

JERSEY / JUDGMENT

J - v - G Ltd [2005] JRC 103 (30 June 2005)

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judgment

DEPUTY bailiff: 1. This is an application for an interim payment of damages of £4808 plus interest. The Court gave its decision at the hearing on 8 th June and said that it would give reasons later, not least because Mr. Benest had raised a point on whether evidence of previous voluntary without prejudice interim payments was admissible. The Court now gives its

reasons.

Background

2. According to the Order of Justice, on 2 nd January 2003 the plaintiff was shopping at the shop of the defendant. On the floor of the aisle of the shop, there was a metal basket full of crisps which had been placed there by staff. After selecting a loaf from the shelf, the plaintiff turned to walk towards the counter but in doing so caught the edge of the basket causing her to fall heavily on to the edges of the basket and the floor. She suffered cuts and bruising and was taken to the hospital. She also suffered a substantial haematoma over her stomach and groin area. This did not resolve itself as well as might be hoped and she had to undergo surgery in February 2004. She pleads that she also developed a depressive illness brought on as a result of the injury and the impact on her family, social and work life. She has been unable to work since the accident and the medical prognosis is not yet entirely clear. The defendant has filed an answer denying liability. Interim payments 3. The ability to order interim payments is governed by Rule 8 of the Royal Court Rules 2004. The relevant provisions are as follows:- "8/2 1. If, on the hearing of an application under Rule 8/1 in an action for damages, the Court is satisfied - (a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or (b) that the plaintiff has obtained interlocutory judgment against the respondent for damages to be assessed; or (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent, or, where there are two or more defendants, against any of them, then the Court may, if it thinks fit, and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which, in the opinion of the Court, are likely to be recovered by the plaintiff after taking into account any

relevant contributory negligence and any set-off, cross-claim or counter-claim on which the respondent may be entitled to rely. 8/6 The fact that an order has been made under Rule 8/2 or 8/3 shall not be pleaded and, unless the defendant consents, or the Court so directs, no communication of that fact or of the fact that an interim payment has been made, whether voluntarily or pursuant to an order, shall be made to the Court at the trial or hearing of any question or issue as to liability or damages until all questions of liability and amount have been determined." The admissibility issue 4. In this case, the defendant's insurers have made four voluntary interim payments totalling £11,250. It is said on affidavit by a representative of the insurance company that these were made at a time when the claim appeared to be relatively minor and straightforward. However, the case is now much more complex in terms of liability, causation and quantum, particularly given the psychological element of the claim and other matters. The insurers have therefore refused to make any further interim payments. Those already paid were made 'without prejudice'. 5. I sat alone to consider this point. Mr. Benest submitted that the Jurats should not be told of the 'without prejudice' voluntary interim payments. First, he referred to Rule 8/6 which prohibited communication to the Court, at the trial or hearing of any question or issue as to liability, of the fact that a voluntary interim payment had been made. He pointed out that, on an application for an interim payment, the Court had to approach the matter in two stages. This was clearly set out by Browne-Wilkinson VC in the English Court of Appeal case of *British and Commonwealth Holdings PLC v Quadrex Holdings Inc.*

- (1989) 3 All ER 492 at 509:- "Under Ord 29 r 11, the court is required to approach the matter in two stages. At the first stage, the court has to be 'satisfied' that the defendant has admitted liability for damages or that a judgment for damages to be assessed has been obtained or (and this is the present case) 'that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages'. Only if the court is so satisfied at the first stage can the court proceed to the second stage where it assesses the reasonable interim payment 'not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered ...'. Thus, says Mr. Benest, as a first step in any application under sub-paragraph (c), the Court must consider whether it is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages. In order to assess that, the Court has to decide whether the defendant will be found liable to the plaintiff and, if so, whether there will be any question of contributory negligence. This was a 'question or issue as to liability'. 6. Secondly, he argued that there were strong policy grounds for this approach. It was in the interests of the administration of justice and of plaintiffs in particular, that defendants (or their insurers) be encouraged to make early voluntary interim payments so as to alleviate financial hardship on the part of plaintiffs. If insurers felt that the making of such an interim payment would be held against them when the Court was asked to consider ordering further interim payments, they would be less likely to make such voluntary payments. Indeed, Mr. Benest, who acts for a number of insurance companies, said very frankly that, in the event of the Court adopting such an approach, he would feel duty bound to advise insurers against making

