23/11/11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 656 OF 2003

BETWEEN:

FREDDY WILLIAM BODDEN

PLAINTIFF

-AND-

JUSTIN THOMPSON

DEFENDANT

Appearances: Mr. Kyle Broadhurst of Broadhurst LLC for the Plaintiff
Mr. Colm Flanagan of Nelson and Company for the Defendant

Before: Hon. Justice Williams

Heard: 10th November 2011

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

PROCEDURE – Grand Court procedure – Action for damages personal injuries in road traffic case where liability agreed - Application for adjournment made during final hearing to obtain and adduce further expert evidence to quantify cost of future medical care - Exercise of Judge's discretion – Applicability of approach in *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894.

Introduction and Background

1. Freddy William Bodden, the Plaintiff, applies for leave to adjourn the part-heard trial for the purpose of calling additional expert evidence to address the issue of costs of future medical care required by the Plaintiff. The Defendant opposes the application.

2. This application is brought within an action for damages for personal injuries arising out of a road traffic accident which occurred on 18th August 2001. The Plaintiff was the front seat passenger of the Volkswagen Beetle vehicle registration number 76651 being driven by the Defendant. The vehicle was being driven at excessive speed, the Defendant lost control and the vehicle left the road and collided with a guard wall. The Plaintiff sustained injuries as a result of that collision. The Defendant subsequently pled guilty to the offence of dangerous driving.

3. The Plaintiff was born on 4th May 1980, so he was 21 years of age at the time of the accident, and he is now 31 years of age.

4. The writ was issued on 9th October 2003, over two years after the accident. There has been a rather laboured history in this matter coming to trial. A review of the chronology of the protracted proceedings leaves one with the impression that blame for delay hitherto may be apportioned to both parties. The parties eventually came to an agreement on liability, although the Defendant initially contested the same. On 17th August 2005 it was ordered by consent that:

"1. there be judgment for the Plaintiff against the Defendant, for a sum to be assessed, the Defendant having admitted liability in open correspondence dated 22nd July 2005.
2. the action proceed to trial on the issue of quantum.
3. the Defendant shall pay the Plaintiff's costs in relation to the question of liability, to be taxed if not agreed on the conclusion of the proceedings."

5. In Paragraph 6 of the Statement of Claim dated 9th October 2003 under the heading Particulars of Special Damages the Plaintiff pleads:

> "The Plaintiff has incurred and continues to incur medical expenses and loss of income as a result of the accident. The Plaintiff faces substantial future medical expenses, which are still being assessed. Full particulars of the Plaintiff's special damages and losses, which are continuing, will be provided prior to trial by means of a separate schedule."

6. Paragraph 6 of the order of Levers, J. made on 22nd July 2005 required the parties to exchange the medical reports of their experts by 31st October 2005. On that date the Plaintiff was ordered to serve within 6 weeks of the date of the order all further medical evidence upon which he intended to rely.

7. By the commencement of the trial on 18th October 2011 the Court had received expert evidence dealing with the issue as to whether future medical care was needed. The Court had not received expert evidence as to the cost of future medical care. No application was made at the pre-trial conference held on 4th October 2011 to adduce such evidence. No application was made at the said review hearing to vacate the hearing to enable such evidence to be obtained and filed.

8. The Plaintiff's Amended Schedule of Damages and Future Loss is dated 12th October 2011. Paragraph 9 of the Schedule dealt with the issue of future medical costs and contained mostly unsubstantiated estimates for the treatment.

9. In August 2011 the Plaintiff had written to the Defendant requesting a Counter Schedule of Damages. The Counter Schedule was provided on 17th October 2011, the day before the hearing. Therein the Defendant highlighted that there was no expert evidence to substantiate the figures and that as a consequence it could not be proved.

10. Mr. Flanagan understandably contends that the directions should have concentrated the Plaintiff's mind to ensure that he had his expert evidence ready in good time for the final hearing. Mr. Broadhurst contends that until he saw the cross-complaint he did not know what the Defendant's position was in relation to the estimates. It is unclear how the Plaintiff felt he would satisfy the Court as to the appropriate figure to award in the absence of expert evidence.

11. The current issue for my determination is of course pre-judgment and was raised on the first day of the hearing. At that stage the Plaintiff indicated that, in light of the Defendant's position now set out in the counter schedule, he wished to place expert evidence before the court relating to future costs. The Court was informed that attempts were being made to have this evidence made available before the end of the hearing. The Court and the parties were anxious to proceed with the taking of evidence and agreed to adjourn consideration of this and a preliminary issue as to a claim for interest until a later convenient stage of the hearing.

