GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2002

BETWEEN:

GRENADA ELECTRICITY SERVICES LIMITED

Appellant

and

ISAAC PETERS

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. E. A. Heyliger, Q.C. and Mr. Mitchell for the Appellant
Mr. V. Maharaj and Mr G. Louison for the Respondent

2002: November 26;
2003: January 28.

JUDGMENT

The Background

[1] **BYRON, C.J.:** Shortly after 3.30 am on the 9th April 1996, Respondent and other members of his family were awakened by a fire that was raging in their house at Tempe in Grenada. The property and it contents were destroyed. The fire services, the police and the appellant through its representatives, all attended the property and performed various functions. The consensus of opinion was, and still is, that it was an electrical fire. The respondent's insurers after sending in an adjuster accepted liability, but because he was underinsured he was only paid a percentage of the damage actually suffered.

[2] He initiated these proceedings to recover the balance of his losses from the appellant, the power company that supplied electricity to his home. The appellant is a statutory corporation created by the Electricity Supply Act Cap 86 of the 190 Laws of Grenada. The trial was conducted on the basis that the liability of the appellant was based on the origin of the fire, if the fire had started outside the house and traveled along the electrical supply lines to the property the appellant would be liable, but if the fire had started inside the house as a result of some deficiency in the internal wiring system, then the respondent would not be liable.

The Judgment

[3] On the 25th day of January 2002, Sylvester J (Ag.), found that the electrical fire was caused by the negligence of the appellant, after a trial lasting some three days during which about twelve witnesses had testified. The judgment was interlocutory, and the learned trial judge directed that the question of damages and costs be dealt with subsequently.

Grounds of Appeal

[4] The appellant contends that the learned trial judge's finding of negligence was against the weight of the evidence as the appellant had rebutted any inference of negligence and based on a legally defective application of the doctrine of *res ipsa loquitur.* The appeal is therefore against the finding of facts by the learned trial Judge and his application of the law

The Appellate Approach to Appeals on Facts

[5] The principles that should inform an appellate court when it is invited to reverse a finding of fact were argued, both counsel relying on the well known and longstanding cases of **Watt v Thomas** (1947) AC 484; **Benmax v Austin Motor**

Company Ltd (1955) 1 All E R 326 and **Booker Stores v Mustapha Ally** (1972) **19 W.I.R. 230** and **Industrial Chemicals v Ellis** (1982) 35 WIR 303.

[6] It may be useful in this case to remind ourselves of our role, where there has not been much conflict in the description of events. The opportunity for diversity of conclusions arises more in the realm of the inferences to be drawn. The statutory duty and power of the court is set out in the Eastern Caribbean Supreme Court Act Cap 336 section 35 which prescribes:

> "On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to;
>
> [i] confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;
>
> [ii] draw inferences of fact;
>
> [iii] direct the High Court to enquire into and certify its findings on any question which the Court of Appeal thinks."

[7] The statute thus confers power on the court of Appeal to find facts and to draw inferences. The authorities relied on discussed the principles on which appellate court would reverse the findings of fact of a trial judge. It is clear that the power is exercised in different ways according to the circumstances. The famous starting point, which the respondent emphasized, is that an appellate court will usually be reluctant to differ from the finding of a trial judge where his finding turned solely on the credibility of one or more witnesses. This however includes an important limitation and requires the court to draw a distinction between a finding of specific fact and finding of fact which in reality is an inference from facts specially found. To use different words the court must distinguish between the perception and evaluation of facts. It is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving the testimony. On the other hand the court may have to consider a situation where what is in dispute is the proper inference to be

drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inferences or to evaluate as the trial judge. This is particularly so in cases of negligence, because the judge has to make specific findings of fact to determine what actually happened, and then he has to draw inferences to determine whether the facts found support a conclusion of negligence. Counsel on both sides invited a close reexamination of the evidential material which informed the decision of the trial judge, and I agree that it is appropriate in this case which depended, to a large extent, on the drawing of inferences.

The Weight of the Evidence

[8] The appellant complained about the evaluation of the expert evidence and the judge's findings on credibility in relation to the commencement of the fire. There were four witnesses who gave testimony which contained opinions on the cause of the fire. I will first review the expert evidence. The respondent called in this context Mr. Paul Thornber an insurance adjuster, and Mr. Alfred Mitchell an engineering consultant, and the respondent called Mr. Louis Belgrave, an electrical engineer and ASP Maitland a police officer, trained as a forensic investigator with some 26 years experience and was the officer in charge of the Fire Investigation Unit of the Police Force since 1986. Messrs Thornber, Mitchell and Belgrave, gave testimony of a theoretical nature, based on information they were given after the event. ASP Maitland gave evidence based on his physical investigations of the scene at the time of the fire. The theoreticians seemed to consider that the possible causes of the fire were, natural disaster, that is Lightning Strike; Voltage Surge; Fire along the Wires leading to the house; and fire from "tired wires" inside the house. It would be fair to say that they all ruled out the Natural Disaster and concentrated on the two main potential causes, whether the fire traveled on the electrical supply wires leading to the house or started in the "tired wires" inside the house. The two witnesses for the appellant concluded that the cause was "tired wires". Since the

learned trial Judge rejected their conclusions it might be appropriate to first consider their testimony.

