moore v Assignment Courier Limited*** *[1977] 1 WLR 638*) and see also (***Best Buds Limited v Garfield Dennis*** *2012 JMCA Civ 1*)

[5] Rules 17.6 (1) (a) – (c) provide for interim payments where liability is no longer in issue as either liability has been admitted, or judgment has been entered against the defendant(s). Provision for an interim payment is also made in cases where the court has ordered that an account be taken and that any sums found to be due to the Claimant are to be paid.

[6] In the case before me, liability is contested on several grounds and there are multiple Defendants, thus Rule 17.6(3) applies. It provides:

> *"In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if -*
>
> *(a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and*
>
> *(b) paragraph (2) is satisfied in relation to each defendant.*

[7] Paragraph (2) speaks to the requirement that before an interim payment can be made the court must be satisfied that the Defendant is:

> *(a) insured in respect of the claim;*
>
> *(b) a public authority; or*
>
> *(c) a person whose means and resources are such as to enable that person to make the interim payment.*

[8] Applications made pursuant to Rule 17.6(3) require the court to assess each party's statement of case and any relevant affidavit evidence filed by the parties to determine whether the Claimant would succeed if the claim went through to trial.

[9] It is important to appreciate the necessary higher burden of proof set out in the language of rule 17.6(3). The Claimant is not asked to establish a prima facie case against the Defendant, nor can he simply establish that he has a reasonable prospect of succeeding against the Defendant.

> *"It is a well established principle of common law that a defendant has a right not to be held liable to pay until his liability has been established by a final judgment." (per Morrison, JA (as he then was) in* ***Best Buds Limited v Garfield Dennis*** *2012 JMCA Civ 1)*

[10] It is for this reason that CPR 17.6 requires a Claimant to establish that he will succeed at the trial as the court will in effect be ordering the Defendant/Defendants to pay over a significant sum of money to the Claimant without the benefit of hearing and assessing his evidence under the scrutiny of cross examination.

[11] In ***Blue Waves Investment Limited v Jamaica Bauxite Mining Limited*** *[2017] JMCC Comm 36*, Batts, J at paragraph 8 said that:

> *"It is well established that the burden, on an applicant for an interim payment, is a high one. The Claimant must show to a high standard that she is likely to succeed in her claim. It must be demonstrated that the claimant "would" obtain judgment, see* ***Etta Brown v AG HCV 03390 of 2007*** *unreported judgment of Brooks J (as he then was) as applied by F. Williams J (as he then was) in* ***Administrator General for Jamaica v Lloyd Lewis [2015] JMSC Civil 116*** *unreported 17 June 2015".*

[12] F. Williams J (Ag) (as he then was) in ***Phylis Anderson v Windell Rankine*** *unreported 2006HCV05105 delivered 10th December 2008*, at page 11 simplified this principle when he explained that:

> *For a claimant to successfully apply for an interim payment, he/she must satisfy the court that he/she will likely win the case against the defendant. The standard by which that must be done is the civil standard (i.e., proof on a balance of probabilities), but such proof must be effected at the higher end of that scale. It is expected that such applications will only succeed where the claimant has a very strong claim and where his/her action is likely to be easy to establish. Establishing a "mere" prima facie case will not be enough. Where the competing contention on the part of the claimant and the defendant are, on the pleadings, of equal weight, and nothing emerges at that stage to "tilt the balance," such an application will likely fail." (emphasis mine)*

[13] It is noteworthy that the considerations for a court on an application for summary judgment and an interim payment are similar and both applications are often heard together, however the burden of proof for the interim payment remains higher.

[14] The issue I must consider on this application before me is therefore, whether the Claimant will succeed at trial and obtain a substantial judgment against one or more of the Defendants. At this stage it is not necessary for me to determine which of the several Defendants would be liable.

[15] In doing so, I must consider whether there are any disputes/triable issues on the parties' statements of case or affidavit evidence and assess whether these issues can be resolved on the facts before me in favour of the Claimant thereby rendering a trial of the issues nugatory. Put another way, at this stage can one or more of the Defendants be imputed with liability for the Claimant's injuries despite their defence to the claim?

