ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 11 OF 1992

BETWEEN:

VERNON [TOY] JOSEPH

Appellant

and

CONARD REYNOLDS

Respondent

and

THE ATTORNEY-GENERAL

Third-Party

Before:

The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr.Albert Redhead — Justice of Appeal
The Hon. Mr. Albert Matthew — Justice of Appeal [Ag.]

Appearances:

Mr. Gerald Watt Q.C., for the Appellant
Mr. John Fuller for the Respondent
Mrs. G. Thom for the Third-Party

1999: February 11, 12, 22

JUDGMENT

REDHEAD ALBERT J.A.

This is an appeal by the appellant against the quantum of an award of damages made against him by the learned trial judge. This was as a result of an action brought by the respondent against the appellant for wrongful arrest and the ultimate destruction of his motor vessel the FREDERICK HUGHES.

The background to this action is that the appellant caused the respondent's boat to be arrested in the St. Johns Port alleging that he the appellant had a share in the boat. It turned out that that arrest was not valid. The appellant conceded this.

The ship was arrested on 10th October, l994 and despite many applications by the owner for its release and which

applications were resisted by the appellant the ship was never released. The respondent at the time of the trial was 62 years old. He went to sea at the age of about 14 years as a mess boy on a sloop the "Sun Flower" trading the islands from Antigua to Trinidad. He eventually became a sea captain of his first ship the VANESSA.

Ambition drove him to negotiate a loan with the Antigua and Barbuda Development Bank in the sum of $159,000.00 for the purchase of his ship the FREDERICK HUGHES for £16,500.00 in 1979. The respondent said it was a damaged vessel that is why it was "so cheap". He spent £6,500.00 on repairs. The total cost of the boat then would have been roughly £23,000.00. But the respondent said in his evidence before the learned trial judge, "by then [after the repairs] I had spent a little over EC$400,000.00 including fuel, food, crew's wages and repairs". I shall calculate and do my best to arrive at a realistic value of the boat which is a head of damage hotly contested by both sides.

The learned trial judge in awarding damages calculated the pound sterling to be valued at $6.64 at the time.

In my view £23,000.00 was the actual cost of the boat at $6.64 would give a value of $152,720.00 Eastern Caribbean Currency. I find difficulty in appreciating how the respondent could have spent a little over $400,000.00 "including fuel, food, crew's wages and repairs" towards the cost of the boat.

It is my view that cost of fuel, food and crew's wages cannot be included as the value of the FREDERICK HUGHES. It is true that these items go towards the costs of acquiring the boat.

The boat was arrested as I have said in October, l984. She lay at anchor at the St. Johns Habour from then, deteriorated and finally sunk in about October, l988.

> The learned trial judge in his judgment at page 179 said: "The Plaintiff gave $400,000.00 as the value of the FREDERICK HUGHES…….. it was put to the plaintiff by counsel for the defendant that it was worth no more than $160,000.00"

In a judgment delivered by Byron J. [as he then was] in Suit No. 344 of1984 Vernon [Toy] Joseph v Conrad Reynolds and the Owners of And other persons interested in the motor vessel "The Frederick Hughes", he stated that the capital cost of the boat according to the defendant [the respondent in this matter] was as follows:

Purchase price	£16,500.00
Repairs	6,500.00
Surveyor's report	800.00
First Insurance Premium	8,500.00
Total	£32,300.00

It was stated that the exchange rate was $6.64 and roughly come to about $182,772.88.

The learned judge ended by saying:

> "The defendant did not account for any of the other expenses which one would normally expect him to have been incurred nor for the value of any of the services he rendered. Many of these would have formed part of the capital invested in the acquisition of the boat; and a proper accounting would in my view undoubtedly show that the capital cost of the boat was in excess of the figure of $182,722.88."

In an affidavit sworn to by the appellant in interlocutory proceedings on 19th December, l984 the appellant swore on oath that:

> "The motor vessel 'THE FREDERICK HUGHES' is worth at least EC$375,088.00"

Learned senior counsel, Mr. Watt, argued that the appellant swore then that the value was $375,000.00 in order to obtain a high security for the release of the boat which was at that time sought by the respondent. Can the appellant represent on oath that the value of the boat is worth one thing when it suits him so to do and be allowed to resile from that value when it does not suit him? I think not.

In my view, fortunately for the appellant, the respondent came to his rescue when on the 17th of December 1984 he swore that :

"The said motor vessel is valued at approximately $160,000.00."

