[2022] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00026

BETWEEN	**GILBERT JOHNSON**	**APPELLANT**
AND	**ATLAS PROTECTION OCHO RIOS LIMITED**	**1ST RESPONDENT**
AND	**KADECIA BENNETT**	**2ND RESPONDENT**
AND	**ALDWAYNE ROWE**	**3RD RESPONDENT**

Written submissions filed by Nunes, Scholefield, DeLeon & Co for the appellant

20 December 2022

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion. I have nothing to add.

STRAW JA

[2] I too have read, in draft, the judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion.

FOSTER-PUSEY JA

Introduction

[3] On 13 August 2008, the appellant, engaged at the time by the 1st respondent, Atlas Protection Ocho Rios Limited ('Atlas Protection') as a security officer, was a passenger in a motor vehicle licensed CG 5010 that was being driven by a servant or agent of Atlas Protection. That vehicle collided with the vehicle owned by the 2nd respondent, Ms Kadecia Bennett and driven by Mr Aldwayne Rowe, the 3rd respondent.

[4] This appeal arises from the refusal of Graham-Allen J ('the learned judge') to grant the appellant's notice of application for court orders, filed on 27 September 2017, for an interim payment from the respondents. The learned judge heard the application on 28 September 2018 and delivered her decision on 12 May 2020. She refused the appellant's application for leave to appeal. However, no written reasons for her decision were provided to the court.

Background

[5] The appellant, by a notice of application for court orders filed on 19 May 2020, sought leave to appeal the learned judge's decision, and permission was granted by this court on 1 March 2021. The notice of appeal was filed on 8 March 2021 and came up for hearing in the week of 31 October 2022.

[6] The 3rd respondent (hereinafter referred to as 'Mr Aldwayne Rowe') was not served with the notice of appeal and the appellant, on 27 October 2022, filed a notice of discontinuance of appeal against him.

[7] By letter dated 25 October 2022, the attorneys-at-law for Atlas Protection informed the registrar of this court that they had "no instructions from [their] institutional client to oppose the … appeal". The 2nd respondent did not file any submissions in respect of the appeal.

[8] The court considered the written submissions filed by the appellant on 25 October 2022.

The pleadings in the court below

[9] The pleadings in the matter are important to the determination of this matter. As a result of the collision, the appellant sued Atlas Protection, filing his claim form and particulars of claim on 18 February 2013. These were later amended on 7 July 2014. The amendment included, among other things, the addition of the 2nd respondent and Mr Aldwayne Rowe as defendants to the claim. On 6 November 2020, the particulars of claim was further amended to consolidate claim nos 2013/HCV 00880, 2014/HCV 03850 and 2014/HCV 01764.

[10] The appellant in his pleadings, asserted that Atlas Protection's servant drove negligently, and this caused the motor vehicle licensed CG 5010, in which he was travelling, to fall into a ditch, and him to suffer serious injuries and incur loss and expense. The particulars of negligence in his claim included the assertion that Atlas Protection's servant or agent drove without due care and attention, failed to keep any proper lookout, failed to have effective control of the motor vehicle and failed to stop, slow down, swerve or in any other way manage motor vehicle licensed CG 5010 so as to prevent the accident.

[11] Atlas Protection filed its defence to the claim on 16 May 2013. It was subsequently amended on 12 August 2014. The company admitted that the appellant was a passenger in its motor vehicle and that the motor vehicle was involved in an accident on 13 August 2008. It, however, denied that its servant drove negligently. It instead pleaded that its driver was proceeding along the Anchovy main road, away from Buff Bay, and heading in the direction of Drapers Heights. The driver of its motor vehicle signalled his intention to pass a Toyota Corolla motor vehicle and commenced this manoeuvre, when Mr Aldwayne Rowe, the driver of the Toyota Corolla motor vehicle, suddenly and without warning steered the Toyota Corolla motor vehicle into the path of the company's motor vehicle licensed CG 5010. Atlas Protection pleaded that its servant tried to avoid the collision by swerving to his right, but both motor vehicles nevertheless collided. Its motor vehicle climbed the embankment to the right, collided with a stone wall and overturned in a ditch. In light of the facts pleaded, Atlas Protection asserted that the accident was caused by the negligence of Mr Aldwayne

Rowe, the driver of the Toyota Corolla motor vehicle. The company outlined a number of particulars of negligence that it attributed to Mr Aldwayne Rowe.

[12] On 5 April 2016, the 2nd respondent, the owner of the Toyota Corolla motor vehicle, filed a defence and counterclaim in response to the claim and an ancillary claim form. Thereafter, on 17 January 2018, she filed an amended defence and anciliary claim. This was further amended on 18 December 2020. On 18 December 2020, the 2nd respondent filed a further amended defence.

