

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

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2019/0019

BETWEEN:

TINA PAPIES

Appellant

and

CLIVE JAMES

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Sonya Parry and Ms. Chauntelle Hobson for the Appellant
Mr. Hasani McDonald and Mrs. Natasha Grey-Brookes for the Respondent

2022: November 8;
2023: May 11.

Civil Appeal – Motor vehicular accident – Assessment of damages – Special damages – Diminution in value – Jurisdiction of an appellate court to interfere with an award of damages – Whether the master erred in awarding special damages in the sum of \$39,845.92 representing the cost of repairing the respondent's vehicle – Whether direct loss or diminution of value should be pleaded as a claim for general damages or special damages – Whether the reasonableness of repair to chattel must be judged with reference to the claimant's position or his insurer's position – Proof of value – Loss of income – Whether the master erred in finding that three weeks was reasonable to begin repairs in calculating loss of profits – Pre-judgment and post-judgment interest – Whether failure to

comply with 8.6(4) result in automatic failure to be awarded interest – Rule 8.6(4) of the Civil Procedure Rules 2000 – Whether delay in the delivery of judgment disturb the award of interest in a claim.

Summary judgment on liability was entered against the appellant in a negligence claim in which a motor vehicle driven by the appellant collided with the respondent's hire bus. The matter then came up for assessment of damages before the learned master in the court below.

After considering the evidence of the respondent, the master accepted the approved costs of repairs from the respondent's insurers in the sum of \$39,845.92. She considered that the approved sum (reduced by deductibles) would have placed the respondent at a disadvantage as only \$31,879.82 was disbursed by the insurance company. The respondent was therefore awarded the sum of \$39,845.92.

Under the head of damages for loss of income/loss of use, the respondent sought loss of income from the date of the incident (17th March 2017) to the date of filing the claim (12th June 2017) and continuing from the date of filing to 6th September 2017. The award for loss of income/loss of use was assessed at \$47,196.80.

The master awarded the sum of \$300.00 to the respondent for the costs of obtaining a demand letter from his lawyer and the police report despite the lack of evidence to substantiate the claims. Finally, the master awarded pre-judgment and post-judgment interest at a rate of 2.5% and 5% respectively rejecting the respondent's claim for pre-judgment interest at a rate of 6%.

Dissatisfied with the master's decision the appellant filed a notice of appeal on 21st March 2019. The appellant took issue with the master's calculation and award of special damages under the following general headings: (i) cost of repairs to the vehicle, (ii) loss of income and (iii) pre-judgment interest.

Held: allowing the appeal in part; affirming the master's award in respect of pre-judgment interest in the court below; setting aside the master's award in respect of loss of use (loss of profits) and substituting the sum of \$46,248.99 as the award for loss of profits; setting aside the master's award in respect of damages to the vehicle and remitting this head of damage to the court below for assessment; and making no order as to costs, that:

1. For an appellate court to interfere with an award of damages, it must first be satisfied that in assessing damages, the trial judge applied a wrong principle of law or made an award so inordinately low or so unwarrantably high that it represents an entirely erroneous estimate of damages to which the claimant is entitled and as such could be said to be plainly wrong. If the award is reasonable, after considering all the elements of loss/damage, it is not appropriate for an appellate court to disturb the judge's award because of a mere difference in opinion on the amount awarded.

Saffron Limited v Angel Estates Limited ANUHC VAP2012/0045 (delivered 1st February 2019, unreported) applied; **Alphonso and Others v Deodat Ramnath** [1997] 56 WIR 183 applied.

2. The normal measure of damages is the amount by which the value of the goods damaged has been diminished. In the case of goods, the cost of repair has become established as prima facie the correct measure of a claimant's loss. The cost of repair must also be reasonable to put the chattel in the state it was in before it was damaged. Further, a direct loss or diminution in value should be pleaded as a claim for 'general damages' and not 'special damages'. This distinction is important as special damages consist of out of pocket expenses and must be pleaded and proved with proper particularity.

Coles v Hetherton [2013] EWCA Civ 1704 applied; **Ruth Dubois et al v Francis Maurice** SLUHC VAP2013/0007 (delivered 18th May 2018, unreported) applied.

3. Documents such as the invoice for the cost of repairs undertaken are no more than evidence of the diminution in value which can be used to make a good claim. The cost of repairs is not itself the loss suffered. Therefore, generally, a claim for loss of use is a claim for general damages. On the other hand, if the chattel concerned is one that is normally used in the hope of making a profit (such as a hire bus in this case), then a claim for the profits lost because the chattel could not be used for that purpose would constitute special damages. Those damages have to be specifically pleaded and proved.

Coles v Hetherton [2013] EWCA Civ 1704 applied.

4. Where a claimant's insurer has arranged repair, the reasonableness of the repair charge must be judged by reference to what a person in the position of the claimant could obtain on the open market and not what his or her insurer could obtain on the open market. It would be an error of law for a judge to rely on correspondence detailing what costs of repair the insurance could obtain on an open market. It was therefore not open to the learned master to consider or apply the correspondence detailing the position of the insurer. The master was instead obliged to consider the ample evidence before her and arrive at an award which represented the reasonable costs of repairs having regard to the estimates from both parties and any oral evidence adduced.

Coles v Hetherton [2013] EWCA Civ 1704 applied; **Parry v Cleaver** [1970] AC 1 applied; **Jones and another v Stroud District Council** [1988] 1 All ER 5 applied.

5. The owner of a vessel (and motor vehicle) is entitled to the expenses of detention of his vessel and the amount of profit lost. However, these heads of damages are dependent on the relevant timing, so that the owner is only entitled to such period necessary allowing for reasonable dispatch. What constitutes 'reasonable dispatch' is dependent on the facts of each case. It is clear in the court below that the master determined that the three additional weeks for the repairs to begin was

not unreasonable. The appellant provided no factual or legal basis to disturb that finding.

Malcolm Joseph et al v Alison Charles GDAHCV2002/0077 (delivered 6th February 2003, unreported) applied.

