NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L . 2000/Q-001

BETWEEN	SELFORD QUARRIE	CLAIMANT
AND	C & F JAMAICA LIMITED	1st DEFENDANT

Messrs. Alexander Williams & Benito Palomino instructed by Williams, Palomino, Gordon Palomino for the Claimant.

Mr. Conrad George instructed by Hart Muirhead Fatta for the 1st Defendant.

Heard: 12th, 16th & 20th June, 2003.

Mangatal, J. (Ag.)

1. This application is by the Claimant for an interim payment to be made by the 1st Defendant in the sum of $4,000,000.00.
2. The application, which is made by way of Notice dated 16th April, 2003, first arose on the occasion of a Case Management Conference held in respect of this matter on the 30th May 2003.
3. Although the Case Management Conference was conducted on the 30th May 2003, and a date for assessment of damages fixed for

30th September 2003, the application for an interim payment was, on the application of the 1st Defendant's Attorney-at-Law, adjourned to the 12th of June 2003.

4. On the12th of June 2003 when this matter came on for hearing, Mr. George, Counsel for the 1st Defendant applied for an adjournment, on the basis that there was a pending application to set aside Interlocutory Judgment, and submitted that the overriding objective in part 1 of the CPR 2002 required that the matter be adjourned to await the outcome of the application to set aside Judgment, fixed for hearing on the 7th July 2003. The application to set aside Judgment was filed on the 11th of June 2003, after the Case Management Conference and one day before the hearing of this application commenced.

5. Mr. Williams for the Claimant vehemently opposed the application for an adjournment. He referred to the history of the matter, which is as follows:

   (a) The Law Suit was filed in the year 2000.

   (b) Interlocutory Judgment was first entered against the 1st Defendant on the 7th of June 2000.

   (c) Initially, the Suit had been filed against two Defendants,

C & F Jamaica, 1st Defendant, & TNT Engineering Services Limited, 2nd Defendant, the Claimant alleging that on the 3rd April 1997 he suffered serious injuries as a result of the negligent driving, management or control of a hydraulic escavator by the servant or agent of the 2nd Defendant, or alternatively the servant and /or agent of both the 1st and 2nd Defendant.

(d) Suit was discontinued against the 2nd Defendant on the 7th June 2001.

(e) On the 4th October 2002 an order was made by Consent, inter alia, that the Interlocutory Judgment dated 7th June 2000 be set aside, and the 1st Defendant have unconditional leave to defend. The 1st Defendant was ordered to file an Appearance within 7 days, and a Defence within 14 days after Appearance.

(f) Although an Appearance was filed, no Defence was ever filed on behalf of the 1st Defendant in accordance with the Consent order or at all.

(g) As a condition for the discharge of a Mareva Injunction obtained against it, the 1st Defendant in 2002 put in place a bond in the sum of $10 million dollars as a fund from which the

Claimant would be able to settle any Judgment inclusive of interest and costs obtained against the 1st Defendant in the Suit.

(h) The 1st Defendant not having filed a Defence, the Plaintiff again entered Interlocutory Judgment on 5th November 2002.

(i) The 1st Defendant on the 9th January 2003 applied to have the Interlocutory Judgment set aside. The Application was supported by the second Affidavit and third Affidavit sworn to by Mr. Conrad George, Attorney-at-Law for the 1st Defendant.

(j) The application was on the 9th January 2003 dismissed, with Leave to Appeal being granted.

(k) A Case Management Conference was held on 30th May 2003, and the Assessment of Damages set for 30th September 2003.

6. In addition to referring to the history of the matter, Mr. Williams submitted that the Affidavit of Mr. Angel Herrero Valverde, sworn to on the 12th of June 2003, confirms that the 1st Defendant has no sincere interest in defending this matter . He also referred to the particulars of Special Damage set out in the Statement of Claim where credit is given for the sum of $127,401.75 paid by the 1st Defendant on 16th October 1997 towards the Plaintiff's medical expenses.

7. The parties appear to have had some disagreement as to exactly what was decided by the Court on the occasion of the application to set aside Judgment on 9th January 2003.

8. Mr. George indicated that on that occasion, one of the submissions he made was that the Interlocutory Judgment entered on 5th November 2002, was irregularly entered since the judgment could not then, after the order setting aside in October 2002, be reentered by an administrative act. He stated that the learned Judge rejected that submission. I make no comment on the merits of that submission since it has been heard and determined and Leave to Appeal granted. In those circumstances it would not be appropriate for me to revisit the merits of that submission.

9. Mr. George stated that the application on 9th January 2003 was dismissed on the basis of a procedural technicality in that the affidavits in support of the application were sworn to by him and not a principal of his client with personal knowledge of the matter, as opposed to being dismissed on the merits or upon any finding that the Defendant had no real prospect of successfully defending the Claim. The Attorneys-at-Law for the Claimant dispute whether or not the matter was dealt with on its merits. They say that the matter was

determined and dismissed on the merits after a full hearing, according to paragraph 8 of the Claimant's Affidavit, sworn to on the 12th of April 2003.

10. In part 1 of the C.P.R. 2002, the overriding objective is set out as follows:-

1.1. (1) *These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly –*

(2) *Dealing justly with a case includes: -*

(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) dealing with it in ways which take into consideration:

(i) the amount of money involved;

(ii) *the importance of the case;*

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously

and fairly; and

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources as to other cases.

Rule 1. 2 states:-

The court must seek to give effect to the overriding objective when it -

(a) exercises any discretion given to it by the Rules;

or

(b) interprets any Rule."

11. I exercised my discretion by refusing the adjournment. In my view given the state of the matter, the age of the claim, and the history of how the matter has unfolded, it is just to press on and determine the application.

12. The English Court of Appeal's decision Biguzzi v. Rank Leisure plc [1999] 4 ALL E.R, 934 is a case decided after the English C.P.R. 1998, upon which many of the provisions in our own C.P.R. 2002, are based. In that case, the Court emphasized that the whole purpose of making the C.P.R. a self – contained Code was to send the message which now generally applies. Earlier authorities are no longer

generally of any relevance once the C.P.R applies. That case also emphasized that under the C.P.R, time limits were now even more important than they were previously. However, the Courts have vider and more varied powers to control the litigation.

13. This does not, and cannot mean that there is a complete abandonment of old authorities, and the emphasis must be on the word generally no longer of relevance. It seems to me that where the provisions being considered are the same or substantially the same, or where the previous authorities deal with certain basic procedural principles that repeat themselves in the C.P.R, then they may be of some use.

14. I am aware, as I mentioned to the Attorneys at Law on both sides, that in the Jamaican Court of Appeal decision Jamaica Record Limited v. Mark Ricketts 27. J.L.R 55, Lord Justice of Appeal Campbell stated the following:-

> *... commonsense, economy in the use of judicial time, and the avoidance of any suggestion that a matter has been predetermined without a hearing justify the continued use of the procedure generally adopted by judges which as far as practicable ensures that a Summons to Set Aside default Judgment of which they are aware at the time an Order to proceed to assessment of damages is sought, is heard and determined before consideration of the latter.*

In that case the Court of Appeal indicated that the Master ought to have granted an adjournment of a Summons to proceed to

Assessment of Damages in light of the existence of a pending application to Set Aside Judgment.

15. In addition, in the Jamaican Court of Appeal decision in Granville Gordon & Adelaide Gordon v. Williams Vickers & Lucille Vickers 27. J.L.R. 60, it was recognized that it is open to a Defendant against whom a default judgment has been entered to make more than one application to set it aside. However, in that case, Rowe P issued the Caveat:

> *This does not mean that the Court is powerless to curb an abuse of its process, nor does it mean that a defendant against whom a default judgment has been regularly entered can make repeated applications to set it aside without adducing new relevant facts*

16. It seems clear that a Defendant, in the interests of justice, can make more than one application to set aside a default judgment, provided the application is based on new grounds, or is not an abuse of the Court's process. This follows from the fact that the default judgment is not a judgment on the merits.

17. However, it seems to me that the practice described in the Jamaica Record Case under the old Civil Procedure Code of adjourning Sine Die an application to proceed to assessment of damages once a Summons to Set Aside a regularly obtained Interlocutory Judgment is

pending, would not survive under C.P.R. 2002. It may be different where the allegation is that the judgment was irregularly entered, which is not the case here. In any event, the new Rules have no equivalent of a Summons to proceed to Assessment of Damages. I am however, applying by parity of reasoning the statement in relation to the Summons to Proceed to an Assessment of Damages to an interim payment Application made at a time when an application to set aside judgment is pending.

18. The new Rules emphasize that parties must obey the time limits set out in the rules or by Court order.

19. Under Part 26 of the C.P.R the Court has very wide powers to strike out based on non-compliance with Rules, practice directions or orders.

20. Part 13.3 deals with regularly obtained judgments, and recognizes that a Plaintiff who has a regularly obtained default judgment has something of value and is not lightly to be deprived of it. It is stated that the default judgment may be set aside only if the defendant meets certain conditionalities.

21. It is also arguable that a Plaintiff with a default Judgment under the new Rules has a far more substantial asset in hand; under the old rules the default judgment could be set aside if the Defendant raised an

arguable case. Under the new Rules the bar has been raised to that applicable in the case of summary judgment, ie. the Defendant must show that he has a real prospect of successfully defending the claim.

22. *Rule 13.5 states:*

> *Where judgment is set aside under Rule 13.3 , the general rule is that the order must be conditional upon the defendant filing and serving a defence by a specified date.*

23. I take Rule 13.5 to mean that even where the Court decides to exercise its discretion to Set Aside a regularly obtained Default Judgment, the Defendant is not then given a general licence or carte blanche to do as he or she pleases. If the condition as to filing the Defence by a certain date is not fulfilled, as I understand it, the Judgment stands.

24. Overall, I am of the view that the new Rules would suggest that a Court faced with an application for an interim payment whilst an application to set aside judgment is pending, should not as a matter of course adopt a practice of adjourning the application for interim payment. I find support for that view in Rule 17.9 where the Court has power to vary or alter or order the Claimant to repay interim payments.

25. Even if I am wrong as to how the tenure of the new Rules would suggest that one would deal with an application at hand for an interim

payment, it seems clear to me that the balance of where justice lies shifts as the case marches on and parties take or omit to take varying steps. The target of dealing with a case justly is a moving one; it is not fixed.

26. In other words, even if it would be just under the new C.P.R to adjourn an application by a Plaintiff to obtain an interim payment, at the stage of the first pending application to set aside a regularly obtained judgment, (which I have doubted as a practice), it cannot be just, nor can it be a proper recognition of the principles of proportionality and relativity , to adjourn such an application on the basis of not the first, nor indeed the second, but a third application to Set Aside a Judgment. Simply put, even if costs could be said to compensate, would it be right to turn the claimant away without consideration of the application whilst the Defendant makes repeated unsuccessful (or incomplete, in one of the instances in this case) applications to set aside? I do not think so.

27. It is in these circumstances that I refused the adjournment. After my refusal, Counsel for the 1st Defendant then applied for an adjournment on a new basis, ie. that he wished time to file Affidavit medical

evidence in response to the claimant's Affidavit. Again this application was opposed by the Claimant's Attorney-at-Law.

28. I also rejected this new basis for the adjournment. As recited in the history above, this application first came on for hearing at the Case Management Conference on 30th May 2003 and was adjourned on the application of the 1st Defendant. There was ample time to file a response, the 1st Defendant having been served with the application prior to the conference, and I did not think that on an interim payment application it would be appropriate for me to adjourn for the Defendant to obtain medical evidence to oppose the application in these circumstances.

29. I turn now to a consideration of the arguments advanced in respect of the application.

30. The Claimant's Attorneys-at-Law filed skeleton submissions and urged that the conditions to be satisfied for an application for an interim payment are all satisfied, those conditions being found in Rule 17. 6 of the C.P.R 2002.

31. With regards to the amount of the payment to be regarded as reasonable, the Claimant relied upon a number of cases in order to demonstrate a range of possible awards, and relied upon the first

instance decision of Collett J. in Wittich v. Twaddle 32 W.I.R. 172. The Claimant's Attorneys conclude by stating that the sum of $4,000,000.00 claimed is more than reasonable.

32. The First Defendant's Attorney-at-Law, as I understood it, made two main submissions. Firstly, that Rule 17.6 (1) (c) does not apply because a Judgment for Damages to be Assessed, does not apply to an Interlocutory Judgment. Secondly, he submitted that for Rule 17.6 (1) (d) to apply the Court must be satisfied that the Claimant would obtain judgment against the first Defendant for a substantial sum of money. He stated that it would be inappropriate for an interim payment to be made against a party who may not ultimately be liable and submitted that here there is a proper Defence. He submitted that the Court must not merely feel that the Defendant is likely to ultimately have to pay damages, but that the Court must be satisfied that the damages would be payable. He submitted that the Defence which the First Defendant wishes to put forward is more than sufficient to show that the matter has to be fully ventilated.

He relied upon a number of authorities including,

Shanning International Limited v. George Wimping International Limited [1988] 3 ALL ER 475,

British and Commonwealth Holdings plc v. Quadorex Holdings Inc [1989] 3 ALL ER 492, and Andrews v. Schooling and others [1991] 3 ALL ER, 723.

