

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2014/0016

BETWEEN:

THE CASTRIES CONSTITUENCY COUNCIL

Appellant

and

LAMBERT NELSON

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

On written submissions:

Ms. Renee T. St. Rose of Messrs. Peter I. Foster & Associates
for the Appellant

Ms. Lydia B. Faisal for the Respondent

2016: February 4.

Interlocutory appeal – Exercise of judge’s discretion – Whether discretion properly exercised – Order for interim payment – Rule 17.6(1) of the Civil Procedure Rules 2000 – Whether claimant admitted liability – Whether judgment would be obtained against claimant

The respondent took up employment in the public service in 1984. In 1999, he was seconded to the post of Town Clerk with the appellant, the Castries Constituency Council (“the Council”),¹ a statutory corporation, for a period of 2 years. In 2001, the respondent resigned from the public service to take up a permanent position as Town Clerk with the Council. The respondent’s letter of employment dated 22nd August 2001 stated that the position of Town Clerk is a pensionable post but did not say how the pension was to be calculated and the method of calculation was not stated in any other document.

¹ The Council was then known as the Mayor and Citizens of Castries.

In or about January 2010, the respondent applied to the Council to “bridge” his 15 years of public service to his years of service with the Council. This was approved by the Finance and Administration Committee of the Council on 4th February 2010 and ratified on 23rd March 2010. The respondent subsequently applied for early retirement and this was approved by the Council in a letter dated 29th June 2010 which also confirmed the Council’s consideration and approval of the respondent’s request for bridging his years of public service with his period of employment as Town Clerk.

In a letter dated 23rd October 2012, the Council advised the respondent that the Board of Councilors has no legal authority to bridge his tenure in the public service with his employment at the Council, and as a result, the computation of his retirement benefits is on the basis of his employment with the Council which commenced in 2001. The letter indicated that, by applying the provisions of the Collective Agreement between the Civil Service Association and the Council (“the Collective Agreement”), the respondent was entitled to a gratuity in the sum of \$134,890.00 but that the Council was not in a financial position to make full payment of the gratuity at the time. In a letter dated 4th April 2013 from Council’s solicitor to the respondent’s solicitor, the Council acknowledged the gratuity owed to the respondent in the sum of \$134,890.00 and asked to pay the gratuity in monthly instalments. The respondent did not accept the terms set out in the letter and he insisted that his pension be calculated on the basis of his years in the public service bridged with his tenure of employment with the Council.

The situation remained unresolved; consequently, the respondent applied for and was granted leave to bring judicial review proceedings against the Council to set aside its decision in its letter dated 23rd October 2012 not to honour its previous decision to add his tenure in the public service to his period of employment with the Council. In its defence to the respondent’s claim, the Council stated that any decision by the Council in 2010 to bridge the respondent’s two terms of service was unlawful, ultra vires and in excess and/or an abuse of the Council’s powers. In its defence, in contrast to the position taken in its letter dated 23rd October 2012, the Council also denied that the respondent is entitled to a pension or gratuity. The Council averred that the respondent was not entitled to a pension or gratuity because the Collective Agreement did not apply to him.

In light of the new position taken by the Council, the respondent applied to the court below under rule 17.6(1) of the Civil Procedure Rules 2000 (“CPR 2000”) for an interim payment of \$134,890.00 on account of his entitlement to a gratuity. The Council opposed the application. Following the hearing of the application, the judge made findings in relation to the credibility of the Council’s witnesses and fraud on the part of the Council, and concluded that the Council’s case was weak. Based on these findings, the judge ordered the Council to pay the respondent the sum of \$30,000.00 as an interim payment on account of the respondent’s claim for a gratuity of \$300,825.00, pension payments, damages and costs.

The Council, being dissatisfied with the judge’s decision, appealed against the order.