6. Awards of interest are designed to compensate claimants for the cost of being kept out of their money. The purpose of CPR 8.6(4) is to ensure that the defendant is aware of the claim being made against him and on what grounds. The claim form clearly set out the type of interest claimed as well as the relevant rate and period. This was sufficient to bring the claim of interest to the appellant's attention. The fact that the respondent did not plead the statutory framework does not deprive the court of the jurisdiction to make an award in an appropriate case. Further, the delay in the delivery of judgment cannot be laid at the respondent's feet. In this case there is no basis upon which the respondent should not recover interest during the period where he continued to be kept out of his money.

N.G.S.C Ltd v N.P.A (1990) 1 NWLR (Pt. 129) 741 considered; **A.B. Kemp Limited and Ors. v Tolland** (1956) 2 Lloyd's Law Report 681 applied.

JUDGMENT

- [1] **ELLIS JA:** This is an appeal against the ruling on an assessment of damages by the learned master delivered on 8th April 2019. The appellant takes issue with the master's award of special damages, in particular, damages to the vehicle in the sum of \$39,845.92, loss of income in the sum of \$47,196.80 and the master's award of pre-judgment interest at the rate of 2.5%.

Background

- [2] The matter in the court below concerned a negligence claim arising out of a motor vehicular incident in which a motor vehicle driven by the appellant collided with the respondent's hire-bus. Summary judgment on liability was entered in favour of the respondent and the matter came up for assessment of damages before the learned master.
- [3] In his statement of case, the respondent sought *inter alia* special damages in respect of: (i) damages to his vehicle in the sum of \$44,971.65; (ii) loss of income

from 17th March 2017 (the date of accident) to 12th June 2017 (the date of filing the claim) and continuing (aggregate of 25 weeks) at an average weekly rate of \$2,550.00, which totalled in the sum of \$63,750.00; and (iii) cost of the letter of demand (\$250.00) and police report (\$50.00) totalling \$300.00. The respondent also claimed pre-judgment interest at a rate of 6%, post-judgment interest at a rate of 5% and costs.

- [4] The amount claimed in respect of damage to the vehicle represented the costs of labour, materials and parts. In support of his claim, the respondent produced an estimate of repairs from Mr. Wrenford Evelyn dated 30th March 2017. That report set out an estimated cost of repair at \$44,971.65 and the time for repairs at 15 days. In contrast, the appellant produced two reports dated 10th July 2017 which estimated the repairs at \$26,553.01 and \$19,521.00. The appellant, however, led no evidence and made no submissions which explained the disparity in her estimates.
- [5] Also before the master was evidence that the respondent's insurers approved the costs of repairs in the sum of \$39,845.92 but in fact disbursed the sum of \$31,879.82 after taking into account the usual deductibles. However, when he was cross-examined under oath, the respondent testified that his vehicle was not repaired by Mr. Wrenford Evelyn but by an individual referred to as "Zoom" with whom he felt more comfortable. The respondent claims that he still owed Zoom but he did not provide the court with evidence of the total cost of the repairs, the sum paid or the balance outstanding.
- [6] Not surprisingly, in conducting her assessment, the master observed that the respondent was not forthright in his evidence about the actual costs of the repairs. The master, however, accepted the approved costs of repairs from the respondent's insurers, in the sum of \$39,845.92. She took into account that the approved sum which was reduced by deductibles would have placed the

respondent at a disadvantage as only \$31,879.82 was disbursed by the insurance company. The respondent was therefore awarded \$39,845.92 'as approved by the [respondent's] insurer for the damage to the vehicle'.¹

[7] Under the head of damages for loss of income/loss of use, the respondent sought loss of income from the date of the incident (17th March 2017) to the date of filing the claim (12th June 2017) and continuing from the date of filing to 6th September 2017. This amounted to a claim for a period of 25 weeks at a weekly rate of \$2,550.00. There was no contention that the respondent used his vehicle as public transportation for commuters. In making this award, the master reduced the respondent's earning days from a seven day week to a six day week as the respondent indicated during cross-examination that 'he sometimes worked on Sundays and on holidays when there were festival activities'. A 50% allowance was made for Sundays and holidays.² The master also considered that the accident occurred at about 2:00 pm in the afternoon and reduced the respondent's earnings for the day by 80% and deducted 1 day due to the passage of Hurricane Irma. The sum was further reduced by 20% to account for vicissitudes. The final sum awarded for loss of income/loss of use was \$47,196.80.

[8] The respondent's claim for special damages also included the costs of obtaining a demand letter from his lawyer in the sum of \$250.00 and the costs of the police report in the sum of \$50.00. The master awarded the sum of \$300.00 in total, despite the lack of evidence to substantiate the claims. The master accepted the sums as not being unreasonable in relation to the standard costs of a police report and a demand letter and cited the case of **Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al**³ in support, which held that

¹ Paragraph 6 of Master's judgment.

² Paragraph 15 of Master's judgment.

³ ANUHCVP2004/0022 (delivered 6th February 2006, unreported).

lack of evidence of value does not mean that ‘the court is inescapably driven to refuse to award any amount for an undoubted loss’.⁴

- [9] The master also awarded pre-judgment and post-judgment interest at a rate of 2.5% and 5% respectively. In doing so, the learned master rejected the respondent’s claim for pre-judgment interest at a rate of 6% stating that ‘[i]t is an established principle that interest on special damages is awarded at half percent of the statutory rate...’⁵ Prescribed costs on the global award was awarded in the sum of \$7,860.84 in accordance rule 65.5 of the **Civil Procedure Rules 2000** (“CPR”).

The Appeal

- [10] On 21st May 2019, the appellant filed a notice of appeal which lists 12 grounds of appeal against the learned master’s decision. The grounds of appeal can be conveniently categorised under three general headings: cost of repairs to vehicle, loss of income and pre-judgment interest. These are considered in turn.