In my judgment neither of them was being honest with the court. On the one hand the appellant sought to inflate the value of the boat. On the other hand the appellant sought to put a lower value on it, each seeking thereby to gain an unfavourable advantage.

I, like the learned trial judge, would attempt to arrive at a true and realistic value of the FREDERICK HUGHES, just before she sank. I regard this as not too easy a task.

I, however, unlike the trial judge would not calculate the value based on the insurance paid on the boat as he had done when he said:

> ……"he insured [the boat] to cover the journey to Antigua and for one year after that journey in the sum of £48,000.00 when the value of pound sterling was equivalent EC$6.64. Looking at the risks, the plaintiff claimed he insured and those that are more likely to be insured, I allowed 75% of that sum as being the comprehensive cover against the loss of the vessel and arrive at $239,040.00."

As learned counsel for the appellant pointed out that the insured value of the boat must have included the £17,000.00 freight which the vessel took from London to Antigua then.

I agree with Mr. Watt, Queen's Counsel, when he argued that under ground one of the appeal that there was little evidence to enable the court to arrive at a valuation of the boat. I also recognise that notwithstanding the learned trial judge's valiant effort to arrive at a true value with the paucity of material he had before him, he however fell into error when he attempted to arrive at that value based on the insured value of the vessel.

Having regard to all the available evidence in this matter that the actual value of the boat was $152,728.00 and having regard to

the fact that the respondent said that he got the boat cheap because it was damaged and having repaired it, the value would have in my view appreciated.

Taking into consideration also the fact that the appellant swore in 1984 that the boat was valued $375,000.00 and the respondent's swore an affidavit that it was valued at $160,000.00. I put a value of $200,000.00 on the FREDERICK HUGHES and this is the sum I would allow for its loss taking in account $20,000.00 which the respondent said he had spent on the overhaul of the engine and also the $10,000.00 which was the value of the wreck of the FREDERICK HUGHES when it was finally handed over to him.

In arriving at the value of the FREDERICK HUGHES, the learned trial judge took into account $8,500.00 being the cost of a crane which was salvaged the cost of a shed built on the vessel at a cost of $15,000.00 and $12,150.00 as the cost of sand blasting the bottom of the boat in 1981. I shall disallow these amounts because these do not increase the value of the boat.

Under ground 2 of the grounds of appeal learned Counsel argued that the award of the learned trial judge was exorbitant having regard that they were special damages which had to be strictly proved and the non availability of documentary evidence to support the assertions of the respondent.

The learned trial judge awarded the respondent the sum of $275,000.00 for loss of trading profits from south to north.

The learned trial judge arrived at these figures by reasoning as follows:

> "His [the respondent] evidence is that he arrived at 8 trips by having made as many as 10 trips in good times and as low as 4 trips in bad times during the five years he traded. By the cleverest permutation, this would only amount to 7 trips. If one takes the maximum of 10 for 2 years the minimum of 4 for 4 years and use a probability of between 5 and 9 trips for the extra year.
>
> He further admitted that there were times when he went south on ballast, because he had insufficient cargo. I will

> allow 5 trips going south at $20,000.00 for 2¾ years giving $275,000.00. Having carefully perused the volume of documents submitted by the plaintiff in support of his claim that he averaged $60,000.00 per trip coming north. I will allow 7 trips at the safer figure of $56,000.00 per trip for 2¾ years and arrive at $1,058,750.00."

Learned senior counsel, Mr. Watt submitted that the figures of $20,000.00 and $56,000.00 could not be supported by the evidence available to the learned trial judge. Mr. Watt pointed to exhibit CR3 the judgment of Byron J [as he then was] when the respondent said in evidence that:

> "In 1979 between my arrival and December, I made 2 trips, Antigua, St. Vincent, Barbados, Guyana, Antigua and St. Lucia. The ship's expense for each trip was about $20,000.00. I did trips in 1980. I did about 9 trips. In 1981 I did about 8 trips. I cannot remember exactly how many trips I made in 1982. I make some trips in Guyana and through the Islands. In l983 I did about 4 trips. In 1984 I did about 4 trips. The trade was getting down. It was getting worse".

From the evidence it is clear that the respondent kept no logs or reliable record. I agree with learned senior counsel Mr. Watt when he said that the evidence reveals that the respondent was either trying to recollect from memory or he deliberately tried to mislead the court. In my view most of the handwritten "documentary evidence" bears that out as the figures and dates on most of them have been altered.