voluntary interim payments because of the risk that this would count against them in any subsequent application, on the basis that the Court might well feel that, if an insurer was insufficiently confident of its denial of liability to refuse any interim payment, why should the Court not come to a similar conclusion. 7. Mr. Dickinson countered with two authorities. First, he referred to *Fryer v London Transport Executive* (30 th November 1982). In that case, the defendant admitted liability. At the hearing of an application for an interim payment of damages, the judge was told of an earlier voluntary interim payment and of the amount of a payment into court. Before the English Court of Appeal, it was submitted by the defendant that the English equivalent of our Rule 8/6 meant that the judge should not have been told of these matters. The Court of Appeal held that a decision as to whether or not to make an interim payment and, if so, how much, was not an issue as to damages. It was a question of what should be done to meet the justice of the case. 8. However, as Mr. Benest pointed out, *Fryer* was very different from the present case. There had been a formal admission of liability. Accordingly, the case fell to be dealt with under the equivalent of our sub-paragraph (a), not sub-paragraph (c). There was therefore no need for the Court to consider any question of potential liability as it was simply not an issue. This Court can well understand the English Court of Appeal's view that, liability having been admitted, it was reasonable for a court considering whether an interim payment should be made, to hear of previous interim payments, and that the Court was not having to resolve any issue or question as to damages. 9. Secondly, Mr. Dickinson referred to the Jersey case of *W v S Limited* (24 th January 1996). That involved an action for damages for personal injury and the plaintiff applied for an interim payment. At the hearing, the plaintiff sought to refer to and rely upon a letter from the defendant's insurers, offering £120,000 in full and final settlement of the claim. The letter was, on its face, an open letter. However, during the hearing, the defendant's advocate stated that she felt that the letter was without prejudice. The Court allowed her a short adjournment in which to take instructions. Having done so, she informed the Court that the insurers now said that the letter was privileged. The Court went on to refer to *Fryer* before concluding that it would be right to look at the letter as if it were an indication of an admission of liability. However, the Court did not make any finding as to whether the letter was in fact an open letter or whether it had been written without prejudice. Furthermore, it seems that the Court was treating the matter as an application under sub-paragraph (a) (or its equivalent in the then Rules). The Court did not at any stage consider, as required by sub-paragraph (c), whether it was satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages. It merely held that the letter could be treated as an admission of liability. In short, the case seems to have been one under sub-paragraph (a) rather than sub-paragraph (c) and the Court did not specifically rule that without prejudice correspondence could be relied upon. In the circumstances, I do not think that the case is relevant to the issue which I have to decide in this case. 10. Finally, Mr. Dickinson submitted that the wording of Rule 8/6 did not require the Court to exclude evidence of a previous interim payment because a decision to make an interim payment was not a hearing of any question or issue as to liability or damages. Furthermore, he