Damages to Vehicle

- [11] Grounds 1-7 challenge the master’s assessment of the damages to the respondent’s vehicle and the award of special damages in the sum of \$39,845.92 which was the sum approved by the respondent’s insurance company. Counsel for the appellant submitted that it was incumbent upon the respondent to have led evidence in the court below as to the actual costs of the repairs. She noted that the evidence before the master was that prior to the assessment hearing, the vehicle had already been repaired although the actual cost of the repairs was unknown. Counsel for the appellant submitted that the quantification of the award should be based on the actual costs of repair and not probable loss.

⁴ Ibid at paragraph 17.

⁵ Paragraph 18 of Master’s judgment.

- [12] The appellant also took issue with the fact that the master based the amount of the award on a without prejudice letter from the respondent's insurance company, which was attached to the witness statement of the respondent. She submitted that the master failed to give any or any sufficient weight to two estimates put into evidence by the appellant but solely relied on the insurance company's letter. Counsel argued that the letter from the insurance company was not put in as evidence of the actual loss and was inadmissible hearsay. Moreover, she pointed out that the insurance company is not an expert in auto body repairs and as there was no representative at the hearing to provide oral evidence, the appellant had no opportunity to cross-examine the insurance company.
- [13] Counsel for the appellant submitted that where there is no actual evidence as to the specific loss but the learned master formed the view that some loss has occurred, the proper approach was to have been for the master to award nominal damages.
- [14] Counsel submitted further that the amount to be awarded for nominal damages is a percentage of the total amount claimed and that in authorities such as **Alex Losik v Eldeane Henry**,⁶ **Cosmos Williams v The Comptroller of Customs et al**⁷ and **Fredricia Hodge et al v Frances-Ann Butler et al**⁸ where nominal damages were awarded, the amount did not exceed 50% of the amount claimed. According to counsel, had the master adopted this approach on the assessment of damages, then the master would have found that the two estimates put into evidence by the appellant, which quoted the sums of \$19,521.00 and \$26,553.01 respectively, would have fallen within the suggested range and the master's award should have been limited to the same.

⁶ ANUHCv2009/0068 (delivered 15th March 2010, unreported).

⁷ SLUHCv2006/0259 (delivered 29th July 2008, unreported).

⁸ SKBHCv2017/0295 (delivered 8th April 2020, unreported).

- [15] In response, the respondent conceded that he had not provided cogent proof of the actual costs of repairs. However, counsel for the respondent submitted that in circumstances where there was insufficient evidence (or indeed no evidence) of the actual cost of repairs, a court is obliged to do its best with the limited evidence before it to make an award that would put the respondent in the position that he would have been in had the accident not occurred. In this case, counsel submitted that the best evidence was the amount approved by the insurer before deductibles. Accordingly, counsel submitted that the master acted properly when she awarded the sum approved by the insurer.
- [16] While counsel for the respondent agreed that where the circumstances warrant, it is open to a court to make an award of nominal damages, he noted that such damages 'does not mean small damages but it is the duty of the court to recognize it by an award that is not out of scale'.⁹ Counsel argued that the master made an appropriate award for the damages under this head.

Loss of Income

- [17] Grounds 8-9 take issue with the master's calculation of the award for loss of income. First, counsel for the appellant submitted that it was incorrect of the master to use the period of 25 weeks as a reasonable period for loss of use. Counsel pointed out that the evidence showed that after the respondent received the cheque from the insurance company to repair the vehicle on 28th July 2017, he then waited an additional three weeks for 'a convenient time' for his mechanic to actually effect the repairs. Counsel argued that the respondent was under a duty to mitigate his loss and the additional three weeks should not have been included in the period of time for the calculation of the loss of use. Moreover, he submitted that there was no evidence of the actual duration of the repairs.

⁹ Respondent's submissions paragraph 9.

[18] The respondent refuted the submission that the 25 week period being claimed for loss of income is unreasonable. Counsel for the respondent submitted that the three weeks (between the respondent receiving the cheque from the insurance company and completion of repairs) was reasonable. He posited that the following factors ought to be considered: i) that the respondent received a cheque from the insurance company which was less than the estimate from Mr. Wrenford Evelyn; ii) given the respondent's duty to mitigate his loss, it was reasonable for the respondent to 'wait around' for a trustworthy mechanic who could repair the vehicle at a lesser cost; and iii) the workload of the mechanic and time taken to source parts.

[19] Second, under the head of loss of income, the appellant submitted that there was an error in the master's calculation as it relates to the number of days during the week. The respondent agreed that the learned master's calculation on the loss of income was inaccurate, however, there was still some disparity between the appellant's and respondent's submissions of the correct figure. The appellant however conceded during the hearing of this appeal that the respondent's calculations were correct and that the master fell into error in her calculations and that the correct sum for loss of income should be \$46,248.99.

Pre-Judgment Interest

[20] Grounds 10 and 12 relate to the master's award of pre-judgment interest. Counsel for the appellant indicated in her written submissions that she would not pursue ground 11 which challenged the rate of interest at 2.5%.

[21] The appellant submitted however that the respondent failed to provide any basis of entitlement for interest, as is required by CPR 8.6(4), and such failure precluded an award for pre-judgment interest. Further the appellant stated that the master failed to consider, in the exercise of her discretion, the 1 year and 4 months that had elapsed between the conclusion of the assessment of damages hearing and the date when judgment was delivered. According to the appellant, in the

circumstances, it was unfair for the master to order pre-judgment interest up to the date of judgment.

- [22] In response to the appellant's argument, counsel for the respondent submitted that the failure of the respondent to mention the basis of entitlement is not a ground upon which pre-judgment interest should not be awarded. Rather, relying on the authorities **Wakeem Guishard v The Attorney General of the Virgin Islands**¹⁰ and **Pickle Properties Limited v Stephen Leslie Plant**,¹¹ the respondent submitted that once the claim for interest was substantial, though not complete, it was enough to be deemed in compliance with CPR 8.6(4).

