IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 00238

BETWEEN DESMOND ANDERSON CLAIMANT

AND RON KELLY T/A HILTON KINGSTON HOTEL 1ST DEFENDANT

AND OCEAN CHIMO LIMITED 2ND DEFENDANT

MR. A. WILLIAMS, INSTRUCTED BY USIM, WILLIAMS & CO., FOR THE CLAIMANT.

MR. K. BISHOP, INSTRUCTED BY BISHOP & FULLERTON, FOR THE DEFENDANTS.

PERSONAL INJURY — INJURY TO WORKER ON THE JOB- SAFE SYSTEM OF WORK - CLAIM FOR HANDICAP ON THE LABOUR MARKET - WHETHER EMPLOYER LIABLE — IF SO, WHETHER CLAIMANT ALSO NEGLIGENT.

HEARD: SEPTEMBER 24, 2009; AND JANUARY 8, 2010.

F. WILLIAMS, J (AG.)

FACTS

THE CLAIMANT IN THIS CASE HAS SUED THE DEFENDANTS TO RECOVER DAMAGES FOR PERSONAL INJURY. HE WAS INJURED ON SEPTEMBER 14, 2005 WHEN HE FELL FROM A LADDER WHILST ATTEMPTING TO REPAIR A DEFECTIVE ELECTRIC LIGHTING FIXTURE. THIS FIXTURE WAS LOCATED ON A ROOF ON A BUILDING

AT THE DEFENDANTS' PREMISES IN NEW KINGSTON, ST. ANDREW.

IN A NUTSHELL, THERE ARE TWO BASIC COMPETING CONTENTIONS IN THIS CASE:- FIRST, ON THE CLAIMANT'S CASE, THE CONTENTION IS THAT THE LADDER FROM WHICH THE CLAIMANT FELL WAS DEFECTIVE; AND/OR NOT PROPERLY SECURED BY THE DEFENDANTS' SERVANTS OR AGENTS, MESSIEURS KEVIN WELSH AND RICHARD SMELLIE. SECOND, ON THE DEFENDANTS' CASE, THE CONTENTION IS THAT THE CLAIMANT SLIPPED WHILE HE WAS DESCENDING THE LADDER (THE LADDER NOT BEING DEFECTIVE, AND HAVING BEEN PROPERLY SECURED BY THE DEFENDANTS' SERVANTS OR AGENTS).

SUMMARY OF THE CLAIMANT'S CASE

THE CLAIMANT'S CASE IS TO THE EFFECT THAT ON THE DAY IN QUESTION, AS HE WAS DESCENDING THE LADDER, THE FASTENERS ON IT GAVE WAY AND THE PART OF THE LADDER THAT WAS EXTENDED BEGAN TO SLIDE DOWN. THIS CAUSED HIM TO FALL. HE LANDED RIGIDLY ON HIS FEET AND FOLDED, "HITTING

HARD ON MY BUTTOCKS, SEVERELY JERKING MY BACK AND NECK. I COULDN'T FEEL MY RIGHT LEG, BUT I HAD FEELING IN MY LEFT LEG. I WAS IN GREAT PAIN, AND LYING ON THE GROUND". (SEE PARAGRAPH 13 OF HIS WITNESS STATEMENT).

HE HAD COMPLAINED SEVERAL TIMES PREVIOUSLY ABOUT THE FACT THAT THE LADDER WAS DEFECTIVE, BUT TO NO AVAIL. IN ADDITION TO THE FASTENERS BEING DEFECTIVE, THERE WAS ALSO MISSING FROM THE LADDER A ROPE THAT HAD PREVIOUSLY BEEN ON THE LADDER AND USED AS AN ADDITIONAL SAFETY DEVICE TO PREVENT THE LADDER FROM SLIDING DOWN.

IN CROSS-EXAMINATION, HOWEVER, HE STATED THAT WHEN THE LADDER WAS EXTENDED, PERSONS ON THE GROUND WERE IN A BETTER POSITION TO SEE WHETHER THE FASTENERS WERE IN PLACE OR NOT.