submitted that to construe the Rule in the way contended for by Mr. Benest would be to exclude helpful and relevant evidence. If a defendant (by his insurers) had made a voluntary interim payment, this must assist the Court in deciding whether, as required by sub-paragraph (c), it should be satisfied that the plaintiff would obtain judgment for substantial damages if the matter proceeded to trial. 11. On balance, I was persuaded by Mr. Benest's submissions. In my judgment, when considering the first stage of the two-staged approach required under sub-paragraph (c), the Court is considering a question or issue of liability. It may not be making a finding on liability, but, in order to decide whether it is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages, the Court has to consider whether the defendant is likely to be held liable to the plaintiff and, if so, whether the plaintiff is likely to be found guilty of contributory negligence. These are questions or issues as to liability. Furthermore, I agree with Mr. Benest that policy supports this interpretation. If the fact that a defendant (or his insurer) has made a voluntary interim payment is always to be made known to a court considering a subsequent application for an interim payment, I can well understand that this might deter an insurer from making such interim payments and that advocates would so advise insurers. This seems to me highly undesirable; on the contrary, the making of voluntary interim payments should be encouraged wherever possible so as to alleviate hardship suffered by plaintiffs who are suffering loss of wages or other expenses through incapacity to work. 12. I would emphasise that the ruling I have made relates only to the first stage of the two-staged approach referred to in paragraph 5 above. Once the Court has determined that the requirements of sub-paragraph (c) are met, it will no longer be considering any question or issue as to liability when it decides whether an interim payment should be made and if so, for how much. Knowledge of previous voluntary interim payments will be highly relevant to that exercise. Similarly, it seems to me that, where a court has ordered an interim payment, that fact will not be inadmissible in relation to a subsequent application for a further interim payment. By definition, when making the first interim payment, the Court will have considered whether the conditions of sub-paragraph (c) are met and will have determined that it is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages. Accordingly, on a subsequent application, there would be no question or issue as to liability and the Court would consider merely the second stage of the two-staged approach, namely whether there should be a further interim payment and if so, for how much. 13. For these reasons, I held that the evidence of the 'without prejudice' voluntary interim payments made on behalf of the defendant in this case should not be disclosed to the Jurats during their consideration of the first stage of the hearing, namely whether the requirements of sub-paragraph (c) are met. Is sub-paragraph (c) satisfied? 14. The Court must first remind itself of the correct test to be applied when considering whether it is satisfied that, if the matter proceeded to trial, the plaintiff would obtain judgment for substantial damages. As was held by this Court in *Kuwait Oil Tanker Company SAK v Mohsin*, the Court only has to be satisfied to the civil standard, not the criminal standard of beyond reasonable doubt. However, the Court must bear in mind that

the purpose of interim payments is to enable the plaintiff to receive that which he will be receiving in due course at trial. It is intended as an advance on damages to which he will become entitled in due course; it is not intended as a procedure for giving him interim damages when he may well fail at trial. The following comments of May LJ in *Gibbons v Wall*

- (1988) CA Transcript 111 were quoted with approval by Browne- Wilkinson VC in *Quadrex* (supra) at 509:- "the civil burden of proof is a flexible test and it depends on the nature of that which has to be proved where on the flexible scale of the balance of probabilities one has to pitch the burden in the context of an application for an interim payment the burden is a high one within that standard if only because litigation of its nature involves no certainties. A plaintiff with what might appear on paper to be a strong case may find it fails at trial. If he does, then he will have to repay the whole or, to the extent that he fails, part of the interim payment. But the plaintiff may spend it If he does, it may be difficult to recover Clearly, the burden resting on an applicant in those circumstances is towards the top of the flexible scale". 15. In *Quadrex* itself the Court of Appeal had to consider the nature of the test to be applied. In particular, it had to consider whether it was possible for a court to order an interim payment (on the ground that it was satisfied that the plaintiff would obtain judgment for substantial damages if the matter proceeded to trial) where unconditional leave to defend had been given in an application for summary judgment under Order 14, Rules of the Supreme Court. On this aspect, there had been conflicting decisions in the English Court of Appeal. In *Shanning International Limited v George Wimpey International Limited*
- (1988) 3 All ER 475, one division of the Court of Appeal had held that no order for an interim payment could be made in those circumstances. In *Ricci Burns Limited v Toole*
- (1989) 3 All ER 478, a different division of the court, without being referred to *Shanning* , had decided to the opposite effect. In *Quadrex* the Court of Appeal, following full argument, had to decide which of these approaches it preferred. It opted for that reflected in *Shanning* , with Browne-Wilkinson VC (with whom the other judges agreed) summarising the position as follows at 510:- "I can see no reconciliation between these two decisions, both of which were cases where the leave to defend was unconditional. I prefer the *Shanning* decision. It is perfectly correct, as Ralph Gibson LJ points out, that the question arises in a different context under Ord 14 (where the decision is final) and under Ord 29 (where the conclusion is provisional and can be corrected at trial if the provisional conclusion proves to be wrong). But Ord 29 (as construed by this court in the *Shearson Lehman* case) requires the court, at the first stage, to be satisfied that the plaintiff will succeed and the burden is a high one; it is not enough that the court thinks it likely that the plaintiff will succeed at trial. For myself, I find it an impossible concept that the same court can be simultaneously 'satisfied' that the plaintiff will succeed at trial, and at the same time consider that the defendant has an arguable defence sufficient to warrant unconditional leave to defend. If there is a distinction between the two concepts which I

