In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 6

KATE THOMSON **Plaintiff**

-v-

JAMES THOMSON

1st Defendant

-and-

COLONIAL INSURANCE COMPANY LIMITED

2nd Defendant

RULING
(APPLICATION TO ADMIT FURTHER EVIDENCE POST-TRIAL)

(in Chambers)

Date of hearing: November 23, 2015
Date of Judgment: November 30, 2015

Mr. Paul Harshaw, Canterbury Law Limited, for the Plaintiff
Mr. Craig Rothwell, Cox Hallett & Wilkinson Limited, for the Second Defendant

Background

1. On June 14, 2013, following the liability phase of a split trial, the 2nd Defendant was found liable for the 1st Defendant's negligence in causing the Plaintiff (his wife) serious injuries in a road traffic accident which occurred on January 15, 2006. The Plaintiff was found to have been contributorily negligent in that she was not wearing a seat-belt at the time of the accident[1]. In my Ruling dated June 22, 2015 in *Warren-v-Harvey et al* [2014] SC (Bda) Civ (22 June 2015) (at paragraphs 105-106), I made findings as to the applicable discount rate for the Plaintiff's future loss award. The latter Ruling has been appealed by the 2nd Defendant.

2. On July 17, 2015, I delivered judgment on the quantum limb of the Plaintiff's claim. In paragraph 32 of that Judgment, I found as follows:

> "*32. The pension contribution claim is clearly supported by the Dews case, the recoverability of the private medical expenses claimed is clearly supported by the Woodrup case but there is no support for the proposition that the loss of health insurance premium contributions is recoverable independently of a corresponding medical expense. The 2nd Defendant accepts in principle that the employer's contributions towards the Plaintiff's pension for whatever period she would have worked in Bermuda constitute recoverable loss (Counter Schedule, page 18). The Plaintiff based on my findings is entitled to recover $50.68 per week for the seven month period conceded by the 2nd Defendant until March 5, 2014. I did not understand the quantum of the corresponding UK pension employer contributions to be in dispute and so the amounts claimed by the Plaintiff are, for the avoidance of doubt, also awarded, subject to hearing counsel as this issue was not directly addressed in either the 2nd Defendant's Counter Schedule nor, as far as I can recall, in oral argument* [Footnote: *This 'omission' was drawn to my attention by Mr. Harshaw when commenting on a draft of this Judgment. When Judgment was handed down it emerged that no evidence on the UK pension position was actually adduced at trial.*]."

3. At the hearing when judgment was handed down, Mr Harshaw informed the Court that this finding was erroneous to the extent that while a loss of pension claim had been asserted by the Plaintiff, no evidence had been adduced at trial in support of a specific quantified amount based on the hypothesis that she would have returned to the UK to work as a NHS nurse. The Plaintiff's case on quantum had been based on the premise, which I rejected, that she would have worked in Bermuda until

[1] [2013] SC (Bda) 49 Civ (14 June 2013); [2013] Bda LR 48.

retirement. With a view to filling this evidential lacuna, the Plaintiff issued a Summons dated August 12, 2015 seeking leave to amend her Schedule of Loss to claim an additional £247,979 (or $396,766). This Summons was treated as in substance an application to adduce further evidence after trial.

4. At the hearing of this Summons, both the content of principles governing adducing further evidence after trial and the ability of the Plaintiff to invoke them were hotly contested. I indicated that I considered the real question not be one of amending pleadings; the loss of pension claim had been sufficiently pleaded in modern terms. The crucial issue was whether it was open to the Plaintiff to adduce further evidence post-judgment, before the final Order had been perfected, to quantify a head of loss which was not in principle disputed but which the Plaintiff had through oversight failed to address at trial.

5. It was clear, despite much huffing and puffing on Mr Harshaw's part directed at shifting blame for the evidential gap onto the 2nd Defendant's employment expert, that with reasonable diligence the relevant evidence could to some extent have been adduced at trial. It was admittedly impossible to anticipate with any precision how the Court would have resolved the disputed issue of how long the Plaintiff would have continued to work in Bermuda and, if not until retirement, when she would have returned to the UK. But some evidence could have been adduced indicating at least in outline the basis on which a UK loss of pension claim would be calculated.

6. I should add that save in this one respect, the Plaintiff's case had (with the assistance of specialist English solicitors) been prepared with scrupulous care.

7. Less clear than the fact that a gap in the evidence existed was the governing principles applicable to a prayer for relief which has not seemingly received the benefit of considered judicial attention in Bermuda before.

Findings: applicable legal principles

8. Mr Rothwell opposed the Summons by essentially contending that the governing rules on post-judgment fresh evidence were substantially the same as those governing adducing fresh evidence on appeal under English law. He relied in particular on a recent authority, *Absolute Lofts South West London Limited-v-Artisan Home Improvements* [2015] EWHC 2632 (IPEC) (September 17, 2015). In that case Hacon J refused permission to the claimant in a patent case to adduce post-judgment evidence in the form of a page accidentally omitted from a license agreement, with a view to enhancing its damages award. Hacon J approved the following principles and applied them to the facts of the case before him in the following way:

"*6. Birss J recently reviewed the jurisdiction of a court at first instance to reconsider a judgment after it has been handed down and, where that may done, the matters relevant to the exercise of the court's discretion so to do, see Vringo Infrastructure Inc v ZTE (UK) Limited [2015] EWHC 214 (Pat). Having considered the several authorities in some detail he said this:*

> *'[38] I can summarise the principles in this way. The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind as in here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the Ladd v. Marshall factors are also likely to have real significance.*
>
> *[39] As regards principles applicable to amendments, the modern view is probably the Court of Appeal in Swain v. Hillman [2001] All ER 91. If the court would not have permitted the amendment before trial, it is hard to see how it is likely to be admitted after trial, apart from some very unusual circumstances. Nevertheless, just because a court would have permitted the amendment sought before, or even during the trial, if it had been raised at that stage, it does not mean that it should be permitted after judgment.*
>
> *[40] As to Ladd v. Marshall, the trial judge is in some ways in a better position than the appellate court to assess the significance of a new point and new evidence. In any case, at this stage the Ladd v. Marshall factors should be applied more leniently to an applicant than they might be applied in an appellate court; but, all the same, the Ladd v. Marshall factors are clearly relevant because the application is an attempt to call new evidence after judgment. If those factors, even applied more leniently, are against the applicant, it is likely that powerful factors in the applicant's favour will be needed to justify the application.'*

8.Absolute Lofts' main difficulty is the first of these requirements. It concedes, as it must, that the parts of the Shutterstock licence now relied on were just overlooked until very recently and so not put before the court. I take the view that this engages the overriding principle of the Civil Procedure Rules in an important way. It is essential to the saving of expense, ensuring that a case is dealt with expeditiously and fairly and allotting an appropriate share of the court's resources to a case that the parties bring all relevant evidence before the court at the trial. Where a party fails to do that and has no reasonable excuse for that failure, it will have to overcome a high barrier to satisfy the court that the circumstances are sufficiently unusual to permit the proceedings to be reopened with fresh evidence after judgment has been handed down. It is possible that a court could be persuaded, for example, where the second Ladd v Marshall requirement is resoundingly satisfied (bearing in mind that Ladd v Marshall is to be applied in attenuated form, as contemplated in Vringo). In

other words if the fresh evidence unarguably puts the issues considered in the judgment into a bright and truly compelling new light, that might be enough to tilt the exercise of the court's discretion."

9. It is clear from a careful reading of this judgment, that:

   (a) *Ladd-v-Marshall* factors can be applied more leniently by the trial judge;

   (b) where evidence was not adduced due to an oversight, there must be compelling reasons to adduce the evidence post-judgment;

   (c) where the omitted evidence does not demonstrably impact on the findings recorded in the judgment and sought to be disturbed, the application to admit fresh post-judgment evidence will be refused.

10. The three conditions for admitting fresh evidence on appeal established in *Ladd-v-Marshall* [1954] 1 WLR 1489 are, of course, as follows:

    (1) the evidence could not with reasonable diligence have been obtained at trial;

    (2) the evidence would clearly have an important influence on the case;

    (3) the evidence must be clearly credible.

11. Mr Harshaw submitted that the Court should be guided by the overriding objective. I agree. This proposition finds support in the United Kingdom Supreme Court case of *In re L* [2013] 1 WLR 634 where Baroness Hale stated (at 643):

> "*This Court is not bound by ….any of the previous cases to hold that there is any such limitation* [i.e. exceptional circumstances] *upon the acknowledged jurisdiction of the judge to revisit his own decision at any time until his resulting order is perfected. I would agree with Clark LJ in Stewart-v Engel [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with cases justly…Every case is going to depend upon its particular circumstances.*"

12. This case, carefully read, is dealing with a somewhat different jurisdictional question to the test for adducing fresh evidence: the jurisdiction of the trial judge, of a court's own motion, to reconsider a decision delivered in a judgment before the final order is drawn up. However, it is instructive in that it reminds us that the trial judge's case management powers do not disappear into thin air at the conclusion of a trial because

the trial (or interlocutory hearing) is not concluded until the final order has been drawn up and signed.

13. To the extent that *In re L* does support a distinctly more relaxed approach to the *Ladd-v-Marshall* rule, Mr Rothwell correctly pointed out a different approach is clearly taken in children's cases: *In re L* [2013] 1 WLR 634 at 646H (per Baroness Hale); *Re Webster* [2009] 2 All ER 1156 at 1181c (per Wall LJ). But in my judgment In re L and *Absolute Lofts South West London Limited-v-Artisan Home Improvements* [2015] EWHC 2632 (IPEC) are still broadly consistent in supporting two propositions:

    (a) a trial judge can apply *Ladd v Marshall* more flexibly that an appellate court; and

    (b) a trial judge retains an autonomous case management power to alter his decision after judgment but before the final order giving effect to the judgment has been signed.

14. However, I accept Mr Harshaw's more fundamental submission that the Bermudian test for admitting fresh evidence on appeal (and, by analogy, after judgment as well) is in any event broader than the corresponding jurisdiction under English law. In *Interinvest-v- Black and Dobie* [2010] Bda LR 41 at page 2, the Court of Appeal for Bermuda (Ward JA) held:

> "12. *In the final analysis the Preliminary Objection was not vigorously pursued, and it was conceded that in Bermuda the test with respect to fresh evidence is less restrictive than that which operates in England following Ladd v Marshall [1954] 3 All ER 745. This is because the language of Section 8 (2) of the Court of Appeal Act 1964 and section 14 (5) of the Civil Appeals Act 1971 confers on the Court full discretionary power to admit fresh evidence on appeal without the constraints of the English Order 59 Rule 10 (2) of the Rules of the Supreme Court 1999 under which further evidence on appeal would only be admitted 'as to matters which have occurred after the date of the trial or hearing except on special grounds.' So the question now before the Court is not whether fresh evidence can be admitted but rather whether leave should be granted for its admission in the circumstances of this case.*" [emphasis added]

15. This more flexible test does not mean that, if the Bermudian Court is considering an application to adduce fresh evidence in light of the overriding objective, the English approach to similar applications will be wholly irrelevant. In many cases, the English practice may be useful guide. However, the Bermudian law position is distinctly more flexible, with the courts enjoying a more liberal power to admit fresh evidence where

it would be just to do so. What justice requires will always be materially shaped by the circumstances of the individual case.

16. The governing substantive law principle applicable to the assessment of damages for personal injuries is the principle of full compensation:

> "*60. The only principle of law is that the claimant should receive full compensation for the loss which he has suffered as a result of the defendant's tort, not a penny more but not a penny less…*"[2]

17. The governing procedural law imperative enshrined in Order 1A of the Rules is "*enabling the court to deal with cases justly*". According to original 1999 commentary on this rule[3]:

> "*The classic explanation of the role of civil procedure is that it should be the 'handmaiden of justice' (Re Coles and Ravenshear [1906] 1 K.B.1, CA, at 4, per Collins MR)…in a given situation, what is just and what is fair may be a matter on which reasonable persons may reasonably differ. Clearly, the overriding consideration must be the doing of justice in the individual case*…"

18. The governing principle in Order 1A/1 is then supported by two important operational principles. Firstly, the parties are obliged to assist the Court to achieve the overriding objective (Order 1A/3). Secondly, the Court is obliged to actively manage cases with a view to achieving the overriding objective (Order 1A/4). The first listed case management duty is to encourage the parties to co-operate in the conduct of litigation. These procedural principles have particular practical relevance to the disposition of the present application.

Findings: exercise of Court's discretion

19. The present application arose in circumstances quite unlike any of the cases referred to by counsel. The context of a trial on quantum in a personal injuries case is fundamental to assessing the merits of the application. Consistent with the parties' obligation to assist the Court to achieve the overriding objective, the Court's primary function in a trial on quantum is usually to determine disputes on issues of legal principle. The Court relies on the parties to resolve arithmetical disputes of quantification to avoid Court time which could be deployed in resolving other substantive disputes being wasted. The opposing lawyers have a mutual interest in co-operating to achieve an accurate result. In one case a paying party may make an error in the receiving party's favour; in another case, the converse may be true. In a single

[2] *Simon-v-Helmot* [2012] UKPC 5 (per Lady Hale).
[3] '*Civil Procedure Rules 1998*' (Sweet and Maxwell: London, 1999), paragraph 1.3.3.

large case, each side may make computational errors which they will expect their opponent to correct if it is identified.

20. As far as lawyers are concerned, it may sometimes be unclear when an error made by an opponent creates a right in favour of one's client which cannot be waived without the client consent; or, alternatively, when a slip is made by one's opponent which one should not take advantage of. Rule 59 of the Barrister's Code of Professional Conduct provides only general guidance in the following terms:

> "*59. A barrister should never waive or abandon his client's legal right (for example an available defence under a statute of limitations) without his client's informed consent, but in civil matters it is desirable that a barrister should avoid resorting to mere technical objections and attempts to gain advantages from slips or oversights not going to the real merits of the case and he should not be a party to tactics which will merely delay or harass the other side.*"

21. There was no suggestion that the Plaintiff's failure to adduce evidence in support of her UK loss of pension claim was not in legal terms the sort of slip in calculating a head of loss which Mr Rothwell ought not to have taken advantage of. It went to the merits of his client's position on quantum in that, absent the evidence, the head of loss could not be proven. But, looked at in practical terms, the oversight was very close indeed to the sort of slip that does not go the merits and which reasonable civil litigants would not be expected to take advantage of. I only refer to this rule to illustrate the comparative opaqueness of the ethical dimension of lawyers' co-operation duties with the contrasting clarity of the procedural law position of their clients.

22. The overriding objective in Order 1A of the Rules of the Supreme Court imposes duties of cooperation upon parties which indirectly obliges lawyers to conduct litigation, in some respects, with far higher levels of co-operation than the minimum professional standards require. Those duties have an enhanced significance in the context of calculating undisputed heads of loss in the context of a trial on quantum.

23. These are the key facts:

    (1) the right of the Plaintiff in principle to be compensated for the loss of the employer's pension contributions she would have earned but for the accident was not disputed at trial;

    (2) the Plaintiff adduced evidence of what pension rights she would have earned had she continued to work in Bermuda till retirement, which was her case. She omitted due to an oversight to address the alternative UK scenario;

    (3) the 2nd Defendant asserted that the Plaintiff would have returned to England and worked as an NHS nurse. This assertion included the tacit

admission that the Plaintiff would have received the relevant employer pension contributions, whatever the relevant figure might be. The Court accepted this assertion, albeit on the basis of a later return date;

(4) the Court in its Judgment:

(a) found that the Plaintiff was entitled to recover her UK employer's pension contributions which would have accrued in her favour but for the accident, an issue which was essentially agreed; and

(b) invited counsel to address the Court further on the quantum of the claim, assuming that evidence had been adduced which the Court had been unable to identify.

24. Having regard to the governing substantive law principle of full compensation, the governing procedural principle of achieving a just result and the governing operational principle that the parties are obliged to assist the Court to achieve these twin objectives, I find that it is not fairly open to the 2nd Defendant to take advantage of an evidential gap on a head of loss which is not substantively disputed. It would be inconsistent with the overriding objective for the Court to exercise its discretion to entertain further evidence by refusing to do so. The process of computing undisputed loss items in personal injuries cases should ordinarily be a collaborative process unpunctuated by tactical "gotcha!" moments.

25. I find that leave should be granted for the admission of further evidence as to the quantum of a head of loss which was agreed in principle and which I have found the Plaintiff is entitled to be compensated for. The present application is not designed to encourage the Court to change its mind on an issue which was addressed by evidence and which formed the subject of findings by the Court. The present application is essentially a response to an invitation from the Court in its Judgment to clarify the precise amount of an undisputed head of loss (which the Court was willing to award) for the purposes of inclusion in the final Order which has yet to be drawn up, being either:

(a) an agreed amount (as I originally assumed); or

(b) an outstanding item for assessment by the Court.

26. The only prejudice which the 2nd Defendant can in these circumstances complain of suffering can be compensated for by way of costs. The Plaintiff ought to have adduced all relevant evidence, including evidence to support a finding based on a hypothesis advanced by the 2nd Defendant, at trial. If the present facts do not meet the Bermudian test for adducing fresh evidence, they must fall within the ambit of the trial judge's case management powers and I would grant leave for the further evidence to be adduced of my own motion.

Conclusion

27. For the above reasons I grant the Plaintiff's application to adduce post-Judgment fresh evidence in support of her undisputed claim for lost UK NHS pension contributions her employers would have paid for her benefit had the accident not occurred. Unless either party applies within 14 days by letter to the Registrar to be heard as to costs, I would make no order as to costs.

Dated this 30th day of November, 2015 _____
IAN RC KAWALEY CJ