

COMMONWEALTH OF THE BAHAMS

IN THE SUPREME COURT

Commercial Division

2021/CLE/GEN 001470

BETWEEN

BRINDEL PRATT

Claimant

AND

AML FOODS LIMITED

Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr Lessiah Rolle for the Claimant
Mr Rhyan Elliott for the Defendant

Hearing Dates: 5th February, 2025; 18th February, 2025

Submissions rec'd: 8th November, 2024; 18th February, 2025

Practice and Procedure – Negligence – Personal injuries – Interim payment – whether a proper case where there is a substantial dispute as to how the accident occurred and where it occurred – where the trial date is approximately three weeks away

RULING

Darville Gomez, J

- [1.] This is an action brought by the Claimant, a former employee of the Defendant for injuries sustained while at work. The trial of this action is scheduled for 31st March, 2025 and 1st April, 2025.
- [2.] The Claimant has applied for an interim payment in the sum of \$50,000 to \$70,000 by Notice of Application filed on 8th October 2024. It is supported by (i) a Second Affidavit of the Claimant filed on 8th October 2024; (ii) a Fourth Affidavit of the Claimant filed on 6th November, 2024; (iii) a Fifth Affidavit of the Claimant filed on 6th November, 2024; (iv) a Second Affidavit of Cyril Morris on 18th February, 2025.
- [3.] The Defendant objected to the application and relied on (i) the First Affidavit of Dr. David Barnett filed on 31 October, 2024; (ii) First Affidavit of James Williams filed on 1 November, 2024. The Defendant filed written submissions on 8th November 2024.

[4.] It is undisputed that the Court has the power to award interim payments under the Civil Procedure Rules, 2022 (“CPR”), Part 17.15. However, certain conditions must be satisfied and in the instant case, it is without question that 17.15(1)(a) through 17.15(1)(c) does not apply. The Claimant has sought to rely on 17.15(1)(d) which reads as follows:

- (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;
- (2) In a claim for personal injuries the Court may make an order for the interim payment of damages only if the defendant is –
 - (a) a person whose means and resources are such as to enable that person to make the interim payment;
 - (b) insured in respect of the claim; or
 - (c) a public authority
- (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

[5.] The Claimant has relied upon the following grounds in support of the interim payment application:

- (i) The Defendant has no defence to this claim on the issue of liability and the Defendant will not likely succeed on the claim for contributory negligence;
- (ii) the Claimant is likely to obtain judgment for a substantial sum at Trial;
- (iii) the Claimant is experiencing financial and emotional hardship and difficulties as a result of the reduction in his income due to his alleged injuries;
- (iv) The Defendant is insured and its means and resources are such that it is able to make the Interim Payment sought.

[6.] The Defendant disputed the grounds upon which the Claimant relied and opposed the application on (i) firstly, serious preliminary and procedural grounds and (ii) secondly, without prejudice to its procedural objections (which it does not in any event waive) on a comprehensive and substantive basis.

CPR - Part 17.15(1)(d)

[7.] Pursuant to Part 17.15(1)(d) of the CPR, 2022, the Court may make an order for an interim payment only if it is satisfied that if the case went to trial the Claimant would obtain

judgment against the Defendant for a substantial amount of money or costs. Therefore, the Claimant must establish that he is more likely than not on the balance of probabilities to establish liability and obtain a judgment for a substantial sum against the Defendant.

[My emphasis added]

[8.] The parties referred to several authorities on this issue of the legal principles to be applied on an application for an interim payment including **Schott Kem Ltd. v Bentley and other [1990] 3 All ER 850**; **HM Revenue and Customs v The GKN Group [2012] EWCA Civ 57**, **Joseph Pinder v Trishnell Wetherill HCVAP 2011/041** and **Patrice Knowles v Island Hotel (T/A Atlantis Paradise Island) 2022/CLE/gen/00382**.

[9.] The authorities establish that the court approaches this matter in two stages: (i) *at the first stage the court has to consider whether it is “satisfied”* that if the action went to trial that the claimant would obtain judgment against the defendant for a substantial sum of money and (ii) at the second stage *in order for the court to be satisfied that the claimant would obtain judgment “something more than a prima facie case is clearly required, but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden.”*

[10.] Neill, L.J in **Schott Kem Ltd. v Bentley and other [1990] 3 All ER 850** stated that *“interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve.*

[11.] Aikens, L.J. in **HM Revenue and Customs v The GKN Group [2021] EWCA Civ 57** posed the second question, viz., stage two (after addressing the first stage), as follows: *“That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an Interim Payment, the claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money.”* [My emphasis added]

[12.] In **Joseph Pinder v Trishell Wetherill HCVAP2011/041**, Pereira, J (as she then was) delivering the decision of the Court of Appeal on an appeal against an interim payment in the amount of \$50,000 where liability was disputed and there was conflicting evidence in relying upon the case of **Schott Kem Ltd. v Bentley and other [1990]** had this to say as follows:

[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 case, 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, 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 not 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.*

[13.] Finally, reference was made to the Bahamian authority of **Patrice Knowles v Island Hotel (t/a Atlantis Paradise Island (2022/CLE/gen/00382** where Winder, CJ considered an application for an interim payment under the CPR where liability was disputed. He refused to grant an interim payment. He relied on both Schott Kem supra and Joseph Pinder supra and had this inter alia to say:

[36.] *As an application for an order for an interim payment is an application for interim relief, the Court must not conduct a "mini-trial" or to seek to finally determine issues which are properly left to the trial judge.*

[37.] *I am mindful that I am required to adopt a conservative approach and to avoid venturing too far into disputed issues on the relevant pleading and on the available evidence, which is incomplete.*

[14.] The Claimant referred also to the duties and obligations of the Defendant under the Health and Safety at Work Act Chapter 321C which provides inter alia, that every employer is under a duty to ensure so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

[15.] The Claimant alleged that the Defendant (i) failed to maintain the loading dock in a state of good repair; (ii) required the Claimant to assist with off-loading the container after the regular working hours, rather than wait until the next day for the regular staff; and (iii) these acts constituted a breach of section 4 of the Health and Safety at Work Act. He referred to his Witness Statement filed on 16th June, 2023 at paragraph 11 and that of Zhivago Evans at paragraph 6 which corroborated that the loading dock "was in a state of disrepair with broken out places".

[16.] Further the Second Affidavit of Cyril Morris filed on 18th February, 2025 exhibited photographs of the loading dock contained in the Claimant's Witness Statement filed on 16th June, 2023.

[17.] The Claimant submitted that these allegations satisfy that the Defendant was in breach of its statutory duty and consequently the burden to prove otherwise shifts to the Defendant to prove that it did all that was reasonably practicable to eliminate the risk. He asserted that the Defendant neither pleaded nor put any such evidence before the Court. The Claimant has relied upon **Butler v Swann SCCivApp. No. 61 of 2013** and referred to the dicta of Justice of Appeal Adderley where, he set out the two stage process that is required to succeed in an action for breach of statutory duty.

CPR – Part 17.15(2)

[18.] In a claim for personal injuries the Court may make an order for the interim payment of damages only if the defendant is: (i) a person whose means and resources are such as to enable that person to make the interim payment; or, is (ii) insured in respect of the claim.

[19.] The Claimant asked the Court pursuant to section 80(1)(j) and (2) of the Evidence Act, Chapter 65 to take judicial notice of the Defendant's annual report which indicates revenues of \$191 million and profits of \$4.9 million. A copy of the report was exhibited to an affidavit of Cyril Morris and reference made to the report's placement on the Defendant's website. This report the Claimant submitted demonstrated the Defendant's means and resources to satisfy the interim payment.

[20.] The Claimant relied on the decision of **Patrice Knowles v Island Hotel Company Limited (t/a Atlantis Paradise Island) 2022 CLE/gen/00382** where he alleged that the Honourable Chief Justice took judicial notice of the Defendant's means and resources. The claimant was not awarded an interim payment and the case was distinguished on the basis that she had previously been awarded an interim payment, the claimant was seeking a second interim payment, she was involved in two separate accidents, there was no medical report before the court hence no nexus between the injury and the defendant's negligence and the court opted to order an early trial.

[21.] The Claimant distinguished the instant action from the **Patrice Knowles** case and asserted that a nexus between the injuries suffered and the accident was established by the report of Dr. Charles Rahming.

[22.] Finally, the Claimant attempted to distinguish the cases of **Joseph Pinder** and **Adriana Thompson**.

[23.] The Defendant's submission also addressed the: (i) Claimant's legal burden to prove negligence and or breach of statutory duty under the Health and Safety at Work Act; (ii) the Claimant's failure and or refusal to disclose all relevant and available medical records in breach of his disclosure obligations and the Case Management Order; (iii) the Claimant's failure to comply with the strict procedural requirements of CPR Part 17 which applies to all interim payment applications; and (iv) the Claimant's reliance upon inadmissible evidence in support of the application.