33. Rule 17.6 reads as follows:-

(1) The court may make an order for an interim payment only if –

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for any amount found due to be paid;

(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;

(d) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or

(e) the following conditions are satisfied –

(i) the claimant is seeking an order for possession of land (whether or not any other order is also being sought); and

the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.

(1) In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if 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.

(2) 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.

(3) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(4) The court must take into account –

(a) contributory negligence (where applicable); and

(b) any relevant set-off or counterclaim.

34. Rules 17.7 (5), (6) and (7) read as follows:-

17.7 (5) The Court may order that an interim payment be made in one sum or by instalments.

(6) An order for interim payments made under rule 17.6 (1) (e) may direct that periodical payments be made during the continuance of the proceedings.

(7) The Court may direct that repayment of the interim payment, with or without interest, be secured

35. Rule 17.9 reads as follows:-

17.9 (1) *Where a defendant has been ordered to make an interim payment, or has in fact voluntarily made an interim*

payment, the court may make an order to adjust the interim payment.

The court may in particular –

(a) order all or part of the interim payment to be repaid;

(b) vary or discharge the order for interim payment; or

(c) *order a defendant to reimburse, either in whole or in part, another defendant who has made an interim payment.*

(3) The court may make an order under this rule –

(a) without an application by a party if it makes the order when it disposes of the claim or any part of it ; or

(b) on an application by a party made at any time.

36. The C.P.R. 2002 provides a degree of flexibility which allows the Court a wide discretion to deal with cases justly and fairly. For example, in Part 26 – headed "Case Management – The Court's Powers" – Rule 26.1 (2) states:-

Except where these Rules provide otherwise, the court may....

(d) *adjourn or bring forward a hearing to a specific date.*

37. It seems to me that, subject to a consideration of whether the Claimant had been served with the Application to Set Aside Judgment, and had

had sufficient time to consider the matter or file any Affidavits in response, theoretically one way to deal with a matter like this would be to bring forward the hearing of the application to set aside judgment, presently fixed for July 7 2003, and hear the application now before dealing with the application for interim payment.

38. However, in this case it would be inappropriate to do so because of the dispute between the parties as to whether on the 9th January 2003 the matter was dismissed on the merits, ie. on the basis not only that the Affidavits were sworn to by the Attorney-at-Law, but on the basis that there was no merit in the matters raised in the Affidavits.

39. In so far as the Affidavit of Mr. Valverde in support of the application set for hearing on the 7th July 2003 repeats the substantive matters set out in the Affidavits of Mr. George in Support of the application dismissed on January 9, 2003, it would be inappropriate for me to deal with those matters if on the 9th January 2003 the judge on that occasion felt that there was no merit in the matters raised. That matter would have to be addressed by way of Appeal. I have therefore left the application for hearing on the 7th July 2003 and suggested to the parties that they obtain the reasons for Judgment, or an agreed note, prepared by them signed by the learned Judge.

40. I have looked closely at the relevant provisions and find as follows:-

(a) sub- paragraphs 17.6 (1) (c) and (d) are to be read disjunctively, not conjunctively as indeed are sub-paragraphs (a) and (b). Sub-paragraphs (d) and (e) appear as if they are to be read together. It cannot be rational that, for example, in a case where the Defendant has admitted liability to pay damages (sub-paragraph (a)), that the Court must also be satisfied that the Claimant has obtained judgment against that Defendant for damages to be assessed (Sub-paragraph (c)). By parity of reasoning, I am of the view that where the Court is satisfied that a Claimant has obtained judgment against the Defendant for damages to be assessed, the Court does not then have to go on to satisfy itself that if the Claim went to trial, the Claimant would obtain judgment against the Defendant for a substantial amount of money or for costs.

(b) the interlocutory Judgment is a judgment against the Defendant for damages to be assessed. So too a Court could pronounce at trial or at Case Management on the issue of liability having heard the matter, and give judgment for damages to be assessed. To my mind, both types of judgment would be a judgment for assessment of damages.

41. I find support for that, or in any event, justification, in Rule 17.9 which decrees that the Court may vary or discharge an order for interim payment, or order its repayment, on an application by a party made at any time.

42. It is to be noted that the cases cited by Mr. George do not deal with cases where the Judgment is a Default Judgment. What they are dealing with is the instance where the Claimant does not yet have a Judgment, and the issue is whether the Claimant is entitled to a summary judgment. It is also to be noted that all these cases cited deal with the English Rule Order 29, Rule 11, or R.S.C. Order 29, Rule 12, which is in the same terms as our paragraph 17.6 (1) (d) and not 17.6 (1) (c).

43. it is in the context of the consideration of an application for Summary judgment, that the discusssion, in the Quadrex Holdings case ensued. In that case it was held that the court had no jurisdiction to make an order for interim payment where a Defendant had been given unconditional leave to defend because the Court could not be satisfied on the one hand that the Plaintiff would succeed at trial and on the other hand that the Defendant had an arguable defence sufficient to warrant unconditional leave to

defend. However, where the court entertained sufficient doubt as to the genuineness of the defence to give only conditional leave to defend it could make an order for interim payment if in all the circumstances such a payment appeared to be sensible and desirable.

44. I am satisfied that the requirements of Rule 17.6 (1) (c) have been met. I am also satisfied that the condition in Rule 17.6 (2) (c) that the 1st Defendant has means and resources such as to enable the Defendant to make the interim payment have been met. Paragraphs 11 and 12 of the Affidavit of Selford Quarrie, sworn to on 12th April 2003, which Affidavit is unchallenged, indicate that the 1st Defendant is the recipient of the sum of $217,000,000.00 and has put in place a bond of $10,000,000.00 being a fund from which to settle the amount of the judgment and that the 1st Defendant is a Spanish multinational company.

45. In my view, it would be just and reasonable to make an order for an interim payment in this case. The question is what is the quantum that should be awarded. The Rules indicate that the amount should not be in excess of a reasonable proportion of the expected final Judgment sum.

46. It is not contested that the Claimant here suffered very serious injuries. The Plaintiff had a fractured pelvis and haemoperitoneum with severe anal sphincter disruption. He suffers from incontinence and he says constant pain in his back pelvis and anus. There is documentation in respect of past and future medical expenses.

47. I have looked at the cases referred to by the Claimant's Attorneys-at-Law and I am of the view that the uppermost expected recovery figure which they suggest for the Claimant $18,430,323.28, is somewhat high. In arriving at that figure, some discounting of the figures in the case of Tyrone Gregory (bnf Alton Gregory) and Alton Gregory v. Dervan Blackstock and Richard Kerr Suit No. C.L. 1998/G098 in Mrs. Ursula Khan's "Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica," Volume 5, 195, was done. However, I think that the discounting should have been more extensive, and that a figure of $15,000,000.00 is more in the range of the high figure. I am of the view that at the lower range , the Claimant could expect an award of $12,000,000.00.

48. In the Wittich v. Twaddle case, which is a first instance judgment of the Bermudan Supreme Court, Justice Collett held that in principle, a Plaintiff might expect to receive at least one-half of the total damages awarded by way of interim payments; and this proportion might in some instances be as high as two-thirds. The learned judge indicated that in his view the interim payment should be calculated by reference to the highest and lowest estimates of the likely award of general damages to be made, one should then compute two-thirds of the higher figure and one half of the lower figure, and that a figure between those two amounts would be the appropriate figure.

49. As the learned Judge suggested at Page 174 (j), of his judgment, there are not a lot of authorities providing guidance on arriving at the reasonable amount to award and I have not had the benefit of reading the article by Mertyn Berkin appearing in the English periodical "Litigation" referred to in the judgment.

50. I must confess that I do not find anything in the reasoning or rationale provided in the Judgment, that persuades me that a reasonable proportion is to be arrived at exclusively by the process, or in the fractions outlined.

51. I am of the view that it is appropriate for me to make such an order as I think fit, having regard to all the circumstances of the case. In arriving at a reasonable sum, I bear in mind the following:-

(a) The date set for Assessment is not far away, and therefore the period over which the Claimant will be without the potential judgment sum will be relatively short;

(b) The Defendant does have outstanding another application to set aside Judgment, and

(c) The Claimant states that he is in dire financial straits and has no source of income. The significance of this statement is that the Claimant needs the interim payment, but may well not be able readily to repay the Defendant should that become necessary. Although a Claimant's impecunious state may not disentitle him from obtaining an order, it may properly in my view influence the amount to be ordered by way of interim payment. The award should reflect the possibility that the Claimant may be unable to repay the 1st Defendant in the event of readjustment.

52. I consider the sum of $3 million to be appropriate. I order that the 1st Defendant pay to the Claimant's Attorneys-at-Law total interim payment of three million dollars. The payment is to be made in two (2) equal monthly installments of one million five hundred thousand each, payable on the last day of each of the months of June and July 2003.

53. Costs are to be costs in the Claim. Permission to Appeal is granted. Stay of execution refused.