I bear in mind however that the learned trial judge had seen and accessed the evidence of the respondent and had "carefully perused the volume of documents submitted" by him.

In his statement of claim the respondent pleaded under Particulars of loss.

[1] Loss of profit for 2¾ years:

- [a] North to South 8 trips per year at $20,000.00 per trip;
- [b] South to North 8 trips per year at $160,000.00 per trip.

In his amended statement of claim he pleaded:

[1] Loss of Profit for 2¾ years

[a] North to South 8 trips per year at $20,000.00 per trip;

[b] South to North 8 trips per year $60,000.00 per trip.

The respondent said in evidence on oath:

"I would make between $58,000.00 and $89,000.00 profit. I understand profit to mean after the expenses come out."

In my judgment having regard to the pleadings and the manner in which I interpret the above evidence the respondent was not taking into consideration operational cost when he said he made between $58,000.00 to 89,000.00. I am confirmed in this view by the hand written exhibits which in my view are contrived but nonetheless reflect the view I am expressing.

Exhibit CR.5 [a] freight cost amounting to EC$84,440.63 operational costs $20,000.00 profit EC64,440.63

Exhibit CR.5 [b] shows freight $73,200 .00 and operational cost to be $14,200.00.

Exhibit CR.5 [c] shows cargo to the value of $76,6669.15 and operational costs to be $18,000.00 profit $58,169.15.

The learned trial judge said:

"Having carefully perused the volume or documents submitted by the plaintiff in support of his claim that he averaged $60,000.00 per trip coming north, I will allow 7 trips at a safer figure of $56,000.00 per trip for 2¾ trips and arrive at $1,058,750.00.

Having regard to the pleadings and the evidence of the respondent "I would make between $58,000.00 and $89,000.00 "profit" and having regard to the fact that my finding that operational costs were not considered when the respondent gave his evidence; it is my judgment that the learned trial judge failed to take operational costs into consideration in considering profits. It is my

view therefore that a more realistic figure in arriving at profits for his north bound trips is $40,000.00 instead of $56,000.00 that is deducting $20,000.00 from $60,000.00. I would not disturb the award of $20,000.00 for the south bound trip. But having regard to the evidence 3 trips instead of 5 trips. The award for loss of trading profits will be as follows:

Loss of profits 3 trips from north to south for 2¾ years at $20,000.00 per trip $165,000.00

Loss of profits from south to North $40,000.00 per trip for 7 trips for 2¾ years $770,000.00.

I now turn to ground 3 the learned trial judge awarded the respondent loss of earnings for 4 years amounting to the sum of $156,200.00. Learned counsel argued strenuously that the learned trial judge ought to take into consideration the duty placed upon the respondent to mitigate his loss. Mr. Watt argued that the respondent made no serious efforts to get another job when his ship was arrested.

Learned counsel pointed to the evidence where the respondent said that in 1984 when his boat was arrested he was age 50 years, fit and an experienced sea captain. He agreed that there was work outside of Antigua but he was looking for work in Antigua in order to be available when his matter came on for hearing.

Learned counsel referred to Halsbury's Laws of England 4th edition Volume 12 paragraph 1194 where the authors state:

> "The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter."

Mr. Watt also referred to:

Moore & Another v DER LTD 1971 3ALL.ER.517 and argued that the learned trial judge's finding that the respondent did his utmost to find work commensurate with his skill and ability, but did not succeed, does not conform with the evidence before the court.

The evidence also reveals that the respondent did not sit idly by. He made repeated applications to have his boat release from arrest. The appellant resisted strenuously all the applications made by the respondent.

On one application the respondent offered as security his freehold property valued at approximately $300,000.00. This, in my view, was unreasonably rejected by the appellant when he the appellant was only claiming a half share in the boat. This claim was later held to be unfounded.

As the learned trial judge in his judgment observed:

> "The defendant and his legal adviser did not appear to have given even scant consideration to the consequences which was likely to follow in the event that the action came against him"

It is quite obvious to my mind that the appellant had a hidden agenda in causing the respondent's boat to be arrested; this is borne out by the fact that the appellant had his own boat trafficking between Antigua and Guyana, the same route plied by the FREDERICK HUGHES when she was arrested.

The respondent said in evidence:

> "As a result of what the defendant did to me my life had gone down to earth I was 50 years old then I am now 62; the last 12 years of my life has just wasted."