SUMMARY OF THE DEFENDANTS' CASE

EVIDENCE FOR THE DEFENDANTS WAS GIVEN BY MR. KEVIN WELSH AND MR. RUDOLPH SMELLIE WHO WERE THE

DEFENDANTS' EMPLOYEES WHO WERE SUPPOSED TO HAVE BEEN HOLDING THE LADDER AT THE MATERIAL TIME.

THEIR EVIDENCE IS TO THE EFFECT THAT THE LADDER DID NOT SLIP. THEY HAD CHECKED THE FASTENERS AT LEAST ONCE. IT (THE LADDER) WAS NOT DEFECTIVE. THEY HAVE NO KNOWLEDGE OF THE ROPE THAT THE CLAIMANT MENTIONED IN HIS EVIDENCE.

THE ACCIDENT OCCURRED, THEY SAID, AS A RESULT OF THE CLAIMANT'S LOSING HIS BALANCE AND SLIPPING AS HE ATTEMPTED TO DESCEND THE LADDER.

IT LATER EMERGED THAT IT IS LIKELY THAT MR. SMELLIE MUST HAVE BEEN TO THE RIGHT OF THE LADDER AS THE CLAIMANT ATTEMPTED TO DESCEND IT. I SAY "IT IS LIKELY" BECAUSE THIS WAS ONE PART OF THE EVIDENCE THAT NEITHER WITNESS FOR THE DEFENDANTS SEEMED TO HAVE BEEN ABLE CLEARLY TO REMEMBER OR TO HAVE BEEN CERTAIN ABOUT.

The Medical Evidence

In the instant case the claimant's final diagnoses were: 1) "lumbar spine contusion; 2) Right heel pad contusion. There was also a diagnosis of "pre-existing spondylosis of L5". (See medical report of Dr. Grantel Dundas, dated October 24, 2005). Also of note in another medical report (dated August 23, 2006) is the doctor's observation that: "I do not think that Mr. Anderson will be totally incapacitated..."; and "I think he should be able to manage some degree of activity. As long as he can avoid lifting heavy weights and prolonged bending, it is likely that he would be able to function in his job. I do not think, however, that he will become totally asymptomatic".

In a further medical report dated February 7, 2007, the doctor states the permanent partial disability (PPD) as it relates to the cervical spine to be 5% of the whole person; and, in relation to the lumbar spine, to be 8% of the whole person. In his oral evidence, the doctor pointed out that that did not amount to a combined

WHOLE-PERSON DISABILITY OF 13%; BUT, RATHER, OF 12%. THIS FIGURE RELATES TO THE CLAIMANT'S SPINE ALONE, AND NOT TO HIS PRE-EXISTING HIP INJURY AT ALL. HE ARRIVED AT THIS FIGURE BASED ON GUIDELINES PUT OUT BY THE AMERICAN MEDICAL ASSOCIATION – GUIDES FOR THE EVALUATION OF PERMANENT IMPAIRMENT. THIS GUIDE IS NOW IN ITS 6TH EDITION. HE DID NOT QUOTE OR PROVIDE THE COURT WITH A COPY OF THE PAGE OR PARAGRAPH OR TABLE TO WHICH HE MADE REFERENCE IN ARRIVING AT THE FIGURE OF 12%.

THIS LAST OBSERVATION WAS USED AS A BASIS BY THE DEFENCE FOR CHALLENGING THE DOCTOR'S EVIDENCE AS BEING UNRELIABLE.

IN ANSWER TO QUESTIONS FROM THE COURT, THE DOCTOR INDICATED THAT HE HAD PREPARED LITERALLY THOUSANDS OF MEDICAL REPORTS FOR THE COURT IN OTHER MATTERS AND GIVEN EVIDENCE IN COURT ON VERY MANY OCCASIONS. HE HAD NEVER, HE TESTIFIED, BEEN REQUIRED TO PROVIDE COPIES OR QUOTE THE EXACT REFERENCE BEFORE. HE HAD BEEN A

CONSULTANT ORTHOPAEDIC SURGEON FOR SOME THIRTY-ONE (31) YEARS AT THE TIME HE GAVE HIS EVIDENCE.

