

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 03251

BETWEEN	VERMA DAYES	CLAIMANT
AND	THE RITZ CARLTON HOTEL	DEFENDANT
	COMPANY OF JAMAICA LIMITED	
	(Trading in Jamaica as The Ritz Carlton	
	Golf and Spa Resort Rose Hall Jamaica)	

IN CHAMBERS

Danielle Archer and Dale Staple instructed by Kinghorn and Kinghorn for the claimant

Kerry-Ann Sewell instructed by Nunes Scholefield DeLeon and Co for the defendant

INTERIM PAYMENT – WHETHER SUPREME COURT HAS POWER TO GRANT INTERIM PAYMENT UNDER THE CIVIL PROCEDURE RULES 2002– WHETHER POWER ABOLISHED AND NOT REENACTED – SECTION 4 (2) (j) OF THE JUDICATURE (RULES OF COURT) ACT – PART 17 OF THE CIVIL PROCEDURE RULES

December 2 and 13, 2011

SYKES J

- [1] The facts of this case are not crucial to resolving the issue raised in this application for interim payment. They can be stated in two sentences. Miss Verma Dayes says that she is a room attendant at The Ritz Carlton Hotel (the hotel), a true five star hotel, located on the northern coast of Jamaica just outside of the famed Montego Bay and adjacent to wonderful golf courses. On May 19, 2007, while engaged in her duties as a room attendant she was retrieving towels from a house keeping cart when a coworker maneuvered a steel cart in such a manner that it hit her on her hip causing injury. She has launched a claim in negligence or breach of contract to recover damages for the injuries allegedly suffered by her.
- [2] The claim has not yet been heard by the court yet she seeks a payment from the hotel because she says that she is likely to succeed at trial and so there is no need to await that day. The hotel resists. In classic syllogistic reasoning, Mrs Sewell says, a court cannot grant interim payment orders unless it is specifically empowered to do so by an Act of Parliament because no court has any inherent power to make such payments (the major premise). In Jamaica, there is no statutory power empowering the court to make these payments (minor premise). Therefore, this court has no power to grant the application for interim payment in this case (conclusion). Mrs Sewell submitted that part 17 of the Civil Procedure Rules (CPR) that defines the circumstances in which such a payment (called an interim payment) can be made presupposes that the power to make the award exists. She also submitted that Part 17 cannot and does not create the power to order interim payments. Is Mrs Sewell correct? Mr Staple agrees with the major premise but disagrees with the minor premise. He says that the power is derived from section 4 (2) (j) of the Judicature (Rules of Court) Act and part 17 of the CPR. Is he correct? Does the Supreme Court of Judicature of Jamaica have the power to order interim payment? That is the question.

Interim Payments

- [3] On January 18, 1989, the Court of Appeal declared that there was no statutory power in Jamaica enabling the Supreme Court to order a defendant to make a payment (called interim payment) in a claim before liability was determined at a trial (*Jamculture Limited v Black Upper Morass Development Co. Ltd* (1989) 26 JLR 5). The court also held that the provisions in England relating to interim payments could not be imported into Jamaica via section 686 of the then extant civil procedure rules known as the Judicature (Civil Procedure Code) Law. The result of this reasoning was that section 32 of the Supreme Court Act 1981 (UK) (dealing with interim payments) was not applicable to Jamaica. Campbell JA, who delivered the judgment of the court, held that the development of the law in Jamaica on this point would have to wait on legislative enactment. His Lordship stated that the two competing interests, (a) that of the claimant to receive early compensation for a wrong clearly done to him and (b) that of the defendant who should not 'except by a voluntary gesture, part with his property by way of payment of compensation unless and until he has been adjudged a wrongdoer by due process of law', would have to be resolved by statutory power.
- [4] His Lordship expressed the fundamental reason why the common law did not develop the concept of interim payments. The basic rule was that a defendant could not be compelled to pay compensation to a claimant unless and until the defendant was found liable by a court. Any payment in advance of liability being established had to be voluntary.
- [5] The Jamaican Parliament responded to Campbell JA's invitation by passing three statutes dealing with interim payments. These were Judicature (Civil Procedure Code) (Amendment) Act, 1997; the Judicature (Rules of Court) (Amendment) Act, 1997 and the Judicature (Resident Magistrates) (Amendment) Act, 1997.
- [6] The Judicature (Civil Procedure Code) (Amendment) Act inserted Title 36A into the principal law, The Judicature (Civil Procedure Code) Law. The title to this new section read 'Interim Payments.' Section 441A (1) read:

The Court may, where there are proceedings pending and in such circumstances as may be specified in Rules of Court make an order requiring a party to any proceedings to make to another party to the proceedings an interim payment of such amount as may be specified in the order.

