Neutral Citation No: [2024] NIMaster 12	*Ref:2024NIMaster12*
Judgment: approved by the Court for handing down (subject to editorial corrections)	*ICOSNo: 23/065343/02* *Delivered: 22/05/24*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

IMELDA MCLAUGHLIN

Plaintiff

and

ITALIAN COFFEE HOLDINGS LIMITED T/A CAFFE NERO

and

First Defendant

AGEAS INSURANCE LIMITED – INSURERS OF ONE 2 ONE SIGNS SOLUTIONS LIMITED (IN LIQUIDATION)

And

Second Defendant

RADIANT BLINDS LIMITED

Third Defendant

Mr O'Donaghue KC instructed by Tughans Solicitors on behalf of the plaintiff.
Mr McCollum KC instructed by Horwich Farrelly on behalf of the first defendant.
Mr Ham BL instructed by Keoghs on behalf of the second defendant.
Mr Dunlop KC instructed by Clyde and Co. on behalf of the third defendant.

MASTER HARVEY

Introduction

[1] This is an application under Order 29 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") in which the plaintiff seeks an interim payment of just under a million pounds.

Background

[2] The initial summons issued on 2 February 2024 sought a sum of £200,000 in respect of significant additional costs and expenditure incurred to date and continuing to accrue including reflexology, rent, cleaning costs, transport and other matters as exhibited to the affidavit, together with £20,000 "to cover the fees and expenses of the various medical and quantum experts required to quantify the plaintiff's claim". The court subsequently granted leave on the 16 April 2024 to amend the summons which was duly amended on the 1 May 2024. The amended summons sought an interim payment of £967,500 as well as the £20,000 originally claimed for the aforementioned various fees. The amended summons stated that it was issued against the first and third defendants only. The plaintiff received £100,000 from a previous interim payment from the first defendant, on a without prejudice basis and without admission of liability.

[3] The application was then listed for hearing on the 3 May 2024 but adjourned to the 16 May 2024 with certain directions issued by the court including any replying affidavits which were to be filed by the defendants and the court directed the attendance of the second defendant to make submissions in relation to the application as the first and third defendants were of the view that any order that may issue in the event the court acceded to the plaintiff's application, should be against all the defendants.

[4] I am grateful to counsel for their helpful and focused submissions which were of assistance to the court.

Cause of action

[5] The action arises from an incident at the first defendant's premises on 5 April 2023 when the plaintiff allegedly suffered catastrophic injuries loss and damage when a sign and canopy allegedly fell and struck her. In brief terms, the plaintiff suffered paralysis as a result of a fracture of the T12 vertebrae with spinal cord injury at the level of L1 as well as rib fractures and other injuries. It appears such paralysis will be permanent. A writ of summons was issued on 7 August 2023 and statement of claim served on 24 April 2024. The plaintiff has obtained several expert reports including, inter alia, from an Engineer, Orthopaedic Surgeon, Occupational Therapist, Physiotherapist and Accountant. The claim is at a relatively early stage, but the plaintiff's legal advisors have advanced their investigations with commendable alacrity and further reports are being obtained.

The interim payment

[6] The plaintiff has a temporary lease on a property which expires on 3 July 2024. The plaintiff's legal team liaised with their architect and occupational therapist to source and obtain permanent accommodation which will suit the plaintiff's complex requirements in the longer term. A suitable property has been found and is close to the plaintiff's 11-year-old daughter's school. A purchase price has been agreed at £490,000. The plaintiff will also have to pay stamp duty of £12,000, estimated conveyancing fees of £5,500, alterations to the premises at an estimated cost of £200,000 and a further £60,000 for professional and expert fees and outlays. This is in addition to the £200,000 claimed in respect of the matters set out in the grounding affidavit referred to above.

The issues in dispute

[7] In brief terms, the first defendant is the occupier of the premises in which the incident occurred, the second defendant designed and installed the sign, and the third defendant was responsible for the supply of the exterior awning which was installed on the premises.