Discussion and analysis

- [23] The principles governing appellate interference with an award of damages are well known and have been repeated in numerous decisions of this Court. Baptiste JA in **Saffron Limited v Angel Estates Limited**¹² summarised the position as follows:

"The circumstances justifying appellate interference are fairly circumscribed and accordingly lie within narrow parameters. Before an appellate court interferes with an award of damages, it has to be satisfied that in assessing damages, the trial judge applied a wrong principle of law or made an award so inordinately low or so unwarrantably high that it represents an entirely erroneous estimate of the damage to which the claimant is entitled and as such could be said to be plainly wrong."¹³

Baptiste JA also went on to cite the well-known cases of **Flint v Lovell**¹⁴ and **Nance v British Columbia Electric Railway Co. Ltd**¹⁵ in support of this position.¹⁶

¹⁰ BVIHCVAP2018/0006 (delivered 2nd October 2020, unreported).

¹¹ BVIHCVAP2016/0032 (delivered 30th January 2018, unreported).

¹² ANUHCVP2012/0045 (delivered 1st February 2019, unreported).

¹³ Ibid at paragraph 71.

¹⁴ [1935] 1 KB 354.

¹⁵ [1951] UKPC 19.

¹⁶ Supra n. 13 at paragraph 72.

[24] The party who seeks to challenge an award of damages faces a heavy burden. Given that the award is reasonable, it is not appropriate for an appellate court to disturb the judge's award because of a mere difference in opinion on the amount awarded. In **Martin Alphonso and Others v Deodat Ramnath**¹⁷ this Court held:

“... it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial Judge is indeed a heavy one. A Court of Appeal has not the advantage of seeing witnesses especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances to disturb his award. The mere fact that the Judge's award is for a larger or smaller sum than we would have given is not itself a sufficient reason for disturbing the award.”

[25] Bearing these principles in mind, I turn to the grounds of appeal.

Grounds 1-7 – Cost of repairing damage to the vehicle General Principles

[26] In a claim for compensation where a claimant's car has been damaged in a collision caused by the negligence of the defendant, the general principles which apply on assessment have long been authoritatively stated and cannot be in doubt. The normal measure of damages is the amount by which the value of the goods damaged has been diminished. In the case of goods, the cost of repair has become established as *prima facie* the correct measure of a claimant's loss.

[27] In **Coles v Hetherton**¹⁸ at paragraph 27, the English Court of Appeal considered Lord Hobhouse's statement of principle in **Dimond v Lovell**¹⁹ together with statements in other cases and summarised the position in the following terms:

¹⁷ [1997] 56 WIR 183.

¹⁸ [2013] EWCA Civ 1704.

¹⁹ [2000] 2 WLR 1121.

“... (1) where a chattel is damaged by the negligence of another that loss (the “direct” loss) is suffered as soon as the chattel is damaged. (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the general principle in awarding damages, i.e. that of restitution. In Lord Hobhouse’s phrase, “this can be expressed as a capital account loss”. (3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered. (4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages. Thus, subsequent destruction of the chattel, or a decision to delay repairs, or an ability to have the repairs done at less than cost or for nothing will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor. (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer.”

[28] The relevant case law has also made it clear that the cost of repair must be reasonable, both in that the work must be necessary and not profligate. This is because the cost of repair is expected to reflect the diminution in the value of the vehicle.

[29] The appellant contended that the learned master erred when she awarded special damages in the sum of \$39,845.92 representing the cost of repairing the respondent’s vehicle. Before I proceed to deal with the parties’ substantive submissions on this issue; I am compelled to address an obvious flaw in the respondent’s pleadings. His statement of case makes it clear that this head of claim is advanced as an item of special damage. I am satisfied that this does not reflect the true position.

[30] In **Coles v Hetherton**, the English Court of Appeal specifically addressed this pleading issue. That court had to resolve whether the correct jurisprudential

analysis of a claim for diminution in value whether in practice measured by cost of repairs or not, was a claim for ‘general damages’, or one for ‘special damages’. The court definitively held that a ‘direct loss’ or diminution in value claim should be pleaded as a claim for ‘general damages’.

[31] The importance of this is borne out by the fact that unlike general damages, special damages consist of out of pocket expenses and must be pleaded and proved with proper particularity.²⁰ Baptiste JA in **Ruth Dubois et al v Francis Maurice**²¹ citing Lord Donovan in **Perestrello E Companhia Limitada v United Paint Co. Ltd**²² noted that ‘a claimant who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.’²³

[32] How then are documented estimates or invoices of the costs of repairs to be viewed? At paragraph 28 of the judgment in **Coles v Hetherington**, the English Court of Appeal went on to observe:

“Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered. In addition to the direct loss represented by diminution in value, there may be other, consequential losses, such as deprivation or “loss of use” of the vehicle, but that constitutes a different head of claim. Once again a claim for simple deprivation, or loss of use, is a claim for general damages.”²⁴

²⁰ See Dolette Cyr Bartholomew et al and Kenton Hazzard et al GDAHCVAP2021/0020 (delivered 4th April 2022, unreported).

²¹ SLUHCVP2013/0007 (delivered 18th May 2018, unreported).

²² [1969] 3 All ER 479-486.

²³ Supra n. 22 at paragraph 10.

²⁴ See *The Endeavour* (1890) 6 Asp MC 511, *The Glenfinlas* (Note) [1918] P 3663, *The Kingsway* [1918] P 344, and *The London Corporation* [1935] P 70. The principles established in those cases have since been authoritatively reaffirmed by Lord Hobhouse in the House of Lords in *Dimond v Lovell* and in *Jones v Stroud District Council* [1986] 1 WLR 1141 especially at 1150 H per Neill LJ with whom Ralph Gibson and Fox LJ agreed and see also *Burdiss v Livsey* [2003] QB 36 [84]-[85] per Aldous LJ.