[7] This amendment was brought into force on September 24, 2001 (see Jamaica Gazette Supplement, Proclamations Rules and Regulations, Vol. CXXIV, No. 86, Legal Notice No. 137 dated September 24, 2001). The practical effect of this is that the Supreme Court did not have power to grant interim payment orders until September 24, 2001 even though that legislation was passed in 1997.

[8] The wording is to be noted. The Court was authorised to make interim payment orders but only in the circumstances specified by the Rules Committee. This is why section 4 (2) (j) was added to the Judicature (Rules of Court) Act. The view must have been that the Rules Committee was to have power only to specify the circumstances for the interim payment and not have power to give the Supreme Court power to make interim payments. The significance of this distinction will become apparent.

[9] The Judicature (Rules of Court) (Amendment) Act added this provision to section 4 (2) and this addition became and still is section 4 (2) (j):

Rules of court may make provisions for all or any of the following matters –

...

(j) for specifying the circumstances in which the Supreme Court may make an order for an interim payment;

[10] This Act came into force on September 24, 2001 (see Jamaica Gazette Supplement, Proclamations Rules and Regulations, Vol. CXXIV, No. 86, Legal Notice No. 136 dated September 24, 2001).

[11] The amendment to the Judicature (Resident Magistrates) Act reads:

The Court may, where there are proceedings pending and in such circumstances as may be specified in the Resident Magistrate's Court Rules, make an order requiring a party to any proceedings to make to another party to the proceedings an interim payment of such amount as may be specified in the order.

[12] Thus the Resident Magistrates were empowered to make interim payment orders but only in such circumstances as may be specified in the rules of the Resident Magistrate's Court Rules. However, research has uncovered the fact that this provision has not been brought into force. Section 1 of the amendment stated that it would be brought into force on a day to be named in the Gazette. That day has not been gazetted.

[13] While the amendment in respect of the Resident Magistrates was clear that the court now had the statutory authorization to grant interim payment orders in the circumstances specified by the rules for that court, in respect of the Supreme Court, a two stage process was adopted. First, the primary law was amended conferring express power to grant interim payment orders. Second, the Rules Committee of the Supreme Court was given express power to specify the circumstances under which the court may order an interim payment.

[14] The power of the Supreme Court to grant interim payment orders lasted only two years until 2003 when the entire Judicature (Civil Procedure Code) Law, including Title 36A, was repealed by The Judicature (Civil Procedure Code) Law (Repeal) Act of 2003. Section 2 of that law reads:

The Judicature (Civil Procedure Code) Law is hereby repealed.

[15] The importance of this repeal is this: the Code was an Act of the legislature which at the time comprised the Governor and the Legislative Council and therefore is primary legislation. The Code as the procedural statute accompanied the enactment of the Judicature (Supreme Court) Act which itself was signed into

law on May 24, 1879 (Law 24 of 1879). The Act fused the administration of law and equity into one court known as the Supreme Court. The Supreme Court replaced all the other superior courts that existed in Jamaica until then. These other superior courts were consolidated into the Supreme Court (section 5 of Law 24 of 1879).

[16] That the Judicature (Civil Procedure Code) Law was primary legislation can be established by the following. When the Judicature (Supreme Court) Act was passed in 1879 there was the absolute necessity to have a new procedural code applicable to all types of actions and suits which would now be heard by a single court instead of the various courts that existed in Jamaica before. To that end Law 39 of 1879 was passed. A copy of Law 39 of 1879 is not in the Supreme Court Library. It was omitted from the revised laws of 1889 (12 volumes which were edited by C. Ribton Curran J, the Senior Puisne Judge at the time).

[17] Law 39 of 1879 was repealed by Law 40 of 1888. The 1888 Law was signed on December 31, 1888 by the Governor. The preamble to Law 40 of 1888 reads:

Whereas it is expedient to repeal The Civil Procedure Code (Law 39 of 1879), and in lieu thereof to provide a complete System of Procedure, applicable to all proceedings in the Supreme Court of Judicature of Jamaica as established by the Judicature Law of 1879: -

Be it enacted by the Governor and Legislative Council of Jamaica, as follows:-

PRELIMINARY PROVISIONS

1. – *This Law shall be called “The Civil Procedure Code, 1888.”*
2. – *From and after a day to be appointed by the Governor for the purpose by Proclamation in the Jamaica Gazette, the Civil Procedure Code (Law 39 of 1879), ..., shall be and the same are hereby repealed, and this Law shall be and the same is hereby substituted for the same:-*