This to my mind shows a broken man. I am confident that if general damages were claimed the learned trial judge would have awarded substantial damages.

The respondent was finally reduced to selling rotis with his wife for a living. The learned trial judge allowed $28,800.00 from the award which he made which was $60,000.00 for the first year's loss, $48, 000.00 for the second, $41,000.00 for the third year and $36,000.00 for the fourth.

Having regard to the particular circumstances of this case, it is my view, that the respondent did not act unreasonable. I shall not therefore disturb the award of $156,200.00.

The appellant by Third Party Notice claimed against the Attorney-General alleging negligence on part of the Provost Marshal for failure to maintain the FREDERICK HUGHES for the period it was under arrest. The learned trial judge held that the third party was not liable.

The learned trial judge found that the consequential loss to the respondent arose entirely out of the arrest of the FREDERICK HUGHES and its deterioration for an unreasonable length of time and with full knowledge that metal of the kind that the FREDERICK HUGHES was made of deteriorated rapidly while lying still in salt water.

The learned trial judge reasoned:

> "If any substantial issues were concerned with damage to the superstructure, it would certainly have been necessary to examine the conduct of the Provost Marshal which he held a bond for the maintenance of the FREDERICK HUGHES while under arrest. But it seems to me that nothing could have prevented the loss."

He also said:

> "In summary I can find no negligence on the part of the Third party and must therefore exonerate them from liability."

Mr. Watt pointed to the evidence where the respondent testified that the deterioration was to the superstructure of the boat.

Learned Counsel argued that in light of the evidence and based on the reasoning of the learned trial judge he ought to have

seriously examined the question of the negligence of the Provost Marshal and found her liable.

Mrs. Thom, learned counsel for the Attorney-General pointed to the evidence of Mr. Junie De Castro who said on oath:

> "A boat of that nature…. There is no way to stop the deterioration once the boat is at anchor in the harbour."

This evidence was supported by the evidence of the appellant who testified:

> "I agree that a vessel of the age of the FREDERICK HUGHES should not sit idle for three years. I agree that a steel boat will deteriorate in salt water. I cannot say how long the FREDERICK HUGHES will last with the best maintenance."

Mrs. Thom argued that indicates that it was not lack of maintenance which caused the ship to deteriorate but rather by the vessel being sitting idle in sea water.

Moreover, learned counsel, argued that there was no duty placed on the Provost Marshal to carry out extensive repairs. She argued that the Marshal's duty was to keep the vessel safe after arrest. Mrs. Thom pointed to the warrant of arrest which says inter alia: 'to keep the same [the FREDERICK HUGHES] under safe arrest until you shall receive further orders from us'.

Learned counsel referred to:

British Shipping Laws Volume 1 paragraph 263 which reads in part as follows:

> "…….if it should be reported that a defect on the vessel causing or likely to cause serious deterioration in the value of the res then steps would be taken to investigate and possibly remedy the defects. When an arrest lasts more than a week or two, it is usual for the Marshal to take the necessary minimum steps to lay up machinery to prevent undue deterioration."

Learned counsel argued that there is no evidence which shows that any report was made to the Provost Marshal about the condition of this vessel.

Mrs. Thom quoted from a passage in the judgment of Lord Atkin in the Arantzazu Mendi 1939 ALL.ER. P.719.

At page 723 Lord Atkin said:

> "His [the Marshal's] right is not possession, but custody. Any interference with his custody will be properly punished as a contempt of the court which ordered the arrest, but, subject to his complete control of the custody, and possessory rights which previously existed continue to exist, including all the remedies which are based on possession."

It seems to me therefore that the obligation, if there was any, rested on the owner to do maintenance on the vessel.

Mr. Watt then argued that the damage was too remote Learned Counsel posed the question whether the eventual complete deterioration of the FREDERICK HUGHES could have been foreseen by the appellant who had obviously acted on legal advice and had the vessel seized.

Mr. Watt also asked "was the damage complained of only caused by the initial arrest of the FREDERICK HUGHES and was the damage of a class or character foreseeable as a possible result of it?

In my judgment it was not the initial arrest of The FRDERICK HUGHES that caused her destruction but the prolonged detention and her being stationary for that length of time which caused her destruction and that was foreseeable by the appellant.