THE COURT, IN CONSIDERING THE MEDICAL EVIDENCE, APPRECIATES THAT IT IS NOT BOUND TO ACCEPT THE EVIDENCE OF AN EXPERT; BUT IS REQUIRED TO GIVE IT THE SAME CAREFUL CONSIDERATION THAT IT IS REQUIRED TO GIVE TO THE EVIDENCE OF ANY OTHER WITNESS – EXPERT OR OTHERWISE.

HAVING CONSIDERED THE CASE OF **COOPERS PAYEN LTD V SOUTHAMPTON CONTAINERS TERMINAL LTD** [2003] EWCA CIV. 1223; AND HAVING GIVEN CAREFUL CONSIDERATION TO THE MEDICAL EVIDENCE VIS-À-VIS THE EVIDENCE OF THE CLAIMANT, THE COURT IS OF THE VIEW THAT THE EVIDENCE OF BOTH WITNESSES ARE CONSONANT WITH EACH OTHER AND THAT THE MEDICAL EVIDENCE SHOULD BE ACCEPTED AS BEING RELIABLE. ANY OMISSIONS TO COMPLY WITH THE CIVIL PROCEDURE RULES ARE NOT SUFFICIENTLY SERIOUS TO AFFECT THE GENERAL RELIABILITY OF THE SAID EVIDENCE.

Issue Raised in Respect of the 1st Defendant

An issue was also raised (in paragraph 3, onwards of the defendants' written submissions) as to who is the proper defendant to the suit. It appears that it is being contended that the 1st defendant is not the claimant's employer.

It is to be noted, however, that a default judgment was entered against the 1st defendant, with damages to be assessed, the said assessment to take place at the trial of the substantive matter. This fact makes it, in the court's view, a bit late in the day for this issue to be raised. It seems to the court that the entry of the default judgment effectively seals the issue of liability against the 1st defendant, and at this stage the only issue is as to quantum.

In order properly to have raised this issue, the 1st defendant should have applied to have the default judgment set aside in order to defend the matter. Indeed, it could be said (on the authority of **Rexford**

BLAGROVE V METROPOLITAN MANAGEMENT TRANSPORT HOLDINGS LTD. & LLOYD HUTCHINSON – SUPREME COURT CIVIL APPEAL NO. 111/2005 – PAGE 12, PARAGRAPH (3), PER SMITH, J.A.), THAT, AT THIS STAGE, THE 1ST DEFENDANT'S SUBMISSIONS SHOULD NOT BE HEARD AT ALL.

THE CONTENTION THAT PREVAILED

FROM AN ANALYSIS OF THE EVIDENCE IN ITS ENTIRETY IN THIS CASE; AND CONSIDERING ESPECIALLY HOW THE LADDER IS SAID TO HAVE BEEN PLACED, THAT IT FELL TO THE LEFT AND LANDED THERE, THE COURT IS OF THE VIEW THAT THE CLAIMANT DID IN FACT SLIP (THAT IS, LOSE HIS BALANCE) AS HE ATTEMPTED TO DESCEND THE LADDER. THE LADDER DID NOT SLIDE DOWN AS A RESULT OF THE FASTENERS BEING DEFECTIVE OR BECAUSE OF THE ABSENCE OF A SAFETY ROPE (AS THE CLAIMANT CONTENDED). HOWEVER, THE COURT FINDS THAT AT THE TIME OF THE CLAIMANT'S SLIPPING, THE LADDER WAS NOT BEING SECURELY HELD BY THE DEFENDANTS' SERVANTS OR AGENTS, MESSRS. WELSH AND SMELLIE. THE COURT FURTHER FINDS THAT, AT THE MATERIAL TIME, THE LADDER WAS BEING HELD BY MR. SMELLIE ALONE, WHO HAD ONLY ONE FOOT AND ONE HAND