Held: allowing the appeal, ordering the respondent to repay the \$30,000.00 to the Council within 60 days of the date of this order; and awarding costs of the appeal and the application in the court below to the Council, that:

1. The law relating to the treatment of allegations of fraud by the courts is settled. An allegation of fraud must be specifically pleaded and particularised. The mere averment of fraud in general terms is not sufficient; there must be allegations of definite facts or specific conduct. In this case, fraud was not pleaded and was not being asserted by the respondent. It was not an issue in the case; accordingly, it was not open to the judge to deal with fraud, far less to find that representations made by the Council could be fraudulent.

Ecedro Thomas v Augustine Stoutt et al BVIHCVAP1993/0001 (delivered 12th May 1997, unreported) at p. 7 applied.

2. In this case, the judge's findings on credibility and fraud played a significant part in his conclusion that the Council's case was weak and in his decision to make the interim award. The matters of fraud and credibility were matters the learned judge ought not to have taken into consideration. The witnesses had not yet given oral evidence and had not been cross-examined, therefore, the judge's findings rejecting the credibility of the Council's case and its witnesses was premature. In addition, the judge's finding of fraud was made without it being pleaded. The judge also failed to consider sufficiently the Council's case that it did not have authority to give the respondent credit for his years in the public service and that its decision in the October 2012 letter offering a gratuity of \$134,890.00 was based on a mistaken assumption that the Collective Agreement applied to the respondent. In the circumstances, the judge's decision exceeded the generous ambit within which reasonable disagreement was possible. Consequently, the Court set aside the judge's decision and exercised its own discretion.
3. For a claimant to meet the requirements for the grant of an order for interim payment under CPR 17.6(1) (a) or (d) the defendant against whom the order is sought must have admitted liability to pay damages or some other sum of money to the claimant, or the court must be satisfied that the claimant would obtain judgment based on more than the making out of a prima facie case, respectively. Although evidence meeting the criminal standard of proof is not required, the burden (on a balance of probabilities) is high. In addition, the interim payment procedure is not suited to cases of serious disputes on issues of fact or law.
4. In this case, the Council has not admitted liability to bridge the respondent's terms of service or to pay the reduced gratuity of \$134.890.00. These are triable issues of sufficient seriousness to refute the respondent's case that he has met the burden of showing that he will succeed on the main claim. Accordingly, the respondent did not satisfy the requirements of CPR 17.6(1).

Joseph Pinder v Trishel Wetherill ANUHCVAP2011/0041 (delivered 5th June 2012, unreported) at paras. 5 – 6 applied.

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an interlocutory appeal against the order of the learned judge contained in his decision dated 11th June 2014 ordering the appellant to pay to the respondent the sum of \$30,000.00 as an interim payment on account of the respondent's claim against the appellant for a gratuity of \$300,825, pension payments, damages and costs. The background to the claim is set out below.

Background

[2] The respondent took up employment in the public service of the Government of Saint Lucia in 1984. In 1999 he was seconded to the post of Town Clerk of the appellant for a period of two years. The appellant was then known as the Mayor and Citizens of Castries. It is now known as the Castries Constituency Council ("the Council"). The Council is a statutory corporation.

[3] In 2001 the respondent resigned from the public service to take up a permanent position as Town Clerk with the Council. His letter of employment dated 22nd August 2001 stated that the position of Town Clerk is a pensionable post but it did not say how the pension was to be calculated and the method of calculation was not set out in any other document.

[4] In June 2002 the respondent applied to the Council for leave of absence to pursue post graduate studies in England. In order to qualify for study leave the respondent asked the Council to treat his 15 years public service as part of his service with the Council. There is no response to this request in the evidence.

[5] In or about January 2010 the respondent formally applied to the Council to "bridge" his 15 years of public service to his years of service with the Council. The request

was considered and approved at a meeting of the Finance and Administration Committee of the Council on 4th February 2010, and ratified at a subsequent meeting on 23rd March 2010. This was followed by the respondent's request for early retirement which the Council approved by its letter dated 29th June 2010. The letter also confirmed that 'the Council considered and approved your request for bridging of your years of service (1984 – 1999) in the Public Service with your period of employment as Town Clerk.'