- [33] It follows that the charge for the repair is only evidence of the diminution in value of the vehicle that has been damaged, although it is 'often the best evidence'. However, the court went on to distinguish that:
- "[28]... if the chattel concerned is one that is normally used in the hope of making a profit, (such as a trading ship, a lorry or a taxi), then a claim for the profits lost because the chattel could not be used for that trading would constitute "special damages". Those damages have to be specifically pleaded and proved."
- [34] In this appeal, the respondent's evidence was that the repairs to his vehicle had been carried out and partially paid for. He however advanced no evidence of the actual cost of these repairs. This was indeed curious and it is not surprising that the master, having seen and heard the respondent's oral evidence on cross examination, found him not to be forthright in his evidence in relation to the actual costs of repairs.
- [35] Faced with this difficulty, the master elected to accept the approved costs of repairs from the insurer taking into account the cost of the deductibles and the consequential disadvantage that would have been caused. The question is whether it was open to her to do so.
- [36] After observing that in assessing a figure representing the diminution in value, '...the "reasonable cost of repair" is, as a rule of thumb, taken as representing the diminution in value of the chattel that has been suffered as a result of the damage caused by the negligence of the defendant', the English Court of Appeal in **Coles v Hetherton** had to contend with the following critical question: "If a claimant's insurer has arranged repair, is the reasonableness of the repair charge to be judged by reference to: (a) what a person in the position of the claimant could obtain on the open market; or (b) what his or her insurer could obtain on the open market?"

[37] The judgment reflects that the court summarily concluded that (a) is correct - it is from the claimant's position that the reasonableness of the repair charge is to be judged. The court reasoned that the question could only arise because the claimant was insured. Had the claimant been riding a bicycle uninsured, then the alternative vantage point would not have existed and the question could not have arisen. Merely because the claimant is insured, and has within that contract of insurance, a contractual right to require the insurer to repair the vehicle should not and does not, as a matter of principle, make a difference. In reaching this decision, the court relied on two basic long-settled law principles:

“(1) ‘Even in a case where a claimant is insured in respect of the loss suffered as a result of the tortfeasor's wrong and the insurer has indemnified the insured and becomes subrogated to the insured's right against the tortfeasor, the cause of action against the tortfeasor remains that of the claimant, unless it is specifically assigned to the insurer’; and (2) ‘...in respect to loss which is covered by insurance, the benefits obtained under the insurance are irrelevant in assessing the correct measure of damages recoverable’. The Court referred with approval to the view in *Bee v Jenson (No.2)* [2008] Lloyd's Rep IR 221, that ‘defendants have had to accept that a claimant's insurance arrangements are irrelevant and cannot be prayed in aid to reduce their liabilities’. The rationale being that the benefits received by the insured claimant under his contract of insurance are benefits that he bought by paying the insurance premium demanded. So, in Lord Reid's words in *Parry v Cleaver* [1970] AC 1 ‘...it would be unjust and unreasonable to hold that the money which [the insured] prudently spent on premiums and the benefit from it should inure to the benefit of the tortfeasor’.”²⁵

[38] In essence, the enquiry into the diminution of value sustained by the claimant occurs and is judged from the claimant's vantage point – it is claimant centric, as it could only be if there was no contract of insurance existing between the claimant and an insurance company. By reason of the second principle above, the following are essentially irrelevant:

- (i) the existence of the claimant's contract of insurance, and the consequently contractual benefits to the claimant from it and the insurers' subrogation to the claim; and

²⁵ *Coles v Hetherton* at paragraphs 35 and 36 respectively.

- (ii) the position of the insurer and what cost the insurer can obtain repair services for on the open market.

[39] It follows that where 'the claimant's insurer has arranged the repair, the reasonableness of the repair charge is to be judged by reference to what a person in the position of the claimant could obtain on the open market'. It further follows that it would be an error of law for a judge to rely on correspondence detailing the position of the insurer and what cost the insurer could obtain repair services for on the open market.

[40] In the leading case of **Parry v Cleaver**,²⁶ Lord Reid clarified the reason why benefits provided by way of indemnity by the insurer are to be disregarded when assessing the liability of the tortfeasor in the following terms:

"As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should inure to the benefit of the tortfeasor."

[41] Of course, the effect of this approach is that a defendant may likely find that a court may accept higher repair charges as accurately evidencing a claimant's diminution in value. This arises because, almost inevitably, the bargain the individual claimant can achieve on the open market for vehicle repair services will not be as good as what an insurance company could negotiate on the open market. It is entirely likely that the charges which would have been judged unreasonable had the insurer bargained for them in the open market will be judged reasonable when the claimant bargains for them. However, ultimately that position is consistent with the overarching damages principle, that 'compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong'.²⁷

²⁶ [1970] AC 1 at page 14.

²⁷ Per Lord Scarman in *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174.

- [42] Before considering the proper approach which the master should have adopted, it must be borne in mind that “[t]he claim in respect of the physical damage to the vehicle is a claim in general damages and the measure of damages recoverable is the monetary amount of the diminution in value of the vehicle caused by the negligence of the defendant. That diminution in value figure is usually calculated, as a rule of thumb, by the reasonable cost of repairs (to the claimant) in a case where the vehicle is capable of economic repair.”²⁸ It follows that the practical way for the court to have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the vehicle back in the state it was in before it was damaged.
- [43] In this case, the learned master would have had before her an estimate of the cost of repairs from Mr. Wrenford Evelyn dated 30th March 2017, presented by the respondent in the sum of \$44,971.65 and two estimates presented by the appellant dated 10th July 2017 in the sum of \$26,553.01 and \$19,521.00. Presented with such evidence, I do not accept that there was an evidential lacuna which compelled the master to consider and assess nominal damages. Although such damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given, that is decidedly not the case here.²⁹
- [44] The master was obliged to look at the evidence before her and upon her assessment, award a sum for the respondent’s reasonable costs of repairs. This evidence was in the form of the two estimates led by the appellants, the estimate provided by the respondent, the written evidence of all of the witnesses, including the appellant’s witnesses, Alphonso Percival and Calvin Johnson (both auto body repairmen) and oral evidence upon cross-examination. A thorough review of the actual damage caused to the vehicle as against the itemised list of repairs would first have to be considered. Thereafter, the master would have had to consider

²⁸ Coles v Hetherington at paragraph 44.