He himself said in evidence:

> "I have built my own steel hull boat. I agree that a steel boat will deteriorate in salt water. I cannot say how long FREDERICK HUGHES will last with the best of maintenance"

I therefore agree with the learned trial judge when he said:

> "What is quite obvious is that the consequential loss to the plaintiff arose entirely out of the arrest of the "FREDERICK HUGHES" and its deterioration for an unreasonably length of time and with full knowledge that metal of the kind that the FREDERICK HUGHES was made of deteriorated rapidly while lying still especially in salt water." [My emphasis].

The appellant had given evidence that he recognised that the boat had a steel hull and that it was necessary to chip it from time to time, but he never employed anyone to do so. He gave as his reason that he could not spend money on the boat when he did not know the outcome of the matter.

Mr. Watt contended that impecuniosity of the appellant could not be an excuse.

He referred to The Modern Law of Negligence by R.A. Buckley 1988 Ed. P.41; Hughes v. Lord Advocate 1967 ALL.ER p.706 at 708; Owners of Liesboch Dredger v SS Edison 1933 A.C. p. 449; Dodd Properties [Kent] Ltd and Another v Canterbury City Council And Others 1980 1ALL.ER. 928.

In the Owners of Dredger Liesboch v Owners of SS Edison [Supra]. The owners of Liesboch had staked their capital and credit on the successful result of a contract which they were unable to complete because of the loss of the Liesboch. They were unable to purchase any suitable dredger because of the want of funds.

It was held, inter alia, that the measure of damages was the value of the Liesbosch at the date she was sunk plus interest on that capital sum from the date of the sinking.

Mr. Watt argued that “financial disability” was not to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries.

Be that as it may the destruction of FREDERICK HUGHES was the prolonged detention under arrest and the appellant’s unreasonableness in resisting every application made by the respondent for her release when it was reasonably foreseen and known,, by the appellant if kept stationary for a length of time it would deteriorate.

In my judgment there was no obligation on the Provost Marshal to undertake to do the extensive work to keep her in a state of constant repair. In any event the evidence shows that the vessel

lying still for that period would cause the vessel to deteriorate rapidly. In the circumstance no negligence could be visited upon the third party. The appellant is solely liable to the respondent in damages for the loss of his vessel and consequential loss he suffered thereby.

I turn now to the final ground of appeal i.e. the learned trial judge was wrong in his discretion in awarding interest on the judgment in the sum of 9% per annum.

Learned counsel in support of his argument submitted that the principles enunciated by Lord Denning M.R. in Jefford and Another v Gee 1970 ALL.ER. p. 1202 are applicable to this case, notwithstanding that Jefford's case was dealing with assessment of damages in a personal injuries case. I agree.

Learned Senior Counsel, Mr. Watt, referred to S.25 of the Eastern Caribbean Supreme Court Act. Cap. 123 and argued that it is on all fours with the English provision of S.3[1] of the Law Reform [miscellaneous] Act 1934. He contended that since the passing of the Eastern Caribbean Supreme Court Act the Court has been awarding interest of between 5-7% per annum.

In Martin Alphonso et al v Deodat Ramnath Civil Appeal No. 1 of l996 the High Court awarded interest at the rate of 9% per annum on damages in a personal injuries case. This court reduced the interest to 5 percent per annum. In the interest of consistency I shall follow that lead.

Finally, learned senior counsel, Mr. Watt argued that the learned trial judge fell into error when he awarded costs certified fit for two counsel.

Mr. Watt referred to the record which reveals that Mr. John Fuller was Solicitor on record for the respondent and for no justifiable reason the respondent engaged another solicitor who is junior to Mr. Fuller who argued the matter before the High Court and this court. In the circumstances the respondent, argued Mr. Watt, is

not justified in saddling the appellant with unreasonable additional legal costs. I agree.

The judgment of the trial judge is varied:

Loss of the FREDERICK HUGHES	$200,000.00
Loss of profits North to South	165,000.00
Loss of profits South to North	770,000.00
Loss of Earnings	156,200.00
Total :	$1,291,200.00

Interest at the rate of 5 per cent per annum from 15th day of May, l990 until payment.

The appellant has succeeded to the extent of a reduction of about $462,750.00 in the amount of damages awarded against him by the learned trial judge. This represents about 25 percent or one-quarter of the total damages. I therefore award one-quarter of the taxed costs to the appellant, in this court.

The order of the learned trial judge in relation to costs is varied to the extent that the words ‘fit for two counsel’ are deleted from judges order.

Costs to the third-party against the appellant in this court to be taxed if not agreed.

A.J. REDHEAD
Justice of Appeal

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT MATTHEW
Justice of Appeal [Ag]