ON THE LADDER. THIS WAS IN FACT ADMITTED BY MR. SMELLIE IN HIS EVIDENCE (THAT IS, THE MANNER IN WHICH HE WAS SEEKING TO STABILIZE THE LADDER). ADDITIONALLY, THE COURT FINDS THAT AT THE TIME THAT THE DEFENDANT ATTEMPTED TO DESCEND THE LADDER, MR. WELSH WAS A SHORT DISTANCE AWAY AND WAS ABLE TO RETURN NEAR TO THE LADDER WHEN THE CLAIMANT FELL AND ATTEMPT TO BREAK THE CLAIMANT'S FALL.

AT THE END OF THE DAY, THE COURT FINDS THAT THE CLAIMANT SLIPPED AND THE LADDER FELL AWAY TO THE LEFT BECAUSE IT WAS NOT BEING SECURELY HELD BY THE DEFENDANTS' SERVANTS OR AGENTS. IF IT WAS BEING SO HELD, IT COULD NOT HAVE MOVED TO THE LEFT AND FALLEN THERE. IT WOULD LIKELY HAVE GONE DIRECTLY BACKWARD, IF IT WOULD HAVE MOVED OUT OF PLACE AT ALL.

THIS IS THE COURT'S IMPRESSION OF HOW AND WHY THE ACCIDENT OCCURRED. IN FORMING THIS IMPRESSION, THE COURT HAS NOT ACCEPTED EITHER THE EVIDENCE OF THE CLAIMANT IN ITS ENTIRETY ON THE ONE HAND; OR THAT OF THE

DEFENDANTS IN ITS ENTIRETY, ON THE OTHER. THE COURT FORMED THE VIEW THAT EACH SIDE WAS LESS THAN FRANK IN AN EFFORT TO SHORE UP ITS CASE.

THE COURT FINDS THE 2ND DEFENDANT TO BE PRIMARILY NEGLIGENT AND LIABLE FOR THE INCIDENT THAT LED TO THE CLAIMANT'S INJURY. HOWEVER, (PURSUANT TO THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT), IT ALSO FINDS THE CLAIMANT TO BE CONTRIBUTORILY NEGLIGENT- FOR ATTEMPTING TO DESCEND THE LADDER WHEN IT WAS UNSAFE TO DO SO, (BEING BARELY HELD BY ONLY ONE OF THE PERSONS ASSISTING HIM) AND FOR NOT HAVING AS MUCH REGARD FOR HIS OWN SAFETY AS MIGHT HAVE BEEN DESIRED. IN THE WORDS OF DENNING LJ IN **JONES V LIVOX QUARRIES LTD.** [1952] 2 Q.B. 608, 615: "... HE OUGHT REASONABLY TO HAVE FORESEEN THAT, IF HE DID NOT ACT AS A REASONABLE, PRUDENT MAN, HE MIGHT BE HURT HIMSELF; AND IN HIS RECKONINGS HE MUST TAKE INTO ACCOUNT THE POSSIBILITIES OF OTHERS BEING CARELESS".

I APPORTION LIABILITY 70%: 30% TO THE DEFENDANTS AND CLAIMANT RESPECTIVELY.

Damages

Pain and Suffering

Under this head, I find the case of **Naggie v Ritz Carlton Hotel Co. of Jamaica Ltd.** (HCV 00503 of 2004), to be the closest to the instant case, in terms of the injuries suffered.

In the **Naggie** case, the diagnosis was "chronic mechanical lower back pain". This resulted from an injury sustained by the claimant by lifting a heavy urn with ice whilst she was on the job. Her prognosis was that she would be plagued by intermittent lower back pains which would be aggravated by activities of daily living such as prolonged sitting, standing, bending and attempting to lift objects. Her PPD was 10% of the whole person.

Using the **Naggie** case as a general guide, the court is of the view that a reasonable award for pain and suffering is two million, six hundred thousand dollars ($2.6m).

CLAIM FOR HANDICAP ON THE LABOUR MARKET

IN RELATION TO THE CLAIM FOR HANDICAP ON THE LABOUR MARKET, THE COURT HAS HAD REGARD TO THE CASES CITED IN THE CLAIMANT'S WRITTEN SUBMISSIONS: NAMELY, (I) **CAMPBELL ET AL V WHYTE**, 59 WIR, 326; AND **CARLTON BROWN V MANCHESTER BEVERAGES LIMITED** – PAGE 270 OF VOLUME 5 OF KHAN.

THE COURT HAS ALSO HAD REGARD TO THE CASE OF **MOELIKER V REYROLLE** [1977] 1 WLR, 132, IN PARTICULAR TO THE DICTA OF BROWNE, LJ TO THE EFFECT THAT THE COURT MUST CAREFULLY CONSIDER (IN DECIDING WHETHER TO MAKE AN AWARD UNDER THIS HEAD) TO A CLAIMANT'S

> "RISK THAT HE MAY LOSE HIS EMPLOYMENT AT SOME TIME IN THE FUTURE AND MAY THEN, AS A RESULT OF HIS INJURY, BE AT A DISADVANTAGE IN GETTING ANOTHER JOB OR AN EQUALLY WELL PAID JOB".

AGAINST THIS BACKGROUND THE COURT HAS CONSIDERED THE SPECIFIC PARTS OF THE EVIDENCE THAT RELATE TO THIS HEAD OF CLAIM. FOR EXAMPLE, IN RELATION TO THE CLAIMANT'S EARNINGS, HIS EVIDENCE IS TO THE EFFECT THAT: "I CANNOT SAY IT [HIS PRESENT JOB] PAYS MORE OR LESS". ADDITIONALLY, IT IS NOT KNOWN WHETHER OR NOT THE CLAIMANT'S STATED INCOME IS GROSS OR NET. AND THERE ARE OTHER CONSIDERATIONS: (A) THE CLAIMANT IS BETTER QUALIFIED NOW THAN HE WAS WHEN HE WAS EMPLOYED TO THE DEFENDANT: HE HAS NOW OBTAINED A DIPLOMA WHICH HE STARTED TO STUDY TOWARDS WHILST EMPLOYED TO THE DEFENDANTS; (B) BASED ON THE MEDICAL EVIDENCE, HIS INJURIES WILL AFFECT HIS ABILITY TO FUNCTION ON THE JOB; (C) THERE IS NO OR NO SUFFICIENT EVIDENCE AS TO SUCH CONSIDERATIONS AS WHETHER, FOR EXAMPLE, HE IS CAPABLE OF OTHER TYPES OF WORK AND THE AVAILABILITY (OR OTHERWISE) OF EMPLOYMENT IN THE AREA OF ELECTRICAL WORK; (D) THE MEDICAL REPORT DATED AUGUST 23, 2006 INDICATES THAT HE "SHOULD BE ABLE TO FUNCTION"; (E) THE COURT CANNOT (ON THE EVIDENCE) SAY FOR CERTAIN THAT HE WOULD TODAY BE EARNING $70,000 PER MONTH AS PER THE DEFENDANTS' WITNESS, MR. WELSH. MR. WELSH GAVE

EVIDENCE THAT HE WAS NOW EARNING THIS FIGURE AS A MAINTENANCE TECHNICIAN, BUT IT IS NOT KNOWN WHETHER HIS AND THE CLAIMANTS RESPONSIBILITIES WERE OR WOULD NOW BE THE SAME: ARE THERE, FOR EXAMPLE, DIFFERENT GRADES OF MAINTENANCE TECHNICIAN, WITH EACH GRADE ATTRACTING A DIFFERENT RATE OF COMPENSATION? (F) THERE IS NO CLEAR EVIDENCE THAT THE CLAIMANT WILL BE CERTAIN OR VERY LIKELY TO SUFFER A DIMINUTION IN HIS ABILITY TO EARN.