²⁹ See Dixon v Deveridge (1825) 2 C & P 109.

what would be the reasonable cost of carrying out these repairs on the open market for vehicle repair services. Ultimately, the court was required to review the estimates and determine whether they were reasonable and provided satisfactory evidence of the cost of the repairs to be carried out. This is the exercise that the parties will have to undertake, if necessary, when these cases are remitted to the court below for assessment.

- [45] The purported evidential lacuna brought about by the respondent's failure to provide details of the actual costs charged by Zoom or the outstanding balance owed, is in my view of no moment. Applying the dictum in **The Endeavour**,³⁰ the English court in **Jones and another v Stroud District Council**³¹ held:

"It was submitted on behalf of the plaintiffs, however, that if the repairs were necessary and were carried out it was not to the point that the plaintiffs had not proved that they had paid for the repairs themselves. Our attention was drawn to the decision in *The Endeavour* (1890) 62 LT 840, where repairs to the vessel were carried out but before paying for them the plaintiff had gone bankrupt. It was there argued that the plaintiff could not claim the cost of the repairs because the sums recovered would only go to swell the creditors' funds. This argument was rejected, and it was said (at 841):

'If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled to refuse to pay as part of the damages the cost of the repairs to the owner.'

- [46] Applying this dictum to the facts of this case, I am satisfied that in the absence of this evidence, the master was still obliged to consider the evidence before her and arrive at an award which represented the reasonable costs of repairs having regard to the estimates before her and any oral evidence adduced. It was not open to the learned master to consider or apply the correspondence detailing the position of the insurer and what cost the insurer could obtain repair services for on the open market. To the extent that this was done, I am satisfied that this was an error which warrants the court's interference and the setting aside of this award

³⁰ (1890) 6 Asp M.C. 511.

³¹ [1988] 1 All ER 5.

and I would remit the claim for damages to the vehicle to the court below for assessment (which is now in the conclusion).

Grounds 8-9 - Loss of Use/ Loss of Profits

- [47] Although framed a claim for loss of use in the court below, in actuality the appellant advanced a claim for loss of profits of a profit-earning vehicle. The evidence before the master was that his vehicle was a hire bus used to generate income. As such and applying the dictum in **Coles v Hetherton** the claim for loss of profits was properly particularised as a claim in special damages. Such damages however, have to be specifically pleaded and proved.³²
- [48] In the court below, the respondent claimed the sum of \$2,550 per week for a 7-day week. Counsel for the appellant submitted that the learned master reduced the week to a 6-day week for 25 weeks with 50% allowed for Sundays and holidays for the period of 17th March 2017 to 6th September 2017. Counsel for the appellant submitted that during this period, there were 25 Sundays and 5 holidays (14th April 2017, 16th April 2017, 1st May 2017, 7th August 2017 and 8th August 2017). The master further applied the following deductions: (1) she reduced the earnings for the day of the accident by 80% (i.e. a deduction of \$291.42), and deducted one day for the passage of Hurricane Irma on 6th September 2017 (i.e. a deduction of \$364.28); and (2) she further reduced the award by 20% 'to take into account vicissitudes...'.
- [49] Counsel pointed out that even when applying the formula adopted by the learned master there would still have been some mathematical miscalculations which would have resulted in an incorrect total award. Counsel submitted that the correct total ought to have been \$38,817.68, after the deduction of 20% of \$48,522.10 (\$9,704.42). However, during the course of this appeal the parties eventually and

³² The Mediana [1900] AC 113 at 117-118 per Lord Halsbury LC.

very helpfully agreed that the correct calculation would have resulted in an award of \$46,248.99.

- [50] The appellant's case does not however end there. The appellant also submitted that the 25 week period used to calculate loss of income was unreasonable. In support of this contention she submitted that the additional three weeks that the respondent waited after receiving the cheque from the insurance company to begin repairs on his vehicle was contrary to his duty to mitigate his loss.
- [51] Counsel for the appellant argued that it should not be disregarded (and it was), that the respondent received monies from his insurer on 28th July 2017 to repair his vehicle, and provided no evidence as to the length of time it took to repair his vehicle. If one is to add 15 days for labour as estimated by Mr. Wrenford Evelyn in the estimate relied on by the claimant, this time would end on or around 13th August 2017. However, the appellant complained that the respondent chose to wait for approximately another 3 weeks for another mechanic to conduct repairs.
- [52] Counsel for the appellant submitted that the appellant should not be responsible for this additional loss of use which was caused by the respondent. While it is arguable that the respondent sought to wait additional time after receiving monies to repair his vehicle, as he had found a mechanic who would conduct the repairs at a much cheaper rate than he had claimed, she concluded that in any event, it is wholly unreasonable for the appellant to be ordered to pay for the additional time in these circumstances.
- [53] There is a general dearth of judicial authorities addressing this issue and what little case law which obtains has developed entirely in connection with ships and damage to ships. However, I can see no reason why the general principles could

not be extended to chattel other than ships. See: **Aerospace Publishing Ltd. v Thames Water Utilities Ltd.**³³

- [54] In considering the measure of damages for loss of profits for a ship, the court in **Gracie (Owners) v Argentino (Owners), The Argentino**³⁴ observed that the question is what use the shipowner would, but for the collision, have had of his ship, and what profits would have been earned by such use, excluding elements of uncertain or speculative or special character. At page 523 of the judgment the House of Lords stated:

“I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision.”