have failed to detect, such distinction must in my judgment be the result of 'an uncommon nicety of approach' which the requirements of certainty in the law would make it undesirable to recognise. In my judgment, therefore, it is impossible to make an order for interim payment where unconditional leave to defend has been given" (Original emphasis). 16. In the present case, the plaintiff alleges that the defendant was negligent in leaving the basket on the ground in the aisle. It was a tripping hazard. It was not where one would expect to find it and no warning was given of its presence, nor was it cordoned off. The defendant, on the other hand, says that the basket was pushed to the side of the aisle, was clearly visible and did not present a tripping hazard. There was room to come and go along the aisle past the basket and indeed that was what the plaintiff had herself done moments before the fall. 17. The Court was assisted by having the opportunity of watching the defendant's CCTV coverage of the incident. However, it did not have the opportunity of seeing and hearing the plaintiff give evidence as to how the incident occurred nor did it hear any other evidence. 18. This is not a case where summary judgment has been applied for and therefore the issue which arose in *Quadrex* does not directly apply. Nevertheless, we think that the comments in *Quadrex* give a helpful indication as to the level of satisfaction which the Court must feel in order to have jurisdiction to make an interim payment. Having considered all the material before the Court, including the CCTV coverage, the Court has no doubt that the plaintiff would come nowhere near establishing a case for summary judgment. This is a case which would have to go to trial because the outcome is uncertain and difficult to predict. The defendant certainly has an arguable defence. On the one hand, as the plaintiff says, the basket was a temporary obstruction, was not specifically pointed out and was not at eye level so that it might more easily be noticed. As against that, the defendant contends that the plaintiff had walked past the basket twice, the second time only moments earlier, before turning round and possibly tripping over it. It was there to be seen by anyone who was looking where she was going. We are by no means to be taken as saying that the plaintiff will not succeed. We simply cannot say at this stage whether she will or not and whether, if she does succeed, she will be found guilty of a substantial degree of contributory negligence. In those circumstances we cannot possibly say that we are satisfied that, if the matter proceeds to trial, she will recover substantial damages. 19. For those reasons, the Court considered that the requirements of sub-paragraph (c) were not met and dismissed the application without going on to consider the second stage of the process. The Court did however order that an early trial on liability (which should only take a day) take place. If the plaintiff were to be successful on liability, then interim payments might clearly be appropriate thereafter pending final assessment of quantum. *Authorities British and Commonwealth Holdings PLC v Quadrex Holdings Inc.*

(1989) 3 All ER 492 at 509. Fryer v London Transport Executive (30 th November 1982). W v S Limited (24 th January 1996). Kuwait Oil Tanker Company SAK v Mohsin. Gibbons v Wall (1988) CA Transcript 111. Quadrex (Supra) at 509. Shanning International Limited v George Wimpey International Limited (1988) 3 All ER 475. Ricci Burns Limited v Toole (1989) 3 All ER 478. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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