[16] The Claimant, Mr. Martin, has sued four companies for damages for negligence, breach of the duty of care owed under the Occupiers' Liability Act, and also breach of his contract of employment in that his employer failed to maintain a safe system of work.

[17] In his Particulars of Claim, he alleges that he was in one of the Defendants' employ and in their field, when he smelt an odour. He complained when one or more of the Defendants applied what he describes as an "extremely toxic insecticide/nematicide, MOCAP in an adjacent banana field". He said further that fumes from this insecticide escaped from the field and drifted or were blown into the nearby field where he was working. As a result, he was exposed to MOCAP.

[18] He further alleges that his exposure was caused by the negligence of all, or one, or more of the Defendants. At paragraph [9] of his Amended Particulars of Claim he avers that:

> *"The claimant's exposure to MOCAP was due to a breach by the defendants or one of more of them, of its/their duties pursuant to the provisions of the Occupiers Liability Act."*

At paragraph [10] he further avers that:

> *" Further, or in the alternative, the 1st ,2nd, and 3rd defendants or one or more of them owed a duty of care to the claimant arising from the relationship between them of employer and employee"*

[19] The 1st Defendant, JP Tropical Foods Limited, has admitted that the Claimant was employed to the company as a general worker, and that they would owe him a duty of care to provide a safe place of employment. The 1st Defendant denies that it breached this duty in any way.

[20] The 4th Defendant admits that it owned farmlands in Annotto Bay, St. Mary which were occupied by the 1st Defendant. The 1st Defendant also admits that its employees applied MOCAP in an adjacent banana field, but denies that the application was done negligently thereby causing fumes to escape/drift into the Claimant's work space and ultimately exposing him to MOCAP. The 1st Defendant admits that it owed the Claimant a duty of care under the Occupiers Liability Act but denies that this duty was ever breached.

[21] The 1st Defendant also says that the Claimant was outside the area of the reasonably contemplated pesticide drift and denies that the Claimant was exposed

to MOCAP. This Defendant goes further to say that if the Claimant was indeed exposed to MOCAP, this exposure was not reasonably foreseeable by the 1st Defendant and thus there was no negligence on their part.

[22] The 2nd, 3rd and 4th Defendants all deny liability under Rylands and Fletcher. The 1st Defendant also denies liability under Rylands and Fletcher and says that the rule in Rylands and Fletcher does not arise on the factual circumstances of the claim as MOCAP was not brought unto the lands, nor was it collected and/or kept there by the 1st Defendant, which is a necessary component of the claim.

[23] The 2nd, 3rd, and 4th Defendants deny the claimants claim and rely on the particulars set out by the 1st Defendant. All of the Defendants deny that the Claimant was injured and put him to strict proof of his injuries and losses. They also deny that there is a casual nexus between the incident complained of (the exposure to MOCAP) and the Claimant's injuries as outlined in his medical report.

[24] In summary the Defendants have joined issue with the Claimant's statement of case as to:

(i) whether Mr. Martin was in a reasonably contemplated drift area in relation to the field where the insecticide was being used;

(ii) whether he was indeed exposed to MOCAP;

(iii) whether any such exposure was reasonably foreseeable;

(iv) and whether he suffered any injury

[25] In short, the Defendants have put the Claimant to strict proof of his claim.

ANALYSIS

[26] The tort of Negligence requires the Claimant to not only establish that he was owed a duty of care by one or more of the Defendants, but he must also establish that this duty was breached and that he suffered loss as a result.

[27] In relation to his claim under the Occupiers' Liability Act, while liability for dangerous items is strict, it is to be remembered that Mr. Martin's complaint is not that the hazardous chemical was brought unto the property to which he was employed, but rather that it escaped from another property and affected him.