- [55] In **Sunrise Co. v. The Lake Winnipeg**,³⁵ the Canadian appellate court summarised the position in the following terms:

“The authorities recognize that the goal of the award of damages must be to restore the plaintiff to the position it would have been but for the tortious conduct of the defendant – no less and no more. To that end, they insist that the matter is essentially one of determining what loss the plaintiff has established to have been caused by the wrongful act of the defendant, viewing the matter as it stands at the time of trial and taking into account any factors which have diminished the loss in the interval following the defendant's tort.”³⁶

- [56] The authorities do not establish that the person responsible for the initial damage must always bear the whole of the loss resulting from detention, regardless of intervening causes which may also require detention. While it is clear that the owner of a vessel (and I would say by extension a motor vehicle) is entitled to the expenses of detention of his vessel and the amount of profit lost, it is equally clear

³³ [2005] EWHC 2987.

³⁴ (1889) 14 App. Cas. 519 at 523.

³⁵ [1991] 1 SCR 3.

³⁶ *Sunrise Co. v. Lake Winnipeg (The)*, 1991 CanLII 107 (SCC).

that both these heads of damages depend on time, so that the owner is only entitled to such period of time as is shown to have been necessary allowing for reasonable dispatch.³⁷

[57] The master considered the judgment of Barrow J (as he then was) in **Malcolm Joseph et al v Alison Charles**³⁸ in which the learned judge considered the issue of delay in carrying out repairs in the context of a claim for loss of profits. In that judgment, the judge was at pains to note that there were periods of the delay which were unexplained and as such he felt compelled to refuse to award compensation for the entire period.

[58] It is apparent that the learned master was well aware that what constituted “reasonable dispatch” depended on the facts and circumstances of each case. At paragraph 13 of the judgment, the master noted that the respondent received the cheque from the insurer on 28th July 2017 and that the amount paid out (less the deductibles) was significantly less than that quoted in the estimate from Mr. Wrenford Evelyn. The respondent’s evidence was that he had to get another mechanic (presumably at a cheaper cost) to carry out the repairs at a time convenient to the said mechanic. She also took into account that the respondent would have had to source replacement parts.

[59] Given these circumstances, the master determined that the additional three weeks for the repairs to begin was not unreasonable. The appellant has provided no factual or legal basis upon which this Court can purport to disturb that finding. I would dismiss these grounds of appeal.

Grounds 10 and 12 – Pre- judgment interest

[60] In his prayer in the court below, the respondent claimed interest at the rate of 6% from the date of the accident to the date of the trial. The court’s power to award

³⁷ The City of Buenos Aires (1871) 1 Asp MLC 169; The Ferdinand Retzlaff [1972] 2 Lloyd’s Rep 120.

³⁸ GDAHCV2002/0077 (delivered 6th February 2003, unreported).

pre-judgment interest arises from section 29 of the **Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act**³⁹ which provides as follows:

“In any proceedings for the recovery of any debt or damages in the High Court or Court of Appeal, the Court may, if it thinks fit, order that there shall be included in any sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, but nothing in this section

- (a) shall authorise the giving of interest upon interest;
- (b) **shall apply in relation to any debt upon which interest is payable** as of right whether by virtue of any agreement or otherwise;
- (c) or shall affect the damages recoverable for the dishonor of a bill of exchange.”

[61] However, this provision must be read in conjunction with relevant procedural rules. In this case, CPR 8.6(4) states:

- “A claimant who is seeking interest must –
- (a) say so expressly in the claim form and;
 - (b) include, in the claim form or statement of claim, details of the –
 - (i) basis of entitlement;
 - (ii) rate; and
 - (iii) period for which it is claimed.”

[62] The appellant conceded that the claim for interest is pleaded together with the rate and period. However, she contended that the respondent did not plead the basis of entitlement in the statement of claim or claim form. She submitted that the basis of entitlement could have been articulated by the respondent through some reference to legislation or by including the words ‘as the court deems just’. Counsel for the appellant argued the provision of CPR 8.6(4)(b) must be read conjunctively. So that the failure to comply with one of these would preclude an award of interest.

³⁹ Cap 3.11 of the Laws of St. Christopher and Nevis.

[63] In **Speednet Communications Limited and Public Commission**,⁴⁰ a Belizean Civil Appeal from the Caribbean Court of Justice, the court considered rule 8.6(3) of the Supreme Court (Civil Procedure) Rules 2005. Rule 8.6(3) is drafted in almost identical terms to our CPR 8.6(4) except that the provisions of our CPR 8.6(5) appear as a sub-sub rule of their rule 8.6(3)(iv). The court explained the purpose of the rule in this way:

“[10]... one of the purposes of this rule is to promote fairness in the litigation process, a cardinal goal of the Civil Procedure Rules. It is only fair that a party against whom interest is claimed should have an opportunity to understand fully the claim made so that it can appropriately contest or otherwise address it.”

[64] In response, counsel for the respondent submitted that notwithstanding the failure to comply strictly with rule 8.6(4), the respondent should not be disentitled from claiming pre-judgment interest. In support of this contention, counsel relied heavily on the judgments in **Wakeem Guishard** and **Pickle Properties**.

[65] I find the case of **Pickle Properties** to be directly relevant and consistent with the modern approach taken by the courts. In that case, the respondent, who was the claimant in the court below, sought ‘costs and interest’. The Court affirmed the judge’s award of pre-judgment interest. In doing so, the Court noted that:

“[w]hilst there are numerous decisions from the court below which hold that where a claimant fails to comply with rule 8.6(4) the High Court will not award interest, this is not always the case. Importantly, the Judicial Committee has, in *Creque v Penn* awarded interest in the following circumstances: The re-amended statement of claim asked for “interest on such sums found due at such rate and for such periods as to the court shall seem just,” which amounted to substantial (though not complete) compliance with rule 8.6(4) of the Civil Procedure Rules 2000. There is no reason to suppose that either the failure to comply strictly with rule 8.6(4), or the absence of a formal respondent’s notice, has caused any unfairness.”⁴¹

⁴⁰ [2017] CCJ 3 AJ.

⁴¹ Paragraph 91.