[6] Events took a different turn in 2012 when the Council wrote to the respondent on 23rd October 2012 in the following terms:

"Please be further advised that the Board has no legal authority to bridge your tenure in the Public Service with your employment at the Castries City Council as that authority resides with the Cabinet of Ministers. As such, the computation of your retirement benefits is on the basis of your continuous employment with the Council which commenced in July 2001.

Your retirement benefits are calculated by applying the provisions of the Collective Agreement between the Civil Service Association and the Castries City Council and the Pensions Act No. 9 of 1967. The computation of your entitlement is therefore as follows:

Terminal Annual Salary	-	\$122,627.28
Years of Service	-	11 years 3 months
Monthly Pension	-	\$2,155.56
Gratuity	-	\$134,890.00

The Castries City Council is currently not in a financial position to make full payment of your gratuity at this time; therefore we ask that you liaise with the acting Town Clerk and the Accounts Department for arriving at an agreed schedule of payment. We seek your cooperation and patience in this matter."

[7] This was followed by a letter dated 4th April 2013 from the Council's solicitor, Mr. Effrem Edgar, to the respondent's solicitor in which Mr. Edgar "acknowledges the Gratuity owed to your client [the respondent] in the sum of \$134,890.00 for his years of service with our client", and asked to pay the gratuity in monthly installments of \$5,000.00.

- [8] The respondent did not accept the terms set out in these letters and insisted that his pension should be calculated on the basis of his 27 years of service which include the 15 years in the public service that were “bridged” into his term of employment with the Council as Town Clerk.
- [9] The situation remained unresolved and the respondent applied for and was given leave to apply for judicial review to set aside the Council’s decision in its letter dated 23rd October 2012 not to honour its previous decision to add the respondent’s 15 years of public service to his term of employment with the Council.
- [10] The Council’s defence to this claim is that any decision by the Council in 2010 to bridge the respondent’s two terms of service was unlawful, ultra vires and in excess and/or an abuse of the Council’s powers. As such the Council could, in the proper exercise of its statutory duty to spend the Council’s funds only in accordance with its statutory powers, resile from its earlier decision to bridge the two periods of service. Those powers do not extend to compensating an employee for work done for another person (the Government). I will deal with this issue below.²
- [11] There was another turn of events which became apparent when the Council filed its defence on 27th November 2013. In paragraph 6 of the defence it denied that the respondent is entitled to a pension or gratuity. This is in contrast with the position taken in the Council’s letter of 23rd October 2012³ in which it had stated that the respondent’s entitlement to a pension and gratuity was calculated in accordance with the Collective Agreement between the Council and the St. Lucia Civil Service Association for the period 1st April 2010 to 31st March 2013 (“the Collective Agreement”). The Collective Agreement sets out the terms and

² Para. 28 below.

³ See para. 6 above.

conditions of work for the employees of the Council including their right to pension and gratuity in accordance with the **Pensions Act**.⁴

- [12] The Council's new position is that the respondent is not entitled to a pension or gratuity because the Collective Agreement on which the pension and gratuity were calculated does not apply to the respondent. The pleading in paragraph 6 of the defence is vague and unsatisfactory and leaves the reader to wonder just what is being alleged following the clear admissions in the letters of 23rd October 2012 and 4th April 2013.
- [13] The new position was repeated in the witness summary of Shirley M. Lewis, the chairperson of the Council, filed on 6th December 2013. In paragraphs 22 and 23 she repeated that the respondent, as the chief executive officer of the Council, cannot benefit from the Collective Agreement. He negotiated and signed the Collective Agreement on behalf of the Council and so cannot be considered to be a part of the so-called bargaining unit. Further, the position of Town Clerk is not included in the Appendix II to the Agreement. Appendix II deals with leave entitlement in working days by grades and years of service. She concluded: "In the circumstances, Mr. Nelson [the respondent] would not be entitled to the gratuity referred to in the letter of 23 October 2012."
- [14] The respondent must have been taken by surprise by the Council's new position because he was proceeding on the assumption that the Council had offered to pay his pension and gratuity in accordance with the letter of 23rd October 2012 which in any event he had not accepted. The only issue regarding the respondent's pension entitlement up to that point was whether the Council could resile from its prior decision to add his years of public service to his term of employment with the Council.