[8] The second defendant is a company in liquidation which led the plaintiff on the 16 April 2024 to successfully join the insurer as second defendant pursuant to the Third Party (Rights against Insurers Act) 2010 and further to Order 15 Rule 6 of the Rules of Court of Judicature. The insurers state they have repudiated the policy of insurance arising from indemnity issues, namely the policy did not cover commercial premises and had a subcontractor exclusion as it did not provide indemnity for acts or omissions arising from work which was subcontracted out. In short, they contend the second defendant is not an insured party. Moreover, they argue the affidavit from the plaintiff's expert Engineer, Mr Declan Cosgrove, makes no case in negligence or causation against One 2 One Signs. The sign company subcontracted the subject works to another company who they have now joined to the proceedings as a third party and who they assert is liable for any negligence in relation to erection of the signage.

[9] The third defendant initially resisted the application as set out in their replying affidavit of 11 April 2024 as liability was firmly in dispute and they asserted that the case against them lacked any detail. This was filed prior to service of the statement of claim on 24 April 2024 and subsequent to this, the first and third defendants now agree in principle to make an interim payment but on the basis, it is split equally between all three defendants.

[10] The first defendant asserts that if the court grants the plaintiff's application, the apportionment as between defendants should be calculated giving credit to the first defendant for already having made an interim payment to the plaintiff of £100,000. The apportionment in their view would therefore be the amount sought in this application plus the £100,000 already paid and

that combined figure would then be divided equally with each of three defendants contributing.

[11] As stated above, the plaintiff's application is against the first and third defendants only. The current second defendant is not a party to the application and was advised in correspondence from the plaintiff on 17 April 2024 that they were not a party to this summons. While the second defendant was invited to make submissions at the hearing, they submit that no affidavits were filed on behalf of the first and third defendant setting out the basis upon which the second defendant should be liable to make an interim payment and a Notice of Contribution or Indemnity has not been served on them.

[12] Counsel for the first and third defendants made submissions in relation to the position of the second defendant stating that there is sufficient evidence including from the affidavit of the plaintiff's Engineer, Mr Cosgrove, pointing to culpability on the part of the second defendant and in any event, an interlocutory application was not the forum to enter into a debate regarding liability which should be properly reserved for the trial.

[13] They correctly observe that where there are two or more defendants and the interim payment order is sought against any one or more of them and at trial the plaintiff would obtain judgment for substantial damages against at least one of the defendants, but the Court cannot determine which, the Court may order any one or more of the respondents to make an interim payment. In this case they go on to submit it should be against all three defendants as it is not possible at this stage to determine liability and against whom the plaintiff will succeed at trial.

[14] In relation to the insurance issue, the third defendant relies on *Buttar Construction Ltd v Arshdeep* [2021] EWCA Civ 1408, a Court of Appeal decision in England similarly involving an interim payment application. While that case was determined under the CPR Rules applicable in that jurisdiction, the court held that the provision for interim payments against all defendants in the CPR rules was satisfied where the court cannot determine whether the claimant would obtain judgment against one defendant alone or both. I note, however, in the present case, the second defendant insurer states they repudiated the insurance policy, and this has not been challenged by the insured, albeit I note they are in liquidation. In effect they submit there is no valid policy of insurance. The first defendant contends that if the plaintiff's case against the second defendant is so weak, they should bring the appropriate strike out application. The second defendant challenges such an assertion in circumstances where they have only just been joined to the action four weeks ago and even in that short time, they have taken reasonable steps to progress matters including service of a third party notice.

Legal principles

[15] Order 29 where relevant is in the following terms:

"Application for interim payment

12. - (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to enter an appearance has expired, apply to the Court for an order requiring that defendant to make an interim payment.