- [66] This finding is consistent with judicial authorities which have found that the court's discretion to award pre-judgment interest in circumstances where the claimant has been kept out of pocket for a long time is not fettered by the rule of pleading to the effect that a court cannot award a relief that has not been expressly pleaded and proved.
- [67] Although in no way binding, the Nigerian courts have on the ground of equity, bypassed this rule and awarded pre-judgment interest even where the claimant did not plead and prove his/her entitlement to same. One of such case is **N.G.S.C. Ltd. v. N.P.A.**⁴² where the Nigerian Court of Appeal rejected the respondent's submission that in every case evidence must be adduced to prove or establish a claim for pre-judgment interest before interest can be awarded. The Court of Appeal held that indeed, in certain cases, even failure to expressly claim pre-judgment interest on the writ of summons or statement of claim would not preclude a successful plaintiff from asking for and being awarded pre-judgment interest after judgment has been entered in his/her favour.
- [68] The Court of Appeal in this case, cited with approval the English case of **A.B. Kemp Limited and Ors. v Tolland**.⁴³ In that case, after judgment had been pronounced in favour of the plaintiff, the counsel for the plaintiff asked for 5% interest on the basis that 'it is three years since these events occurred' and 'bearing in mind the high rates of interest which had been prevailing for some little time now.' The opposing counsel objected saying that 'there is no claim for this in the writ. It is certainly not my clients' fault that the action has taken so long to come on.' In awarding interest Delvin, J. had this to say at page 691:
- "I think that where the case has been brought on commercial matters and where in ordinary commercial practice money would, if the facts which I have now adjudged to exist had been established, have been paid some time ago, it ought to carry interest. I suppose in the ordinary way that the account would have been paid taking a rough date, probably before the

⁴² (1990) 1 NWLR (Pt. 129) 741.

⁴³ (1956) 2 Lloyd's Law Report 681.

end of 1953. I shall award interest from January 1, 1954, but I think 5 percent is rather high in the circumstances. I should say 4 per cent.”

[69] I adopt this position. Awards of interest are designed to compensate claimants for the cost of being kept out of their money. They should put claimants into the position they would have been in had the debt or damages been paid when they fell due. The purpose of rule 8.6(4) is to ensure that the defendant is aware of the claim being made against him and on what grounds, in clear and concise terms. The claim form clearly set out the type of interest, rate and period. This was sufficient to bring the claim of interest to the appellant’s attention. The fact that the respondent did not plead the statutory framework pursuant to which this claim is brought would not deprive a court of the jurisdiction to make an award in an appropriate case. A court would still be able to exercise its discretion in cases where there has been no unfairness or prejudice to the other side.

[70] CPR 8.6(4) must be read in tandem with the overriding objective. CPR 1.2 states ‘the court must seek to give effect to the overriding objective when it – (a) exercises any discretion given to it by the Rules; or (b) interprets any rule’. It was within the master’s exercise of discretion, having regard to the overriding objective and the circumstances of the case including any resulting prejudice to the appellant, to consider an award of pre-judgment interest. This is not meant to be taken as the Court turning a blind eye to claimants who disregard compliance with the requirements of the CPR. However, upon consideration of all the circumstances in this case, I am not satisfied that the exercise of the master’s discretion to award pre-judgment was plainly wrong to warrant the Court’s interference.

[71] Section 29 of the **Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act** gives the court a wide discretion in awarding pre-judgment interest. **McGregor on Damages** identifies five separate layers of discretion, namely: whether to award interest at all; the rate of interest; the proportion of the sum that

should bear interest; and the period for which interest should be awarded. Given this unfettered discretion, a court is entitled to take into account whether the claimant is guilty of delaying prosecution of the proceedings, such that a reduced rate of interest will be appropriate. The pace of the claimant's claim may be taken into account, in that the court may award a lower rate of interest with respect to a period of delay in the prosecution of that case by the claimant. Under the general statutory provisions, judges have discretion to disallow interest during a period of delay by the claimant, or to increase the rate during a period of delay by defendants. Recent English decisions suggest that the courts are fully prepared to reduce interest payments where claimants are responsible for unwarranted delay.⁴⁴

[72] In this appeal, the appellant contended that the master erred in the exercise of her discretion when she failed to consider the length of time between the assessment of damages hearing and the date of judgment in her award of pre-judgment interest. I find no merit in that submission. The learned authors of **McGregor on Damages** states the position plainly:

“Cases of unwarrantable delay by the claimant apart, there can be no objection to awarding interest down to the date of judgment since damages for loss arising from a single cause of action cover all past loss and even in the exceptional case of a continuing cause of action damages are assessable as far as the date of judgment.”

[73] There can be no doubt that interest is intended to compensate claimants for the cost of being kept out of their money. While the lapse of 1 year and 4 months before delivery of the judgment is regrettable, such delay cannot be laid at the respondent's feet. I can see no basis upon which he should not recover interest during the period while he continued to be kept out of his money.

⁴⁴ Spittle v Bunney [1988] 3 All ER 1031, Corbett v Barking, Havering and Brentwood Health Authority [1991] 2 QB 408 and Beahan v Stoneham 21 January 2001, unreported; 2001 WL 272888.

[74] Given the master's generous ambit of discretion, I find no compelling reason why this Court should interfere with the decision taken by the master, which was well within her statutory powers to make.

Costs

[75] Given my reasoning herein, it is apparent that the appellant has been only partially successful in prosecuting this appeal. Given the partial success of each party in these proceedings, I am satisfied that the result should be costs neutral. Accordingly, the appropriate order as to costs would be that there is no order as to costs.

Conclusion

[76] For the reasons above, I would make the following orders:

- (1) The appeal is allowed in part.
- (2) The master's award in respect of pre-judgment interest in the court below is affirmed.
- (3) The master's award in respect of loss of use (loss of profits) is set aside and the sum of \$46,248.99 is substituted as the award for loss of profits.
- (4) The master's award in respect of damages to the vehicle is set aside. This head of damage is remitted to the court below for assessment.

(5) There shall be no order as to costs.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]



By the Court

Chief Registrar