12. At the outset of day three of the hearing Mr. Broadhurst told the Court that a Dr. Lockhart and a Dr. Akinwunmi had prepared brief reports. These doctors apparently have not seen the Plaintiff so have based their conclusions on the written material placed before them. Mr. Flanagan asserted his concern that Dr. Lockhart's name had never been raised as a witness in any pre-trial hearing and that the attempt to adduce this evidence at the "eleventh hour" was inappropriate, contending it was in breach of the procedure rules and amounted to an "ambush". He said that he was not in a position to respond to any such evidence. At this stage of the hearing Dr. Fulton, an overseas witness on a tight schedule, was due to continue his evidence which had run over from the previous day. The Court indicated that, in light of this, the issue about this additional evidence would be further considered at a later convenient stage of the hearing. My note of that part of the hearing records me saying, no doubt with one eye on the fact that it had by then transpired that the matter would have to be adjourned part heard because of the unresolved criminal appeal brought by the Plaintiff:

> "My view is that both parties were so keen on this matter going ahead this week, that they really should have taken a step back and sought a new date – evidence coming in last minute – Schedules coming in at the door of the Court - ….. - Should have been more structured directions to trial – has been plenty of time put case in order – I will have to balance my responsibility to determine all relevant issues and balance any prejudice to the Defendant."

Further consideration was not given to the issue of the admission of this evidence on that day. The Court adjourned such further deliberations to the hearing set for 10th November 2011. On 10th November 2011 the Court was due also to review the ongoing form of hearing in light of the outcome of the criminal appeal and to give any required directions

13. It is now clear that Mr. Broadhurst does not want to only submit the already prepared medical reports of the doctors and call them as witnesses but also seeks an adjournment for the doctors to see the Plaintiff, prepare a more comprehensive report and then give evidence. Mr. Flanagan stated that hitherto he had thought that the Plaintiff had only been seeking that the doctors submit the already prepared reports and give evidence thereon without them seeing the Defendant. He also commented that such evidence would be of minimal, if any, value.

The Position of the Parties and the Law

14. Mr. Broadhurst rightly highlights that my deliberations in the substantive hearing are focused exclusively upon the assessment of damages. I accept that the purpose of the hearing is to reach a just and comprehensive figure to compensate and meet the long term needs of the Plaintiff. The Court is reminded that the future cost of medical care is not a newly raised issue as it was claimed in the October 2010 Schedule of Damages. I note that future costs were also plead in the Statement of Claim. I am also reminded that the Plaintiff's and the Defendant's experts both recommended on-going treatment.

15. Mr. Flanagan objects to an adjournment and to the admission of this evidence on the grounds that it is too late, unjustified and prejudicial.

16. Mr. Flanagan rightly highlights that Courts, including in the Cayman Islands, have regarded the issue of late evidence as being analogous to an application to amend pleadings prior to the making of a final order. Therefore, Mr. Flanagan cited the post-

Civil Procedure Rules ("CPR") English case of *Charlesworth v Relay Roads Ltd (In Liq)* [1999] 4 All ER 397, in which Neurberger, J. reviewed a number of the oft produced pre-CPR cases such as *Ketteman v Hansel Properties Ltd* [1987] AC 189, *Ladd v Marshall* [1954] 1 WLR 1489 and *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262. Neurberger, J., at paragraph e on page 402 of this post-CPR case, reiterated the observations of Brett MR made in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263, namely that he did not believe the principles established in those cases

> "can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary.... They represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity."

However Neurberger, J. went on to add that:

> "even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of cost, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interest of other litigants whose cases are waiting to be heard, if such an application succeeds."

17. Mr. Flanagan fairly stated that hitherto the Cayman Island Courts in such cases, as evidenced by the decisions in *Cayman Islands Civil Aviation Authority v Inter Island Air Limited* [2003] CILR 483, *Cayman Hotel and Golf Inc v Resorts Gems Ltd* [1992-93] CILR 372 and *Swiss Bank and Trust Corporation v Iorgulesvu* [1994-95] CILR 149[1], have seemed to follow the established pre-CPR English approach.

[1] See Georges JA at page 149.

18. This approach was expressed by Sir Baliol Brett MR on page 263 of *Clarapede* as follows:

> "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There can be no injustice if the other side can be compensated by costs."

19. Despite this, Mr. Flanagan commends to this Court what he and Neuberger, J. term "the modern approach." An approach by which the Court enforces its case management powers and is concerned to do justice to all of the parties as well as to other litigants. Mr. Flanagan relies partly upon the recent English case of *Swain-Mason and Others v Mills & Reeve* [2011] EWCA Civ 1894 in which a late application was made for leave to re-amend Particulars of Claim. It is accepted by Mr. Flanagan that the approach that he suggests has to date not been followed in the Cayman Islands Courts.

20. Mr. Flanagan submits that the Court of Appeal in *Swain-Mason* focused on the case of *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894. Although this was decided pre-CPR, it is clear that it was at a time when the English Courts were changing their attitude to their management of trials, thus gearing themselves up for the procedural changes soon to come. Significantly, unlike in the case before me, the amended pleading in *Worldwide* presented a very different case. Lord Justice Waller viewed the late amendment as being one that totally reformulated the claim. Mr. Flanagan contends that the Court should pay greater regard to all the circumstances, including 'injustice' to the Defendant and other litigants before allowing an adjournment.