⁴ Cap. 15.26, Revised Laws of Saint Lucia 2008.

[15] Faced with this new situation, the respondent applied to the court on 18th November 2013 for an interim payment of \$134,890.00 on account of his entitlement to a gratuity. The notice of application states that the sum of \$134,890.00 is the gratuity ‘...which the Defendant [the Council] has acknowledged as due and owing to the Claimant [the respondent].’ The Council opposed the application.

[16] The application was made under rule 17.6(1) of the **Civil Procedure Rules 2000** (“CPR 2000”) which, insofar as it is relevant reads –

“The court may make an order for an interim payment only if –

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant.

(b) ...

(c) ...

(d) ...it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs...”

The Council has not admitted liability for the gratuity on which the application is based. Its position is that the initial acknowledgment has been withdrawn and the gratuity is now disputed on the ground of mistake. On these facts I do not think that the application falls under sub-paragraph (a). The Council has not admitted liability for the pension entitlements on the basis of the combined period of 27 years.

[17] To succeed under sub-paragraph (d) the respondent must show either that his main claim for pension and gratuity based on 27 years of service will succeed or, failing that, that the offer to pay a reduced gratuity of \$134,890.00, which is not claimed in the main proceedings, will succeed. This is a heavy burden. In dealing with how the court should exercise its discretion under sub-paragraph (d), Pereira JA (as she then was) said in **Joseph Pinder v Trishel Wetherill**:

“[5] Taking into account the tenor of CPR 17.6 and the case of **Scott Kem Ltd. v Bentley and Others**, (1) [[1991] 1 QB 61] the principles guiding the exercise of the court’s discretion in such circumstances

are clear. The court must be satisfied that the claimant would obtain judgment based on more than the making out of a prima facie case. Although evidence meeting the criminal standard of proof (beyond reasonable doubt) is not required, the burden, (on a balance of probabilities), is high.

[6] Further, the **Scott Kem** case is also authority for the principle that the interim payment procedure is not suited to cases of serious disputes on issues of fact or of law.”⁵

These are the principles that should have guided the learned judge when the application was before him. He heard the application in April and May 2014 and on 11th June 2014 he ruled in favour of the respondent. He found at paragraph 26 of his decision that the respondent will receive a judgment of more than \$300,000.00 and awarded an interim payment of \$30,000.00.⁶ It is not clear whether the judge relied on sub-paragraph (a) or (d), or both, of CPR 17.6(1). Based on the tenor of his decision it may be that he felt that the Council had both admitted liability and that the respondent would obtain a judgment in excess of \$300,000.00.

The Appeal

[18] The Council was granted leave to appeal against the judge’s order. The notice of appeal sets out 18 grounds of appeal, many of which overlap. I will deal with them in the following categories:

- (a) findings on the credibility of witnesses and fraud;
- (b) findings on the final issue;
- (c) the order that the Council should make an interim payment of \$30,000.00 to the respondent.

Fraud and Credibility

⁵ ANUHCVP2011/0041 (delivered 5th June 2012, unreported) at paras. 5 – 6.

⁶ At para. 22 of the judgment.

[19] In coming to his decision that the Council will not succeed in defeating the respondent's claim, the judge made the following findings:

- (a) The Council cannot have an honest belief that when the respondent opted for a reduced pension he would have received nothing but a reduced pension.⁷
- (b) The representations made by the Council would be fraudulent if they tend to imply that there was an agreement to accept a reduced pension and nothing more.⁸
- (c) The Council's performance is less than convincing.⁹
- (d) The Council is not being truthful with the court.¹⁰
- (e) An untruthful assertion by the Council that cannot be based on honest belief is the basis upon which the court considers that the Council's case is weak.