[13] The 1st respondent filed a defence to the ancillary claim on 25 August 2016.

[14] The 2nd respondent admitted that a collision occurred between her vehicle and Atlas Protection's motor vehicle, licensed CG 5010, and pleaded that the accident was solely caused or substantially contributed to by the driver of Atlas Protection's motor vehicle. In outlining the version of facts relayed to her by Mr Aldwayne Rowe, the 2nd respondent pleaded that Mr Aldwayne Rowe was waiting to make a right turn and had his right indicator on. He waited for three motor vehicles to pass in the opposite direction, and he started to turn right. He then observed the Atlas Protection's driver attempting to overtake the Toyota Corolla motor vehicle (that he was driving). He steered to his left, but the driver collided along the right rear to the right front of the motor vehicle that he was driving, continued further along the road and then overturned.

[15] It is important to note that neither driver attributed negligence to the appellant.

The application in the court below

[16] By notice of application, filed on 27 September 2017, the appellant sought the following orders:

> "1. That [the respondents] do make an interim payment of Two Million Dollars ($2,000,000.00) to [the appellant] in respect of his personal injury claim within fourteen (14) days …
>
> 2. Alternatively, that such interim payment as this Honourable Court deems just be made to [the appellant].

3. That the Cost of this Application be borne by [the respondents].

4. Such further and/or other relief as this Honourable Court deems just be granted."

[17] One of the grounds on which the appellant relied for the grant of the application, was that in the particular circumstances of the case, the appellant ought to recover damages against either or both respondents. In addition, the respondents were insured in respect of the claim.

[18] The appellant's affidavit in support of the application referred to the averments in the particulars of negligence and included details of the injuries he sustained arising from the accident as well as the extensive surgical intervention and medical treatment that he underwent. He stated that each driver of the two motor vehicles involved in the accident blamed the other and neither alleged that he, the passenger in the motor vehicle licensed CG 5010, was negligent. He also stated that, to the best of his information and belief, the Atlas Protection's motor vehicle was insured with NEM Insurance Co Ltd (now JN General Insurance Co Ltd), while the 2nd respondent's motor vehicle was insured with Advantage General Insurance Co Ltd.

[19] The appellant underwent treatment including skeletal traction, internal fixation of fractures, insertion of skeletal tibial Steinman pin, insertion of a plate, blood transfusion and physiotherapy. He listed some of the expenses he incurred, the excruciating pains he was suffering and his unemployment arising from the nature and extent of his injuries. He claimed sums for continuing special damages and the cost of extra help, as his wife left her employment to take care of him for an extended period. He was assessed with a 19% impairment of the whole person and pleaded that he would be seeking awards for loss of earning capacity or handicap on the labour market. The appellant indicated that a conservative award of damages for pain and suffering and loss of amenities would fall within the region of $8,000,000.00 and $10,000,000.00. He attached an opinion on damages prepared by his attorneys-at-law in support of this estimate, and asked for a sum of $2,000,000.00, less than 25% of the value of his claim, to defray expenses incurred until the final judgment by the court.

[20] The appellant's application was also supported by the affidavit of K Michelle Reid, filed on 5 October 2017, to which were attached medical reports prepared by Drs Mark Minott, Philip Waite and Grantel Dundas, consultant orthopaedic surgeons, as well as Dr Joseph Blidgen, consultant cardiothoracic surgeon.

[21] At this point, it is useful to list the lengthy particulars of injuries reflected at paragraph 8 of the further amended particulars of claim filed on 6 November 2020:

i. Left haemopneumothorax;

ii. Fracture of the forearm;

iii. Malunion left ulna fracture;

iv. Fracture of left 4th - 7th ribs;

v. Fracture of the left 6th, 7th, segmental 8th, 9th and 10th ribs;

vi. Instability in left shoulder;

vii. Weak grip in left hand;

viii. Deformity of the left thigh;

ix. Segmental fracture of the left femur;

x. Reduced range of motion in left hip and left knee;

xi. Post-traumatic arthrosis left hip;

xii. Limb length discrepancy i.e. left leg is 2 cm shorter than right leg;

xiii. Ulna nerve neuropathy at the left elbow;

xiv. Chondromalacia of the left patella;

xv. Patella-femoral arthritis (post-traumatic) left knee;

xvi. Varus malunion to hip with pain, stiffness, impingement;

xvii. Stiffness in the left knee;

xviii. Stiffness in left hand;

xix. Stiffness and pain in left hip;

xx. Weakness and instability in left knee;

xxi. Pain in left side of chest;

xxii. Scarring;

xxiii. Surgical scarring on left upper and lower limb;

xxiv. Cramps in left forearm; and

xxv. Deformity of left forearm.