13. - (1) If, on the hearing of an application under rule 12 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 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
(d) that, in an action in which there are two or more defendants and the order is sought against any one or more of them, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against at least one of the defendants (but the Court cannot determine which), the Court may if it thinks fit, subject to paragraphs (2) and (3), order the respondent, or any one or more of the respondents as the case may be, 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 counterclaim on which the respondent may be entitled to rely.

(2) Where an application falls within paragraphs (1)(a)-(c), no order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely-

(a) a person who is insured in respect of the plaintiffs claim;
(b) a public authority; or
(c) a person whose means and resources are such as to enable him to make the interim payment.

(3) Where an application falls within paragraph 1(d), no order shall be made under paragraph (1) unless the Court is satisfied that each of the

defendants is a person falling within one of the following categories, namely—

> (a) a person who is insured in respect of the plaintiff's claim or whose liability will be met by an insurer under Article 98 of the Road Traffic (Northern Ireland) Order 1981;
> (b) a person whose liability will be met by the Motor Insurers' Bureau, a company limited by guarantee and incorporated under the Companies Act 1929, or an insurer acting on its behalf; or
> (c) a public authority."

…

"Adjustment on final judgment or order or on discontinuance

(19) Where a defendant has been ordered to make an interim payment or has in fact made an interim payment, whether voluntarily or pursuant to an order, the Court may, in giving or making a final judgment or order, or granting the plaintiff leave to discontinue his action or to withdraw the claim in respect of which the interim payment has been made, or at any other stage of the proceedings on the application of any party, make such order with respect to the interim payment as may be just, and in particular-

(a) an order for the repayment by the plaintiff of all or part of the interim payment, or
(b) an order for the payment to be varied or discharged, or
(c) an order for the payment by any other defendant of any part of the interim payment which the defendant who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to or connected with the plaintiff's claim."

[16] In *Eeles v Cobham Hire Services Ltd* [2010] 1 WLR 409 the court set out the applicable principles for such applications, Smith LJ stated:

"30 …Although the power to order an interim payment is a discretionary power, there is not an unfettered discretion...The court has no power to make an order for more than a reasonable proportion of the likely amount of the final judgment…

…The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is

sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award.

…The objective is not to keep the claimant out of his money but to avoid any risk of over-payment. For this part of the process, the judge need have no regard as to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will.

... We endorse the approach of Stanley Burnton J in *Braithwaite.* Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable**…**But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of confidence, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award."

[17] On the issue of granting an interim payment of a large lump sum and the extent to which this might inhibit the trial judge's approach to a PPO, the Court of Appeal stated at [38]:

"… there will be cases (the Braithwaite case [2008] LS Law Medical 261 was one such) in which the judge at the interim payment stage will be able confidently to predict that the trial judge will capitalise additional elements of the future loss so as to produce a greater lump sum award. In such a case, a larger interim payment can be justified. Those will be cases in which the claimant can clearly demonstrate a need for an immediate capital sum, probably to fund the purchase of accommodation. In our view, before a judge at the interim payment stage encroaches on the trial judge's freedom to allocate, he should have a high degree of confidence that such a course is appropriate and that the trial judge will endorse the capitalisation undertaken."

Consideration

Real, immediate and reasonably necessary need

[18] I have considered the various affidavits, supporting medical reports, helpful submissions from counsel and note the urgent accommodation requirements of the plaintiff whose lease in her current property expires in less than two months. The plaintiff with the assistance of her legal advisors has commendably sourced a suitable permanent residential property for which she

is currently "sale agreed." I consider there is a real, immediate and reasonably necessary need for an interim payment now, rather than after trial and that while the amount sought is considerable, it represents a reasonable proportion of the damages that are likely to be recovered by the plaintiff. I do not consider this represents an overpayment given the circumstances of the claim and likely very high award of damages which a case of this nature would be expected to attract.

The impact on a potential Periodical Payment Order

[19] As stated in *AL (by her Mother and Litigation Friend, S) v A, T, Collingwood Insurance Company Ltd* [2021] EWHC 1761 (QB),

> "I recognise that I am encroach[ing] on the trial judge's freedom to allocate between an immediate capital sum and a PPO but I am prepared to predict that the trial judge would take or endorse this course. Again, I do so with a high degree of confidence."

In the present action, I similarly do so with a high degree of confidence and consider it justifiable to predict that the trial judge would take this course in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award. I am also reasonably confident that the trial judge would capitalise another head of future loss to make up any shortfall, if there was one, and I am satisfied that the interim payment is required now, in advance of trial.

Will the plaintiff obtain judgment for substantial damages?

[20] The test under Rule 13 (1) (d) requires the court to be satisfied that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages.

[21] When assessing whether the plaintiff "would obtain judgment" this inevitably requires consideration of the merits of the case to determine whether, on the balance of probabilities, the plaintiff will succeed in her action. On balance, while recognising the limited evidence available to date and that this application is not a "mini-trial" of liability, even in the absence of any admissions of liability, I am satisfied on the balance of probabilities that the plaintiff will succeed in her claim, and I am prepared to accede to the plaintiff's application, however, I cannot determine which of these defendants will ultimately be liable therefore I consider the two respondents to the application are liable to make an interim payment equally in accordance with the Rules. This leaves consideration of the position of the non-respondent second defendant, which I will turn to shortly.

[22] I also consider that based on the material available to me at this interlocutory stage, this plaintiff will attract substantial damages given the extremely serious, life changing nature of the injuries and the associated special damages claim, all of which will likely amount to several millions of pounds. This case clearly falls within the substantial category.

Which parties are liable to make the interim payment?

[23] Order 29 Rule 13(1)(d) makes provision for interim payments where there are two or more defendants and at trial the plaintiff would obtain judgment against one of them, but the court cannot determine which. The provision makes clear the court can make an order against one or more of them, but this is where "the order is sought against any one or more of them." In the instant application the order is sought by the plaintiff against two, not three defendants. Put simply, the issue for the court to consider is that the application pertains to the first and third defendants only and it is against these defendants that the order is sought. The second defendant is not therefore a respondent to the application as defined in the order and assert they should not contribute on this basis, and it is therefore questionable whether it is appropriate or just in all the circumstances to make an order against a defendant who is not a respondent to the plaintiff's application.

[24] Counsel for the third defendant essentially submitted that if the court did not consider an order could be made against the second defendant on the basis it was not a respondent, there was a way to navigate around this and that their request that the second defendant contribute to any interim payment or indemnify the first and third defendants in relation to any such order, should be deemed an "application" under Order 29 Rule 19, such application having been made during oral submissions and it does not require a summons and affidavit. The third defendant asserts the fact the second defendant was present and able to make submissions meant that the court could deal with such an application at this stage.

[25] In considering the submission of the third defendant that they are applying as they may do so "at any other stage of the proceedings" for a contribution or indemnity, the burden of proof is on the moving party, to persuade the court that on the balance of probabilities, the second defendant satisfies the necessary test under the Rules and it would be just for the court to make such an order, requiring the second defendant to contribute to the interim payment or indemnify the other two defendants.

[26] Based on the material available to me and having considered the submissions, as well as having regard to the overriding objective as I was invited to do by counsel for the first defendant, I consider that it is not appropriate or just to make an order against the second defendant either on the plaintiff's substantive application or the application by the first and third

defendants for several reasons. While this is not the substantive trial and counsel for the first defendant robustly asserted this court was not the forum to determine liability issues, this proposition is not entirely correct as I must consider the evidence that has been adduced, although with the obvious caveat it has not been tested at trial.