- [18] The Proclamation bringing Law 40 of 1888 into force was signed by His Excellency Sir Henry Arthur Blake, Governor-in-Chief, on March 14, 1889. The new Code came into force on June 1, 1889 (The Jamaica Gazette, New Series – Vol. XII, No. 12, Thursday, March 21, 1889).
- [19] It was this Code that was amended to make provision for interim payments. The Code has since been replaced by the CPR. The CPR was made by the Rules Committee acting under the Judicature (Rules of Court) Act. The CPR is subsidiary legislation. The CPR in Part 17 deals with interim remedies and it is in that Part that the rules governing interim payments are found. There was now no primary statutory provision giving the Supreme Court the power to make interim payment orders. It is well established that there is no inherent power to grant such order. It must be given by statute and there is now no statute.
- [20] Mrs. Sewell has submitted that once the Judicature (Civil Procedure Code) Law was repealed in its entirety (including Title 36A) and was not replaced with any equivalent statutory provision then the necessary statutory foundation for the power does not exist anymore. The question now becomes whether that power is now found somewhere else given that the Supreme Court has no inherent power to order interim payments.
- [21] In developing her submissions Mrs Sewell makes the telling point that there is a difference between the existence of a power and the regulation of that power. She said that subsidiary legislation, such as the CPR, cannot be a vehicle for conferring substantive rights. If rights are being conferred by the legislature then it has to be through enacting primary legislation. For this she relies on the words of Lord Foscoate in **Beverley Levy v Ken Sales & Marketing Ltd** [2008] UKPC 16, on appeal from Jamaica, who said at paragraph 19:

The Civil Procedure Code 2002, which came into effect on January 1, 2003, contain Rules relating to the making of charging orders but while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction.

[22] In that case the Supreme Court was found to be without power to make charging orders because there was no primary legislation giving the court the power to do so. By parity of reasoning, Mrs Sewell submitted that Part 17 was predicated on the existence of the power to order interim payment and that power no longer exists which means that those sections of Part 17 which deal with interim payments have their feet firmly planted in midair.

The current source of the power to order interim payments

[23] There is no doubt that Judges of the Supreme Court have made interim payment orders since the CPR came into force in 2003. Indeed, this court and other Judges have made such orders. We have proceeded on the basis that the power exists. In any given case where an application was made for interim payment we simply looked at the relevant portions of Part 17 of the CPR to see if the criteria laid down there for making an interim payment order were met and if they were, then the order was granted.

[24] This court is not aware of any case in which the question of the very existence of the power was raised. The only decision that the research of counsel (Mr. Staple) has been able to uncover is a decision of the Brooks J in ***Etta Brown v Attorney General*** Claim No. 2007 HCV 03390 (August 3, 2011). In that case, Brooks J stated that the statutory power to make interim payment orders is to found in section 4 (2) (j) of the Judicature (Rules of Court) Act.

[25] Mrs Sewell has made the fair point that in ***Etta Brown***, the power of the court to order interim payment was not directly in issue and so does not form part of the ratio of the case. The first two pages of His Lordship's judgment proceeded on the basis that the power existed. Miss Brown, the claimant, applied for an interim payment and the Attorney General resisted on the basis that she had not met the requirement of Part 17. Neither side raised the issue of whether the power to make interim payment orders existed. Brooks J concluded that Miss Brown did not meet the standard for interim payment and her application was refused. As part of his reasoning process his Lordship referred to section 4 (2) (j) and

declared that it was statutory basis. Therefore it is permissible to examine the question without there being any lack of respect for the decision of Brooks J.

[26] Mr Staple realised the desperate situation if Mrs Sewell is correct and sought to rebuff her relentless logic. Mr Staple resorted to an analogical argument in which he sought to say that section 32 of the UK statute and section 4 (2) (j) of the Judicature (Rules of Court) Act are identical in meaning even though expressed in different words, that is to say, both provisions confer on the court the power to make orders for interim payments. For the mathematically inclined, Mr Staple submitted that if both provisions are equal to a third thing (the same meaning) then both are equal to each other. This is how the argument proceeded. Section 32 of the UK Act reads:

(1) As regards proceedings pending in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, with provision for the payment to be made to such other party to the proceedings as may be so specified or, if the order so provides, by paying it into court.

(2) Any rules of court which make provision in accordance with subsection (1) may include provision for enabling a party to any proceedings who, in pursuance of such an order, has made an interim payment to recover the whole or part of the amount of the payment in such circumstances, and from such other party to the proceedings, as may be determined in accordance with the rules.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(4) Nothing in this section shall be construed as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs.

(5) In this section “interim payment”, in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party.