[22] Among the authorities on which the appellant relied in proof of the likely quantum of general damages that a court would award was **Sydney Fearon v Fred Brown** Suit CL 1991 F 132, Khan's Volume 5, page 9, judgment delivered 27 April 1999. The claimant, in that matter, suffered a compound transverse fracture of the right olecranium bone, fracture of acetabulum and central dislocation of head of femur, fracture of superior and inferior pubic ramus of right public bone, 2 cm laceration of right elbow and small abrasions to the right eyelid and lateral aspect of the right knee. His permanent functional impairment was assessed at 20% of the right upper limb and 15% of the right lower limb. He was awarded general damages of $1,250,000.00 at trial on 27 April 1999. In their opinion on damages, the appellant's attorneys-at-law stated that the award would value $6,196,916.31 in September 2017.

[23] Reference was also made by the appellant to **Cecil Henry v The Attorney General for Jamaica and Keith Scott** CL 1992 H 128, Khan's Volume 4, page 34, judgment delivered 21 March 1996. The claimant, in that matter, suffered from a 7.5 cm laceration to his forehead, a haemorrhage in his right eye, blunt trauma to his chest and numbness in his right upper extremity. He also suffered a comminuted fracture of the right olecranon, his neck and the shaft of the right femur. He was assessed as having 10% whole person permanent disability for his upper extremity and 6% whole person permanent disability for his lower extremity. The trial judge awarded general damages in the amount of $1,250,000.00 which, according to the appellant's attorneys-at-law, valued $7,809,091.14 in September 2017.

[24] The 2nd respondent filed affidavits opposing the grant of the application. She asserted that the accident was caused by the driver of Atlas Protection's motor vehicle and insisted that she had a good defence to the appellant's claim. Highlighting her

financial state, the 2nd respondent gave evidence that she was a single mother with two children, working as a hairdresser and her expenses exceeded her salary. In addition, her insurance policy with Advantage General had a limit of $3,000,000.00 for third-party bodily injury. She deposed that she was facing another claim arising out of the same accident as other persons had suffered injuries. In light of the circumstances, she asked the court to refuse the appellant's application.

[25] There is no affidavit from Atlas Protection in the record of appeal.

The appeal

[26] The learned judge having refused the application and ordered costs in favour of the respondents, the appellant challenges the decision.

Grounds of appeal

[27] The grounds of appeal on which the appellant relies are:

> "a. The Learned Judge materially erred in exercising her discretion not to award an interim payment.
>
> b. The Learned Judge erred as a matter of fact and/or law in refusing to grant the Appellant's/Claimant's application for interim payment.
>
> c. The Learned Judge erred as a matter of fact and/or law in failing to consider the facts of the instant case on its own merit.
>
> d. The Learned Judge erred as a matter of law in failing to deal with the matter justly.
>
> e. The Learned Judge erred as a matter of fact and/or law in failing to consider that the Appellant is likely to succeed and be awarded substantial damages as against the 1st Respondent and/or 2nd Respondent.
>
> f. The Learned Judge erred as a matter of fact and/or law in failing to consider that the Appellant/Claimant met all the criteria for an interim payment to be awarded.

g. The Learned Judge erred in failing to consider that the refusal of the Application would have created an unfair result to the Appellant."

[28] The appellant seeks the following orders:

"a) The appeal is allowed.

b) Orders 1 and 2 of the Honourable Mrs. Justice Vinette Graham-Allen made on May 12, 2020 are set aside.

c) The Respondents are ordered to make an interim payment of $2,000,000.00 to the Appellant on or before 30 days of the date of this order.

d) Costs of this appeal and the costs of the application and hearing below to the Appellant to be taxed if not agreed.

e) Such further and/or other relief as this Honourable Court deems just."

The issue

[29] The simple issue arising from the grounds of appeal is whether the appellant satisfied the legal requirements for the grant of an interim payment, and whether the learned judge erred in the exercise of her discretion when she refused to grant the application.

[30] As there are no reasons provided from the learned judge, this court has to do the best that it can to see whether there was a basis for the decision to which she came (see **Sean Greaves v Calvin Chung** [2019] JMCA Civ 45, at para. [27]).

Discussion

[31] On an application for an interim payment, the judge exercises his or her discretion to determine whether to grant it. The basis on which this court will set aside the exercise of discretion by a single judge is not in dispute. The relevant principles were correctly identified by counsel for the appellant as having been succinctly outlined by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. Morrison JA stated at para. [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference that particular facts existed or did not exist- which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[32] Counsel for the appellant submitted that the learned judge's exercise of her discretion was "unreasonable in the Wednesbury sense" as there was no evidence to support her refusal to grant the application. Although counsel for the appellant filed fairly lengthy submissions, I hope, I do no injustice by summarising the main points below. Counsel submitted that the appellant:

a) proved that the respondents were insured in respect of the claim;

b) established that, in light of how the accident occurred and the fact that the appellant was a passenger in one of the motor vehicles involved, if the claim went to trial, the appellant would obtain judgment for substantial damages against at least one of the respondents;

c) established that, in light of the serious injuries that he sustained, he should receive a substantial amount for damages at the trial; and

d) demonstrated that the $2,000,000.00 sought was a reasonable amount for an interim payment.