[20] The matter that was before the judge was an application for an interim payment. The witnesses had not yet given oral evidence and had not been cross-examined. All that the judge had before him was the pleadings and witness statements. It is highly unusual for a judge at this interim stage to make findings rejecting the credibility of witnesses. The judge's findings rejecting the credibility of the Council's case and its witnesses are premature.

[21] But what is more remarkable is that the judge went on to find that the representations made by the Council would be fraudulent if they tend to imply that there was an agreement by the respondent to accept a reduced pension and nothing more, and that the Council was reckless in its handling of the appellant's

⁷ At para. 23 of the judgment.

⁸ At para. 23 of the judgment.

⁹ At para. 26 of the judgment.

¹⁰ At para. 26 of the judgment.

pension.¹¹ This was followed immediately in the judgment by a quotation of the following passage from Chitty on Contracts (volume 1 paragraph 6-043):

“Definition of fraud. The Common law relating to fraud was established by the House of Lords in **Derry v Peek** (1889) 14 Appeal Cases 337). It was there decided that in order for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of that which has been stated; in the words of Lord Herschell, “fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, carelessly whether it be true or false.” The converse of this is that however negligent a person may be, he cannot be liable for fraud, provided that his belief is honest; mere carelessness is not sufficient although gross carelessness may justify an inference that it was not honest.”¹²

The judge then found that:

“An untruthful assertion by the Council which cannot be based on honest belief is the basis upon which the court considers the Council’s case is weak.”¹³

[22] In my opinion this is tantamount to a finding of fraud on the part of the Council which was not open to the judge on the facts and the pleadings in the case, and on the law relating to fraud. Factually, there was no representation by the Council, and it is not their case that the respondent had agreed to accept a reduced pension and nothing more. Their case is that the agreements that they had made regarding the respondent’s pension payments be set aside based on their own mistakes.

[23] The law relating to the treatment of allegations of fraud by the courts is settled. An allegation of fraud must be specifically pleaded and particularised. If authority is needed for this proposition in the Eastern Caribbean it can be found in **Ecedro Thomas v Augustine Stoutt et al**¹⁴ where the former Chief Justice, Sir Dennis Byron, opined at page 7:

¹¹ At para. 23 of the judgment.

¹² At para. 24 of the judgment.

¹³ At para. 25 of the judgment.

¹⁴ BVIHCVAP1993/0001 (delivered 12th May 1997, unreported).

“The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest.

The requirement for giving particulars of fraud in the pleadings is mandated in the Rules of the Supreme Court Order 18 rule 12 [1][a].

This ancient principle was referred to in **Wellingford v Mutual Society** [1880] 5 App Cas. p. 685 by Lord Selborne, L.C. at p. 697:

“With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded.”

The allegations of fraud were indeed general and vague.”

[24] In this case fraud was not pleaded and was not being asserted by the respondent. It was not an issue in the case and it was not open to the judge to deal with fraud, far less to find that representations made by the Council could be fraudulent.

[25] The grounds of appeal relating to the credibility of the Council’s witnesses and the finding of fraud are allowed.

Findings on the Final Issue

[26] The findings on creditability and fraud obviously played a significant part in the judge’s conclusions that the Council’s case is weak and in his decision to make the interim award. At paragraph 25 of his judgment he said:

“An untruthful assertion by the Council which cannot be based on an honest belief is the basis upon which the court considers that the Council’s case is weak.”

And at paragraph 26:

“The defendant’s performance is far less than convincing and this leads one to conclude that it is not being truthful with the court and therefore will not succeed in defeating the claim and the Claimant would therefore obtain a judgment.”

These passages, and the findings listed in paragraph 19 above, show that the learned judge took into consideration matters that he should not have, namely fraud and credibility, and did not consider sufficiently the Council’s case that it did not have authority to give the respondent credit for his years in the public service, and that the decision in the October 2012 letter offering a gratuity of \$134,890.00 was based on the mistaken assumption that the Collective Agreement applied to the respondent. His decision exceeded the generous ambit within which reasonable disagreement is possible and is liable to be set aside by this Court.¹⁵ This Court will exercise its own discretion in assessing the respondent’s application.