Analysis and Disposition

- [24.] There is no dispute that the Court must consider the applicability of Part 17.15(1)(d) and for this purpose must consider the two stage test as enunciated in the **Schott Kem** case and **HM Revenue and Customs** case.
- [25.] The trial on liability is set to be heard in about two weeks' time before this Court and all of the witness statements have been filed with the exception of a witness that the Claimant has indicated that he may subpoena. Therefore, the Court at this stage has the advantage of not only the pleadings, but the evidence-in-chief of most of the witnesses.
- [26.] However, the Claimant has submitted that this is a proper case for the exercise of the Court's discretion for an interim payment and referred to the failure of the Defendant to maintain the loading dock in a state of good repair and the insistence with off-loading the container after the regular working hours rather than wait until the next day for the regular staff. He maintained that these acts constituted a breach of section 4 of the Health and Safety at Work Act and exhibited photographs to corroborate his claim.
- [27.] I refer to paragraphs 9 and 12 of the Claimant's Re-Amended Statement of Claim where the Claimant alleged as follows:

- "9. *On Wednesday the 30th October 2019 at about 7:00pm while acting under the instructions of James Williams and Kevin George in assisting to offload of the said trailer, the Plaintiff stepped into a hole on the Loading Dock and fell backwards onto his back.*"
12. *At the material time the said loading dock was in a state of disrepair and the Defendant operated an unsafe system of work.*"

- [28.] In response to these allegations, I refer to paragraphs 9 and 12 of the Defendant's Re-Amended Defence where the Defendant responded to paragraphs 9 and 12 as follows:
"Rear Loading Dock" is defined as a refrigerated container parked at the Super Centre's rear loading dock

- "9. *Save insofar as it is admitted that on 19th October, 2019 Mr. Pratt did fall down (the "Incident") on the Rear Loading Dock, Paragraph 9 of the Statement of Claim is not admitted. Furthermore, it is averred that:*
- 9.1 *In order to facilitate seamless ingress into and egress from containers parked at the Rear Loading Dock, a portable metal ramp (an "Unloading Ramp") is customarily placed near the edge of the loading dock's surface in such a manner that it extends into and rests upon the mouth of the said container thereby effectively functioning as a small, low bridge.*
- 9.2 *At the time the Incident occurred, an Unloading Ramp was in use and Mr. Pratt was walking across or in the immediate vicinity of that Unloading Ramp.*

9.3 *As soon as Mr. Pratt tripped down, those persons in proximity to him (the same including Mr. Williams) sought to help him back up, however, Mr. Pratt refused offers of assistance, arose by himself and continued to work until the unloading operation was complete. During that period, Mr. Pratt did not indicate that he felt any pain nor did he exhibit any visible signs of injury and/or distress.”*

12. As to Paragraph 12 of the Statement of Claim:

12.1 *The allegations that at the material time ‘the loading dock was in a state of disrepair’ and that ‘AML operated an unsafe system of work’ are generalized complaints and are not proper pleadings.*

12.2 *(Without prejudice to the foregoing) Paragraph 12 of the Statement of Claim is denied.*

[29.] The respective witnesses referred to in the preceding paragraphs repeated in their witness statements similar evidence regarding where and how the accident occurred. Therefore, I have for the sake of brevity not included direct references from them.

[30.] The Defendant has objected to the use of the photographs exhibited by the Claimant which he has alleged depict the “loading dock” at the Defendant’s premises where he claimed to have fallen. The Defendant has proposed a miscellany of inadmissibility issues regarding the use of the photographs. In any event, given that the Defendant’s witnesses have alleged that the accident occurred in the refrigerated container and not on the loading dock, I did not need to consider this issue at this stage.

[31.] I found it obvious based on the pleadings and the witness statements that are presently before the court that there is a dramatic difference or substantial dispute regarding how and where the accident occurred.

[32.] Moreover, the Court is mindful of the admonition contained in the authorities, to not conduct “a mini-trial” of the issues at this stage. I consider this case similar to the **Joseph Pinder** case where liability was in dispute and there was conflicting evidence before the Court. I recite Pereira, J (as she then was):

[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.”

[33.] Given the remarkable differences of how and where the accident occurred between the parties and their witnesses, it is impossible to determine the veracity of either party's version of the accident in the absence of cross examination of the witnesses. However, the necessity to do this, would further demonstrate the unsuitability of this action for an interim payment application.

[34.] The Court is also aware of the close proximity to the trial viz., less than two weeks away.

Conclusion

[35.] I have found as follows:

- (i) I am not satisfied that the Claimant would actually succeed in his claim and as a result would obtain a substantial amount of money;
- (ii) the evidence of the Claimant and each party's witnesses demonstrates that there is a substantial dispute of facts or 'considerable variance' as to how and where the accident occurred which can only be resolved by the trial judge at the trial;
- (iii) there is no issue in the delay of the disposal or adjudication of the claim given that the trial date is approximately two weeks away;

[36.] Therefore, for these reasons, I refuse the Claimant's application for an interim payment and award costs to the Defendant to be summarily assessed in accordance with the CPR, 2022 unless otherwise agreed between the parties. If not agreed, the Defendant is to lay over a schedule of its costs being claimed within thirty days of the delivery of this decision.

Dated this 20th day of March, 2025



Camille Darville Gomez
Justice