[27] There is a point that needs to be made about section 32 of the English Supreme Court Act. Campbell JA explained in **Jamculture** that section 32 reenacted the substance of section 20 of the Administration of Justice Act, 1969 (UK) which itself amended section 99 of the Supreme Court Judicature (Consolidation) Act, 1925 (UK), commonly referred to as the Judicature Act, 1925. Section 99 of the 1925 Act gave power to the Rules Committee to make rules for the court.

[28] This statutory provision along with the then Order 29 rr 9 and 10 was said to be the source of the English Court’s power to make orders for interim payments before the English Civil Procedure Rules came into force. Mr Staple relies on this passage from Nicholls LJ in **Shearson Lehman Brothers Inc v Maclaine, Watson & Co. Ltd** [1987] 1 WLR 480, 491:

The court has no inherent power to order an interim payment: Moore v. Assignment Courier Ltd. [1977] 1 W.L.R. 638. The power of the court is derived from rules of court made under section 32 of the Supreme Court Act 1981 (formerly section 20 of the Administration of Justice Act 1969). That section confers a wide power, in general terms, enabling provision to be made by rules empowering the court to order a party to any proceedings to make a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party if

a final judgment or order of the court is given or made in favour of that other party.

[29] Mr Staple submitted that in section 32 of the UK Act there is no clear statement saying that the court has the power to make interim payments (as was the case in Jamaica when the 1997 amendments were made) but rather it confers power to make rules regulating the making of such orders. If the power to regulate the making of interim payment orders was construed as actually conferring the power to make the order then by parity of reasoning, the same outcome could be arrived at in Jamaica if it is the case that there is no primary legislation specifically conferring such a power. According to Mr Staple section 4 (2) (j) of the Jamaican Judicature (Rules of Court) Act which reads:

Rules of court may make provisions for all or any of the following matters –

...

(j) for specifying the circumstances in which the Supreme Court may make an order for an interim payment;

should be interpreted to arrive at the same outcome as the English courts with their legislation. This, he submitted, is a power to make rules governing interim payments, therefore, implicitly, it confers a power to make interim payment orders.

[30] He submitted that the English approach is applicable here because both statutes are primary legislation and to that extent the ***Beverley Levy*** case is different because there was no primary legislation at all dealing with the subject matter; it was just subsidiary legislation. Mrs Sewell would have none of this. She said the Rules Committee cannot create rights and can only regulate access to the courts and the procedure to gain access to rights which already exist. She insists that when one speaks of specifying circumstances for making an interim payment

order it is just that: name, identify, delineate (choose anyone) the situations in which such an order can be made.

[31] Section 20 (1) of the 1969 Act reads:

The power to make rules of court under section 99 of the Judicature Act 1925, and the power to make county court rules under section 102 of the County Courts Act 1959, shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the order so provides) by paying it to another party to the proceedings.

[32] The text is clear. The English Parliament delegated to the Rules Committee the responsibility of (a) giving the High Court power to make interim payments and (b) specifying the circumstances in which an interim payment order may be made. This legislative approach was not adopted in Jamaica. It was however, adopted in the Republic of Trinidad and Tobago where section 20 of the 1969 Act (UK) was adopted verbatim (***Jamaat Al Muslimeen v Bernard (No. 3)*** (1994) 46 WIR 429). However, this adoption came after a legal challenge that is described in the next paragraph.

[33] Sharma JA in ***Bernard*** traced the history of interim payments in Trinidad and Tobago and noted that the Rules Committee had adopted Ord. 29 of the Rules of the Supreme Court which specified the circumstances in which an interim payment may be made but there was no statutory equivalent of section 20 of the 1969 UK Act. The High Court had repeatedly made interim payment awards for nearly two decades before the practice was successfully challenged in court. It was when that challenge was made that it was realised that there was no statutory authority in the Rules Committee or indeed any statutory authority giving the court the power to make interim payment awards as distinct from the

regulation of that power. It was the successful challenge that led to the equivalent of section 20 of the 1969 UK Act being passed in Trinidad. This decision supports the view that power to make rules regulating a power does not amount to conferring the power itself.

[34] Mr Staple's submission is not workable because the very words of the two statutes are not only different, but the words in each statute are not capable of having the same meaning. The Jamaican statute has no language capable of meaning that the Rules Committee was authorised to give the Supreme Court the power to make interim payments as well as specifying the circumstances in which such payments may be made. What the Rules Committee was authorised to do was to specify the circumstances, as distinct from the power itself, in which an interim payment may be made. The words of the Jamaican statute relied on by Mr. Staple cannot produce the result he wishes. The base metal of procedural rules cannot, by judicial alchemy, produce the gold of conferring substantive rights.