The Substantive Claim

[27] The respondent’s claim in the substantive proceedings for judicial review is that his pensionable entitlements should be based on his total years of service with the Government and the Council. The respondent did not invite the court to resolve this issue in the interim application. The application was in respect of the offer to pay the gratuity of \$134,890.00 offered in the October 2012 letter. But the substantive claim is relevant to the application because if the court were to conclude at this stage, following the guidelines in the **Joseph Pinder** case,¹⁶ that the claim will succeed at the trial, the interim payment could be based on that finding without having to resort to the offer of the \$134,890.00 gratuity. The judge made a finding on the substantive issue at paragraph 26 of the judgment where he said that ‘In my view the final judgment is likely to be more than \$300,000.00...’ This could only be a reference to the substantive issue.

¹⁵ The basis upon which an appellate court will interfere with a judge’s exercise of discretion is well established: see e.g. *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188 at pp. 189 – 190.

¹⁶ See para. 17 above.

[28] The Council's case on the main claim is that the decision in 2010 to bridge the two periods of service was based on a mistake. The mistake is that the Council thought that it had the power to take account of the respondent's service with another employer (the Government) in determining his pension entitlements from the Council. The Council now says that it never had such authority and that the agreement to bridge the two periods of service was unlawful and therefore it can resile from the agreement. This is a triable issue of sufficient seriousness to refute the respondent's case that he has met the burden of showing that he will succeed on the main claim. The judge went too far in finding that '...[the Council] will not succeed in defeating the claim'.¹⁷

The Offer on 23rd October 2012

[29] The thrust of the interim application is that the Council acknowledged that the respondent was entitled to a gratuity of \$134,890.00. The acknowledgement is set out in the Council's letters to the respondent dated 23rd October 2012 and 4th April 2013.¹⁸ The offer was initially rejected by the respondent but later accepted as a part payment by his solicitor's letter dated 12th April 2013.

[30] The Council now seeks to resile from the offer of a gratuity in the October 2012 letter on the basis that the Collective Agreement does not apply to the respondent and there is no other basis on which he is entitled to a gratuity. Under the terms of his employment as set out in his engagement letter dated 22nd August 2001, he is entitled to a pension but not a gratuity.¹⁹ This again raises a triable issue which should not be resolved on an application for an interim payment.

[31] I am not satisfied that the respondent has met the criteria in CPR 17.6(1)(a) or (d) for the court to make an interim payment. The Council has denied liability for the

¹⁷ See paragraph 26 of the judgment.

¹⁸ See paragraphs 6 and 7 above.

¹⁹ See paragraphs 10 – 13 of Shirley Lewis' affidavit sworn on 28th January 2014 opposing the respondent's application for an interim payment and the engagement letter as exhibit S.L. 1.

substantive claim and sought to explain the error in the letter of 22nd October 2012 offering the gratuity of \$134,890.00. The respondent has not met the high burden of showing that the Council has acknowledged liability for pension entitlements based on the bridged terms of employment or the gratuity of \$134,890.00, or that he will obtain judgment when the matter goes to trial.

Conclusion

[32] In the circumstances, I find that the judge exercised his discretion on wrong principles and I would set aside his decision and apply this Court's discretion. I am not satisfied that the Council has admitted liability to bridge the respondent's terms of service or to pay the reduced gratuity of \$134,890.00. I am also not satisfied that the respondent has met the very high standard of showing that he will obtain judgment when the case proceeds to trial. The issues should be resolved at trial. As such I would allow the appeal and order the respondent to repay the \$30,000.00 to the Council.

Order

[33] It is hereby declared and ordered as follows:

- (a) The appeal is allowed.
- (b) The respondent is ordered to repay the \$30,000.00 to the Council within 60 days of the date of this order.
- (c) Costs of the appeal and the application in the court below to the Council.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal

