IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No: G 442/2011

BETWEEN:

DONALD CHARLES MINTO

PLAINTIFF

AND:

UNIT CONSTRUCTION LIMITED

DEFENDANT

Appearances: **Mrs. Terry Caudeiron of TMC Chambers for the Plaintiff**

Mr. Orren Merren of Orren Merren & Company for the Defendant

Before: **Mr. Justice Malcolm Swift Q.C. (Actg.)**

Heard: **27th April 2017**

HEADNOTE

Civil Division *– Personal Injury – Special and General Damages – Test to be applied on application to vary default Judgment to allege contributory negligence and to deploy evidence of contributory negligence at the hearing listed for the assessment of damages - Real prospect of success - Extent to which Defendant's behaviour to be taken into account – s.64 of the Labour Law (2011) – GCR O.13 r.9 and O.25 r.4 - Overriding objective of the GCR.*

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JUDGMENT

1. On the 27th April 2017, at the conclusion of the hearing, in chambers, of this interlocutory Summons issued on behalf of the Defendant on the 22nd February 2017, I gave my decision but indicated (in the light of Mr Merren's expressed dissatisfaction with the outcome) that I would provide brief reasons in writing for my decision.

2. The application made by the Defendant was for supplementary directions (additional to the directions contained in the Order for Directions made on the 7th October 2016) namely:

   a. That the Plaintiff's refusal and/or neglect to admit the facts requested by the Defendant's Notice to Admit dated 3rd February 2017 be taken into account for the purposes of the Preamble to the GCR and of GCR O.25, r4;

   b. That in properly assessing the special and general damages awarded to the Plaintiff by way of an interlocutory default judgment dated 14th December 2011, the Defendant be allowed to present evidence of the Plaintiff's contributory negligence in causing the injuries he suffered on or about 11th November 2011; and

   c. That such evidence of the Plaintiff's contributory negligence be considered when properly assessing such special and general damages and (as relevant) to reduce the net quantum thereof accordingly.

3. The application further requested variation of paragraph 2 of the interlocutory default judgment to allow for contributory negligence to be considered (effectively repeating the content of b) and c) above), with liberty to apply, further or other relief and an order for costs to be provided for.

4. After consideration of all the documentation submitted in the case including the skeleton arguments supplemented by oral submissions from Mr Merren, I did not feel it necessary to call upon the Plaintiff to respond as, in my view, the application was ill-founded. Therefore, the summons was dismissed.

5. The Plaintiff's cross-summons for directions was granted (it is not necessary here to set out the particular directions made as they followed the content of the summons) but with one variation namely:

a. That the Defendant was allowed 28 days from the 27th April 2017 to arrange for the Plaintiff to be examined by a defence medical expert;

b. That the Defendant was allowed until the 16th June 2017 for the service on the Plaintiff of any expert medical report to be relied upon;

c. That the Defendant to be debarred from calling expert medical evidence absent compliance with that timetable;

d. That the Plaintiff to be at liberty to respond with supplemental medical expert evidence if so advised.

6. I ordered that the Plaintiff's costs of the hearing be assessed by the legal aid authorities and paid by the Defendant within 14 days of notification of the assessment.

7. I rely, in the usual way, upon the parties to draw up the above order.

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ANALYSIS

8. The issue at the hearing on the 27th April 2017 was whether the Defendant should be permitted to adduce evidence of contributory negligence at the hearing scheduled for the assessment of damages in August 2017.

9. The Plaintiff was seriously injured in an accident at work on the 11th November 2010. The writ was issued on the 8th November 2011 with statement of claim attached. The Defendant, having been served with proceedings, failed to serve a defence. On the 14th December 2011, an interlocutory default judgment was entered ordering an interim payment with damages to be assessed. A judgment debtor examination was due to take place on the 6th June 2012 but the Defendant instructed an attorney to appear and the examination was adjourned. The Defendant was clearly informed by the court of the right to apply to set the default judgment aside and provision was made for such an application by allowing adequate time at the next hearing. The affidavit of the managing director of the Defendant sworn on the 26th June 2012 stated that such an application was to be made. It is clear therefore that the Defendant and its attorneys had this well in mind in mid-2012. No such application was ever made. The Defendant continued to be legally represented until late September 2013. It is also noteworthy that the Defendant, even now, is not applying to set aside the default judgment but instead to amend its terms to allow evidence of contributory negligence to be presented at the hearing at which quantum is to be assessed. This application seeks to ride roughshod over normal procedural requirements purporting to do away with the need for a defence pleading the issue as a matter of liability and all the formal, procedural and evidential consequences of such an allegation being made.

