

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2011/041

BETWEEN:

JOSEPH PINDER

Appellant

and

TRISHEL WETHERILL

Respondent

Before:

The Hon. Mde. Janice M. Pereira

Justice of Appeal

On written submissions:

Ms. Gail S. Pero for Westlin Chambers for the Appellant

Ms. C. Debra Burnette for the Respondent

2012: June 5.

Civil appeal – Interlocutory appeal - Judgment for substantial amount – Interim lump sum payment order – No admission of liability – Conflicting affidavit evidence – Contributory negligence

[1] PEREIRA JA: This Interlocutory appeal arises from the decision of the learned Master made on 7th December 2011 in which she ordered the appellant (being the defendant below) to make an interim lump sum payment in the amount of \$50,000.00 by 22nd December 2011, on account of damages which the court may find him liable to pay. There are no written reasons for the decision, but the consensus between the parties is that the learned Master made the order pursuant to CPR 17.6(1)(d) which in essence says that that court may make an order for interim payment only if satisfied that if the defendant 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.

[2] The appellant complains that the learned Master erred in making such an order as the pleadings and conflicting affidavits (on which there was no cross examination, the learned

Master having not allowed cross examination despite the appellant's request) failed to show that the respondent (the claimant below) would obtain judgment for a substantial amount.

- [3] Here there was no admission of liability. The versions of how the accident occurred were at considerable variance. The parties' affidavits conflicted on many matters ranging from how the accident occurred and the cause thereof to conversations allegedly had between the parties or witnesses for the parties. The issue of contributory negligence was also raised which, if liability was made out, would ultimately affect quantum.
- [4] On 7th December 2011, the learned Master made the order without regard to the application for cross examination of the respondent by the appellant having regard to the conflicting version of events which bears on liability and, if that stage is passed, quantum. Indeed the respondent did not attend before the Master on that hearing.
- [5] In the absence of reasons for the exercise of her discretion under CPR 17.6(1)(d), in the face of conflicting versions of events put forward by the parties in their pleaded cases, coupled with the conflicting evidence on affidavit it is very difficult to uphold the Master's decision. Taking into account the tenor of CPR 17.6 and the case of *Schott Kem Ltd. v Bentley and Others*,¹ the principles guiding the exercise of the court's discretion in such circumstances are clear. The court must be satisfied that the claimant would obtain judgment based on more than the making out of a *prima facie* case. Although evidence meeting the criminal standard of proof (beyond reasonable doubt) is not required, the burden, (on a balance of probabilities) is high.
- [6] Further, the *Schott Kem* case is also authority for the principle that the interim payment procedure is not suited to cases of serious disputes on issues of fact or of law. The version of events here are very much in conflict and gives rise to a situation which cannot be resolved in the absence of cross examination at a trial as to liability and then further, as to the degree of liability. The learned Master had no regard for the application for cross examination, although having to embark on such a course would in and of itself be an indicator of the unsuitability of the approach to this particular case.
- [7] This was not a suitable case for the application of the interim payment procedure and the learned Master erred in principle in ordering an interim payment in the circumstances.

¹ [1991] 1 QB 61.

Conclusion

[8] For the reasons given I allow the appeal and set aside the order of the Master made on 7th December 2011. The Order is as follows:

1. The appeal is allowed. The Order of the Master made on 7th December 2011 whereby it was ordered that the appellant make an interim payment in the sum of \$50,000.00 is hereby set aside.
2. The respondent shall bear the costs of this appeal fixed in the sum of \$1,500.00.

Janice M. Pereira
Justice of Appeal