[35] As can be seen, section 4 (2) (j) is too plain that it empowers rules of court to be made to regulate the circumstances under which an interim payment may be ordered. Indeed section 4 (1) of the statute empowers the Rules Committee to make rules for a number of statutes and then section 4 (2) specifies the things that can be governed by the rules made by the Rules Committee. The Rules Committee has no power to create substantive rights of the nature contended for by Mr Staple. It can only make rules for existing statutes and existing power. If it were otherwise then it would not have been necessary to amend the Code in 1997 as well as the Judicature (Rules of Court) Act. This is the clearest indication that the legislature never thought that section 4 (2) (j) of the Judicature (Rules of Court) Act could do what Mr Staples submitted it could achieve. The language of section 4 (2) (j) is not wide enough to give substantive rights where none existed before. Regrettably, what is here is the identical situation to that which occurred in **Beverley Levy** and **Bernard**: procedural rules regulating a power that did not exist at common law and not conferred by statute.

[36] Mr Staple sought to extricate himself from this legal thicket by suggesting that section 4 (2) (g) gives the Rules Committee the power to create substantive rights. That provision reads:

The Rules of court may make provision for all or any of the following matters –

...

(g) for repealing any enactment relating to matters with respect to which rules are made under this section;

[37] This power was copied from section 99 of the Supreme Court of Judicature (Consolidated) Act, 1925. The Jamaican legislation was passed in 1961 and therefore an argument can be made that it is saved by the savings law clause of the Constitution. The real question is, can the job of repealing legislation be given to an unelected body that is not accountable to the electorate? There is provision for any rule made to be subject to a negative resolution and to that extent can be said to be subject to Parliamentary oversight (section 4 (6)). Is this statutory arrangement compatible with the separation of powers doctrine in the Jamaican Constitution?

[38] According to counsel, the power to repeal enactments must necessarily include a power to enact rights. This submission, if correct would subvert the constitutional democracy. The power to abolish is not the same thing as the power to create. This is not a case where a functionary is given a statutory power and in order to carry out that power, another power which is not stated is necessarily implied in the primary power granted to the functionary. Thus the power to create substantive rights (giving a claimant a right to apply for interim payments in advance of liability being either admitted or decided in a trial) is not necessarily implied in a power to repeal 'any enactment relating to matters with respect to which rules are made under this section.' The conclusion sought by Mr Staple is not accepted.

[39] Before leaving this decision there is a point worth considering. It seems that the legislature overlooked the possibility that it was unnecessary to insert section 4 (2) (j) in the Judicature (Rules of Court) Act because section 4 (4) gave the Rules Committee a general power to make rules to regulate any jurisdiction conferred on the relevant courts. In fact, section 4 (4) states that ‘it shall not be necessary for that or any other law or enactment to confer on the Committee power to make any rules or orders for those purposes.’ This provision is retrospective and prospective. It is saying that if the court already has the power to do some act or make an order then there is no need to state the Rules Committee has power to make rules governing the exercise of that power. This is the retrospective aspect of the provision. Whenever a power which did not exist before is given to the court, then the legislation doing this need not say and the Judicature (Rules of Court) Act need not be amended to say that the Rules Committee have the power to make rules for the exercise of this power. This is the prospective aspect of the subsection. This subsection existed at the time of the 1997 amendment and so there was no need to insert section 4 (2) (j). Section 4 (2) (j) seems to be a belt and braces exercise.

Disposition

[40] Mrs Sewell has succeeded in her resistance to the interim payment application. The Judicature (Civil Procedure Code) Law was repealed and not replaced with any similar legislation. Rules of Court cannot create substantive legal rights unless the legislature specifically gives the Rules Committee the power to do so. This is best done by explicit legislation because giving the Rules Committee such a power is departure from the separation of powers doctrine where the legislature makes law. And even then, giving such a power to the Rules Committee should be actual delegation as distinct from abdication. The written Constitution clearly delineates that legislation is the province of the legislature and not any of the other branches of government. The legislature cannot abdicate its legislative role in our constitutional democracy. In the normal course of things, a Rules Committee is not a source of substantive legal rights but merely a source of

practice and procedural law. No legislation has been passed since the repeal of the Code giving power to the court to order interim payments. Section 4 (2) (j) of the Judicature (Rules of Court) Act does not give power to the Rules Committee to empower the court to make interim payment orders. It simply authorised the Committee to draft rules of practice and procedure to regulate the grant of interim payments. Reluctantly, this court has come to the conclusion that there is no power in the Supreme Court to grant interim payments.

[41] The application for interim payment is therefore dismissed with costs to the defendant. Leave to appeal granted.