[33] The appellant's submissions must be examined in light of the rules and the evidence placed before the learned judge.

[34] Rule 17.5 of the Civil Procedure Rules ('CPR') outlines the general procedure to be followed on an application for an interim payment. An applicant cannot apply for

an interim payment before the period for acknowledgment of service has passed for the defendant from whom he is seeking an interim payment. A notice period must be complied with, and the application is to be supported by an affidavit in which the applicant must describe the nature of the claim and the stage of the proceedings, state the claimant's assessment of the amount of damages or other monetary judgment likely to be awarded, set out the grounds of the application and exhibit any documentary evidence relied upon in support of the application.

[35] A respondent to an application for an interim payment who wishes to rely on evidence may file evidence in reply.

[36] Upon a review of the record of appeal, it is clear that the appellant complied with the required procedure outlined in rule 17.5 of the CPR.

[37] It is, now, necessary not only to consider whether the appellant satisfied the conditions outlined in rule 17.6 of the CPR, but to also examine the nature of the evidence placed before the court, at first instance, in respect of the matters to be taken into account in considering the application.

[38] Rule 17.6 of the CPR provides:

> "(1) The court may make an order for an interim payment only if -
>
> …
>
> (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
>
> …
>
> (2) 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.

(3) **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.

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

(5) The court must take into account-

(a) contributory negligence (where applicable); and

(b) any relevant set-off or counterclaim." (Emphasis supplied)

[39] The general rule is that an interim payment is to be made to the claimant as opposed to a payment into court (see rule 17.7 of the CPR). On hearing any application for an interim payment, the court may exercise any of its case management powers under Parts 26 and 27 of the CPR, and may give directions for an early trial of the claim (see rule 17.10 of the CPR).

[40] Upon a review of the affidavit evidence and the pleadings before the learned judge, the following is clear:

i. Both owners of the motor vehicles involved in the accident were insured in respect of the claim;

ii. Neither owner of the motor vehicles involved alleged that the appellant, a passenger in one of the motor vehicles, contributed in any way to the cause of the accident, but blamed each other;

iii. If the matter went to trial, the appellant would obtain substantial damages against at least one of the defendants in light of his extensive injuries and the serious disability that resulted.; and

iv. The cases to which the appellant referred, in estimating the possible award of damages, were fairly similar and provided useful guidance. Consequently, the amount of $2,000,000.00 for which the appellant applied as an interim payment, was a reasonable proportion of the likely amount of the final judgment.

[41] The appellant had, therefore, established that either Atlas Protection or the 2nd respondent or both of them, could have been ordered to make an interim payment to him. The order could have been made against the 2nd respondent in spite of her claim of impecuniosity and the limit of the insurance coverage. There is nothing in the record of appeal demonstrating a basis on which the application could have been refused.

[42] The learned judge, therefore, erred in law in refusing to order that one or both of the defendants make an interim payment to the appellant.

[43] In these circumstances, however, noting the evidence of the 2nd respondent, the urgent needs of the appellant, and the absence of evidence from Atlas Protection that it is not able to pay the sum requested, I would propose that an order be made for Atlas Protection to make the interim payment of $2,000,000.00 to the appellant within 30 days of the date of this judgment. However, costs of the application below

should be the appellant/claimant's costs in the claim. In so far as this appeal is concerned, I propose that both respondents pay the costs of the appeal.

[44] In light of the ancillary claims before the court, Atlas Protection may be able to recoup some or all of the interim payment, depending on the outcome of the court's determination of liability for the accident.

[45] I note that the appellant's claim was consolidated with other matters. The accident in which the appellant was injured occurred in August 2008 and the claim was filed in 2013. In light of the passage of time, the claims ought to be determined at the earliest possible time. I would order that the consolidated claims urgently proceed to case management, and the necessary orders made with a view to the claims being heard as quickly as possible.

MCDONALD-BISHOP JA

ORDER

1) The appeal is allowed.

2) Orders 1 and 2 made by Graham-Allen J on 12 May 2020 are set aside.

3) The 1st respondent is ordered to make an interim payment of $2,000,000.00 in respect of the appellant's personal injury claim within 30 days of the date of this judgment.

4) Costs of the appeal to be paid by the respondents to the appellant, to be taxed if not agreed. Costs of the application below to be the appellant's costs in the claim.

5) A case management conference is to be scheduled as a matter of urgency with a view to a speedy trial of the consolidated claims.