10. I do not propose to set out the appalling delays and obfuscation caused by the Defendant (see in particular paragraphs 12 to 26 of the Plaintiff's main submissions). I am left with the overriding impression that the Defendant's principal aim is to disrupt and delay the proper resolution of the Plaintiff's claim.

11. In order to avoid yet another adjournment, when it was pointed out to Mr Merren that the Defendant's managing director's affidavit (sworn 20th April 2017) sought to exhibit unsworn witness statements asserting circumstances alleged to amount to contributory negligence, I agreed to treat those statements as if they were in affidavit form for the purposes of this hearing. The statements were recently made in November and December 2016 by two current employees of the Defendant who were also employed by the Defendant at the time of the accident. No explanation was provided for the five-year delay prior to the statements being made. Neither employee saw the accident occur and they speculate about the circumstances of it.

12. The test to be applied by me is whether the suggested defence of contributory negligence has any real prospect of success (I adopt but find it unnecessary to repeat here the Plaintiff's submissions set out at paragraphs 42 to 50). I also take into account the Defendant's responsibility for the unconscionable delay which has occurred in this case.

13. I have considered carefully the rival contentions as to the law applicable to the statutory and common law duties of employer and employee arising out of the circumstances of this accident.

14. The Defendant relies on s.64 of the Labour Law (2011 Revision) set out at paragraph 15 of the defence supplemental outline submissions. I am left dissatisfied with the suggestion that the Plaintiff was provided by the Defendant with any "means, appliances, conveniences or other things" for his "health, safety or welfare" capable of having prevented the events leading to him sustaining injury. On the contrary, the Plaintiff was using a tool which was, on the evidence, provided by the Defendant (albeit seeking to delegate the choice of equipment to the Plaintiff) though the circumstances of its use were unsupervised. It is not enough to leave a workman to carry out his work in the hope that he will be able to do so using potentially viable safeguards which may or may not be appropriate to the task or which may be impractical to deploy. It is not for the workman to ask the employer to do his duty to work out the best and safest way to perform the task. Rather it is for the employer to supervise the task and ensure that any available method of safeguarding is appropriate to the task, can be used in a practical and safe manner and is in fact so used (particularly where a task is being done for the first time using new and untested equipment).

15. Having read the statements upon which the Defendant relies, I am not satisfied that a case of contributory negligence arises on the basis of the facts asserted and certainly not one with a real prospect of success.

16. I must also take into account the delay and obfuscation caused by the Defendant and the consequent effect on the Plaintiff, his health and his recoverable net damages, the Defendant's awareness of the availability of an assertion of contributory negligence as long ago as 2012 (if not earlier as I must assume that any competent employer would have investigated the circumstances of the accident at the time), the failure to make the allegation sooner, the fact that the failure to apply to set the default judgment aside was at a time when the Defendant had legal representation, the age of the case, the increasing costs burden to the Legal Aid Fund and to the Plaintiff, the Defendant's non-compliance with court orders and, as I find, the Defendant's failure to engage in any meaningful attempts to resolve the issues in the case.

17. The notice to admit, served by the Defendant, does not require a response as it is otiose being dependent on contributory negligence becoming an issue in the case.

18. Although it is not strictly necessary to decide the following issue on this application, I have also concluded that the Defendant's submissions that the default judgment should be amended as suggested are misconceived. A default judgment for unliquidated damages may be varied under GCR O.13 r.9 on such terms as the court deems just. However, because the issue raised is a fundamental issue of liability, variation is inappropriate, amendment under any slip rule does not arise and it would therefore be necessary to apply to the court to set the judgment aside.

In the light of my findings, such an application would fail. In any event, it appears that this issue was raised by the Defendant at the directions hearing on the 7th October 2016 and the court declined to entertain an application to set aside on the basis that no material was then before the court providing any grounds for such an application. The Defendant has chosen yet again not to pursue any application to set aside choosing instead to try to amend the judgment.

19. Finally my decision in this case relied on observance of the overriding objective of the GCR with the aim of securing the just, most expeditious and least expensive resolution of the case. I have taken into account and applied Rule 4 dealing with the court's duty to manage proceedings so as to further the overriding objective. There must be no further obstacles placed in the way of the August hearing and final resolution of this claim.

Dated this the 1st day of May 2017

Honourable Mr. Justice Malcolm Swift Q.C. (Actg.)
Acting Judge of the Grand Court