21. I accept that the Defendant is desirous of having this long running case resolved. I accept the general contention that a party should be responsible for ensuring that he has his case in order by the time of the hearing. I also accept that the Court when carrying out its balancing exercise should weigh up the effect of any adjournment and delay on the Defendant and on other litigants. Mr. Flanagan submits that having regard to such circumstances and factors there is a "heavy onus" on the Plaintiff to show why there should be an adjournment to allow him to obtain and produce further evidence concerning future loss.

Conclusion

22. The approach in *Worldwide* may well have been followed in some cases in England and Wales. When that approach has been found to be applicable by those Courts it has been in the context of a jurisdiction operating under procedural rules which give the Court a greater and more specific responsibility to case manage. Although the Courts in the Cayman Islands seek to promote efficient case management and the effective use of available court time for all users, they have to date not embraced the "heavy onus" approach suggested in *Worldwide*.

23. The additional evidence in the matter before me is sought to enable the Court to properly assess the claim for damages for necessary future medical expenses. The sole purpose of this hearing is to determine in a comprehensive manner and to do justice to the Plaintiff's claim for damages in a matter in which liability has been admitted. Unlike *Worldwide*, this is not a matter in which a new claim is now being raised, as the future cost claim was

contained in the Statement of Claim and in the Schedule of Damages. The experts called by each of the parties have already stated that the Plaintiff would benefit from on-going treatment. It appears the Plaintiff mistakenly believed that he could rely on the estimates, opposition to which was not formally notified until 17th October 2010. Having regard to the circumstances of this case, it is not the appropriate vehicle for this Court to commend a change to the approach adopted in *Worldwide* and in the line of certain cases that followed it in England and Wales and, to some degree, in some cases in the Eastern Caribbean Supreme Court which operates under their own CPR. Of Course, the Court must be persuaded by the party seeking an adjournment to enable further evidence to be adduced, why justice dictates that this be granted.

24. Where a party applies for an adjournment to file and call additional evidence at this late stage of the hearing, a Court should consider whether justice requires that a claim which is not futile, frivolous or proposed in bad faith can be argued properly and if the other party can be compensated in costs for any damage suffered by way of a late application.

25. I have considered the issue of delay that may be caused to the Defendant, as well as to other litigants whose cases are waiting to be heard, by any adjournment to gather and adduce this additional information. The reality in this case is that the matter could not have, and still cannot be, concluded until the outcome of the Plaintiff's pending criminal appeal. As I stated at paragraph 12 herein, it may be argued that the hearing should not have been embarked upon until that issue was resolved. I have regard to these factors when I carry out the balancing exercise to enable me to exercise my discretion judicially.

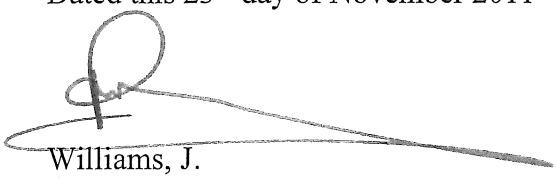
26. I am not satisfied that the late calling of this evidence will have prejudiced the Defendant to the degree he contends. The evidence is on an already pleaded discrete and not new part of the claim. The Defendant would not be precluded from meeting any new evidence that may be put forward. Directions could be given about the filing of such evidence and to enable the Defendant to obtain relevant evidence to address the issue raised. I have reviewed the evidence to date. Mr. Flanagan has not brought to my attention any part of that evidence in support of his contention that prejudice has been caused as a consequence of his approach taken to questioning of the witnesses. That questioning, he states, was based upon his view of the effect of the absence of any evidence supporting the quantum of future cost. In light of this, I am not convinced about the level of prejudice he contends. In any event, the Court will likely look favourably on any application made by Mr. Flanagan to recall a witness to enable him to test them about the need and cost of future treatment.

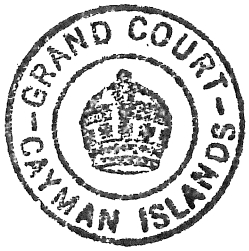
27. Mr. Flanagan has submitted that the Defendant has not been able to take adequate steps to protect itself in relation to costs prior to trial as it goes to the quantum of claim. If offers to settle have been made, the Court when considering costs at the end of the hearing can then be aware that they were made based on the fact that at the time no figures were presented by the Defendant as to the future cost of medical care. Depending on the figure awarded for the balance of the claim, excluding future costs, any figure of settlement made in these circumstances may have potential consequences for the Plaintiff and thus the Defendant will still be protected in this regard.

28. Carrying out the required balancing exercise and having regard to all of the circumstances of this case, I grant an adjournment to enable the Plaintiff to obtain and produce evidence in relation to the quantum of the claim for future medical expenses. Despite the lateness of this application, in a case in which the purpose of the hearing is to make a comprehensive assessment of damages resulting from arguably serious long term injuries, justice dictates that such an opportunity should be afforded.

29. I will hear the parties in relation to the making of directions which should flow from my decision. I will also invite submissions in relation to costs as a consequence of the application for an adjournment.

Dated this 23rd day of November 2011





Williams, J.
Judge of the Grand Court