[27] As stated in *HMRC v GKN* [2012] EWCA Civ at paragraphs 32-39. Aikens LJ gave guidance on the proper approach in such applications, albeit under the equivalent provisions in England:

> "…the claimant has to satisfy the court on a balance of probabilities about an event that has not, in fact occurred, that is, that if the claim went to trial, he would obtain judgment (and for a substantial amount of money)…
>
> The first thing the judge considering the interim payment application …has to do is to put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this 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 this claim, and furthermore that, as a result, he would actually obtain a substantial amount of money…
>
> The only difference between the exercise on the application for an interim payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have had all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the claimant has, in fact, succeeded."

[28] The expert Engineer report adduced by the plaintiff, on balance, calls into question the existence of liability as against the second defendant which leads me to conclude there is, on balance, insufficient evidence currently available that the plaintiff would obtain judgment against this party.

[29] Another factor to determine is whether the second defendant is "insured in respect of the plaintiff's claim" such as to meet the requirements of Order 29 Rule 13 (2) (a). The affidavit of 9 May 2024 filed with the court on behalf of Ageas Insurance avers that One 2 One signs is not an insured party for the reasons set out in the affidavit in relation to sub-contractor exclusions at exclusion 9 of the Public and Products Liability section of the policy and the

nature of the cover in relation to the type of premises and height of the building. In addition, there has been no Notice of Contribution or Indemnity served or affidavit evidence before the court from the first and third defendants establishing the grounds upon which they should recover from the second defendant.

[30] In the *Buttar* case, the court did not have sight of the insurance policy and at para 15 stated:

> "…it may be assumed for the purposes of the present argument that the terms of the policies are wide enough to give rise to an obligation to indemnify."

In that case, the insurers reserved their rights under the policy with regard to the claim and therefore, at paragraph 16 the court stated:

> "the policy remains extant and, since cover has not been declined and the policy has not been avoided or repudiated, the insured remains insured and will remain insured until their insurance has been brought to an end."

[31] The court ultimately held that without having sight of the policy and considering the limited material presented to the court, the assertion the defendant was not insured was "very thin" and at para 30 stated:

> "There was nothing before him (the judge at first instance) to suggest that there was any immediate prospect of repudiation."

In this case, the court has sight of the policy of insurance and schedule and affidavit evidence the policy has been repudiated for a number of reasons which are relevant to the circumstances of this claim.

[32] I therefore consider I do not have sufficient evidence available to me at this stage to conclude the plaintiff will, on balance, proceed to obtain judgment against the second defendant and in this regard, it is not irrelevant that the plaintiff is not seeking an order against this party, therefore I consider it would not be appropriate or just to make such an order. Further I am not satisfied, on balance, that the second defendant is an insured party having regard to the documentation and affidavit evidence before the court in relation to the refusal to indemnify which I consider is distinguishable from *Buttar.* On balance it constitutes a repudiation of the policy and there is more cogent evidence before the court in the present action than the very thin material advanced to the court in *Buttar* which led the court to conclude the defendants were all insured. There was also consideration in *Buttar* that there was a risk the insurers may not indemnify the defendant in the event it was held liable, and this was, at para 42:

"a material feature to be taken into account when the judge came to exercise his discretion."

The same if not greater risk applies here and is a material consideration in favour of not making an order against the second defendant.

[33] Moreover, the first and third defendants have not discharged their burden to establish that on balance such an order should be made and would be just in all the circumstances. This of course does not preclude them from seeking to bring such an application formally at any other stage of the proceedings.

Conclusion

[34] For the above reasons, I grant the plaintiff's application against the first and third defendants. I provisionally direct that the first defendant pay the sum of £443,750.00 (taking into account the calculation advanced by the first defendant) and the third defendant shall pay £543,750.00 by way of interim payment, within 21 days of the date of service of the order. Such order is however provisional pending receipt of any submissions from the parties regarding the aforementioned calculation. I direct that any such submissions shall be filed in writing with the court by the 24 May 2024. In the event no submissions are received, a final order will issue in the terms above.

[35] Costs of the application shall be awarded to the plaintiff, such costs to be taxed in default of agreement. I certify for counsel on behalf of all parties in respect of the hearing.