IN LIGHT OF ALL THESE CONSIDERATIONS, THE COURT IS OF THE VIEW THAT THERE IS INSUFFICIENT EVIDENCE AVAILABLE TO IT TO MAKE AN AWARD USING THE MULTIPLIER-MULTIPLICAND APPROACH. THE LUMP-SUM APPROACH IS THE MORE APPROPRIATE. THE COURT'S AWARD UNDER THIS HEAD IS FIVE HUNDRED THOUSAND DOLLARS ($500,000).

SPECIAL DAMAGES

THE CLAIM UNDER THIS HEAD IS FOR THE SUM OF SEVEN HUNDRED AND FORTY-FIVE THOUSAND, FOUR HUNDRED AND ONE DOLLARS AND SIXTY CENTS ($745, 401.60). THIS REPRESENTS NINETY-SIX WEEKS' LOSS OF EARNINGS AT SEVEN THOUSAND

SEVEN HUNDRED AND SIXTY-FOUR DOLLARS AND SIXTY CENTS ($7,764. 60) PER WEEK.

THE CLAIMANT'S EVIDENCE IN SUPPORT OF THIS CLAIM IS THAT, HE HAVING LOST HIS JOB ON OCTOBER 17, 2006, HE DID NOT GAIN EMPLOYMENT UNTIL IN AUGUST OF 2008. HE FURTHER GAVE EVIDENCE THAT HE TRIED SEVERAL TIMES TO GAIN EMPLOYMENT AND ATTENDED SEVERAL INTERVIEWS BUT WAS UNSUCCESSFUL IN GETTING A JOB. THE EVIDENCE AS TO HIS EFFORTS WAS LIMITED TO THIS. BEARING IN MIND A DEFENDANT'S DUTY TO MITIGATE, AND IN LIGHT OF THE RELATIVE PAUCITY OF EVIDENCE UNDER THIS HEAD OF DAMAGE, THE COURT HAS TO ARRIVE AT WHAT IT CONSIDERS TO BE A REASONABLE AMOUNT FOR SUCH AN AWARD. IN THIS REGARD, THE COURT WILL ALLOW A PERIOD OF 52 WEEKS AT THE RATE CLAIMED OF $7,764. 60. THE AWARD IS THEREFORE $403,759.20.

THE ORDER IN THIS MATTER WILL THEREFORE BE AS FOLLOWS:-

JUDGMENT FOR THE CLAIMANT AGAINST THE 2ND DEFENDANT; AND DAMAGES ASSESSED AGAINST THE 1ST DEFENDANT AS FOLLOWS:-

1. THE COURT APPORTIONS LIABILITY 70% AND 30% BETWEEN THE DEFENDANTS AND CLAIMANT RESPECTIVELY.

2. GENERAL DAMAGES – A. PAIN & SUFFERING:-

   ONE MILLION, EIGHT HUNDRED AND TWENTY THOUSAND DOLLARS ($1,820,000) BEING 70% OF THE SUM OF $2.6 MILLION, WITH INTEREST THEREON AT THE RATE OF 3% P.A. FROM 21.6.06 (DATE OF SERVICE) TO TODAY'S DATE – 8.1.2010.

   HANDICAP ON THE LABOUR MARKET IN THE SUM OF THREE HUNDRED AND FIFTY THOUSAND DOLLARS ($350,000) BEING 70% OF THE SUM OF $500,000.

3. SPECIAL DAMAGES – LOSS OF EARNINGS –

   TWO HUNDRED AND EIGHTY-TWO THOUSAND, SIX HUNDRED AND THIRTY-ONE DOLLARS AND FORTY-FOUR CENTS ($282, 631.44), BEING 70% OF THE SUM OF $403,759.20, REPRESENTING LOSS OF EARNINGS FOR FIFTY-TWO WEEKS; WITH INTEREST THEREON AT THE RATE OF 6% P.A. FROM 14.9.05 (DATE OF INCIDENT) TO 21.6.06; AND AT 3% P.A. FROM 22.6.06 TO TODAY'S DATE – 8.1.2010.

4. COSTS TO THE CLAIMANT TO BE TAXED, IF NOT AGREED.