[28] Despite the 1st Defendant's admission that it used MOCAP on its field, the Defendants have raised several issues in relation to the claim. They do not admit that Mr. Martin interacted with the chemical. They challenge the proximity of the Claimant to the field where the chemical was being administered and also raise the issue of the "contemplated drift" when the chemical was administered. This brings into question, how the chemical should be properly applied and whether it was properly applied in the circumstances.

[29] The challenges raised by the Defendants put several aspects of the Claimant's claim in issue. The Claimant did not provide evidence to resolve these issues such that I could be satisfied that the challenges to the Claimant's claim were resolved.

[30] The court would benefit from hearing evidence on the use of MOCAP, whether it is indeed a hazardous chemical, the correct or accepted application of poisonous pesticides in fields, and whether there is indeed a "reasonable foreseeable drift area" as suggested by the Defendants.

[31] Important to the Claimant's claim is the exact distance between the Claimant and the fields where the MOCAP was being administered which he has not stated.

[32] Indeed, the technical nature of the claim is such that it is likely that the court would have to rely on the evidence of experts at trial who would speak to the issues raised by the defendants, particularly the "area of contemplated drift". The claim is not one which can be described as being "*easy to establish*".

[33] To succeed against the Defendants, Mr. Martin must also establish causation and his injuries. In this regard, I have considered the sole medical report relied on by the Claimant and as prepared by Dr. Myo Thant Khine.

[34] In his medical report Dr. Khine states that he treated the Claimant for seizure disorder based on a reported history of exposure to an insecticide two days before admission. The medical report by itself does not create a sufficient nexus between the Claimant's alleged seizures and his alleged exposure to MOCAP.

[35] The report is absent of the necessary detail that would establish causation. Dr. Khine's medical report merely repeats what the Claimant reported to him when taking his history. Importantly, the doctor states that there is no residual or permanent disability. Also, Mr. Martin should have returned to see the doctor, as there is a six-month referral in the medical report. There is no evidence that the Claimant ever returned to see the doctor.

[36] In his Amended Particulars of Claim, Mr. Martin has however included resulting injuries and disabilities that are not supported by any medical report. In light of Dr. Khan's report that there was no permanent or residual disability, the resulting injuries and disabilities included in his Amended Particulars of Claim would have to be established by medical evidence, which is presently not before the court. This is crucial as it goes to the issue of damages.

[37] There is no evidence that Dr. Khan observed the seizures or fainting attacks or residual effects thereof. More importantly, there is no indication that the seizures/fainting spells are as a direct result of the Claimant's exposure to MOCAP. There is no evidence that further tests were completed to rule out any other cause of the alleged seizures which the Claimant said he experienced.

[38] This is another area in which the court would wish to have the benefit of further or expert medical evidence in relation to the nexus between exposure to MOCAP and seizures. The medical report before the court leaves many questions on the Claimant's claim unanswered.

[39] The facts of the Claimant's case as presented do not meet the threshold to establish that he would succeed at trial and does not therefore warrant an order for an interim payment. The Claimant has not placed sufficient and relevant

evidence before the court to establish that he would obtain judgment against one or all of the Defendants at trial. He has also failed to satisfy the requirements in CPR 17.6(2).

[40] In the circumstances, the Claimant's application for an interim payment cannot succeed.

[41] The order of the court is as follows:

(i) The Claimant's application for an interim payment is refused.

(ii) The costs of the application for an interim payment are awarded to the Defendants to be taxed if not agreed.

(iii) The parties are to attend mediation on or before October 31, 2022, and the defaulting party is to pay the mediation costs of the other party where mediation does not take place prior to the case management conference.

(iv) A mediation memorandum is to be provided by email to the agreed mediator by each party on or before September 16, 2022.

(v) Standard Disclosure is to take place by September 16, 2022.

(vi) Inspection is to take place by September 23, 2022.

(vii) A case management conference is scheduled for January 12, 2023 at 11:00am for 1 hour.

(viii) The Claimant's remaining applications and any other applications which are made by the parties are to be heard at this case management conference and are to be served on opposing counsel by September 23, 2022.

(ix) The Claimant's Attorney-at-Law is to prepare file and serve this order.

(x) Leave to appeal is refused.