Mr. Thornber

[9] Mr. Thornber is an Insurance Adjuster. The appellant criticised the Judge's conclusion that Mr. Thornber could not be relied upon as he was discredited in cross-examination. Mr Thornber visited the premises some days after the fire. He explained from his on site investigation he concluded that the fire originated at a high level in kitchen area. The electrical breaker was in that general area but it was impossible for him to detect whether the fire originated there or above the ceiling level. He also opined that power surges could be a possible cause of ignition when high voltage transmission lines come into contact with a low distribution line with the result that the high voltage current is sent down the feed lines to the consumer property. He felt that if the distribution box is in good condition usually this will cause no further damage but he knew that in some cases current does pass the distribution box and cause damage to electrical appliances. However when pressed the onsite investigation on which he relied seemed to be nothing more than discussions with some persons. He explained "From my discussions with the occupants of the property it appeared that flames were seen rolling across the ceiling, which suggested that the fire started within the roof." The quality of his investigation would be a reason why he was unable to provide more definitive answers. He explained that in view of the age of the installation which was reported to be approximately 25 years he concluded that the most likely cause of the fire was breakdown of insulation within the house and the fire was caused by the "tired wires" of the respondent.

[10] The reliability of his evidence was affected by a number of circumstances which were revealed during his cross-examination. Unbeknown to the respondent, both himself and the appellant were insured with the same company and neither Mr. Thornber nor anyone else disclosed this during the investigation process. It was

possible to doubt Mr. Thornber's impartiality. Mr. Thornber admitted that he was not aware of the testimony of the witnesses who said that they saw fire on the supply lines leading to the house. In fact he admitted that no one told him of a broken power line, nor about the scorched mango tree, otherwise he would have investigated this information. He admitted that he never saw the police or any other report. These were basic facts which could have affected his conclusion as to the origin of the fire. Yet he professed ignorance of them. The judge's conclusion of discredited testimony had an element of simple credibility, but more importantly, it reflected the position that this witness had not been sufficiently informed for the inference he drew to be persuasive. In my view the judge was entitled to conclude that his opinion that the fire was caused by "tired wires" inside the house was not based on a sound premise of accurate facts. I could find no basis for disturbing the assessment of the learned Judge.

Mr. Mitchell

[11] This witness, a consultant engineer, gave testimony of his professional opinion on the various theories affecting fire causation. He had been called in for the case and had never carried out any investigation of the premises. He expressed the opinion that 90% of electrical fires are caused by arcing and overheating of worn out or "tired" electrical equipment and if Mr. Peter's house was built in the 1960s the electrical system would be tired. He thought it reasonable to assume that the "main fuse was inadequately selected to handle the anticipated fault current so the main switch fused and fried itself like a piece of bacon". He ruled out the possiblitiy that the fire was caused by an electrical surge caused by supply lines coming into contact with each other because fusing of wire conductors was not reported and this would have been an inevitable result, there was no deteriorated insulation on the wires to fuel the fire so that the arc would have gone out, and the equipment used by the appellant would have reacted to arcing by causing a blow out of the secondary fuses in the transformer and this did not occur because the surrouding homes did not suffer loss of electricity.

[12] In crossexamination, however, his opinions were shown to be unreliable – on his own admissions. Without intending to do a complete review I could point out a few examples: he admitted "in truth and fact I must admit that I was not given the best material on which with my experience, to have given an informed opinion". In particular he indicated that his opinion could have been different if he had seen the witness statement of Emmanuel Francis because "if the line had been severed on the primary side…it would give credence to the arcing having taken place on the primary side"; "it would have made a difference had I been given the information contained in Mr. Glen Phillip's statement as to the nature and type of connecting wire to Mr. Peters"; "I was not aware that mango branches were intertwined with the wire"; "I have not investigated any fires"; "Nobody provided me that they say an arcing; nobody gave me information for the time it took for the wires to burst. Those would have been very relevant information".

[13] In my analysis these experts attempted to find the primary facts by drawing inferences and then drew the inference as to liability from those inferred facts. There was evidence that addressed those primary facts and the expert witnesses never considered that information.

[14] In my view the judge was entitled to conclude, as he did, that the opinions of that witness could be of little assistance in finding the facts of this case or in drawing inferences from the proven facts.

Was There Fire on the Supply Lines?

[15] A brief synopsis of the testimony adduced by witnesses called on behalf of the respondent will show that there was eye witness testimony of fire on the supply lines to the house. The respondent said that his house was built in 1960 and remodeled and substantially expanded in 1980 at which time the entire house was rewired. He said that the appellant connected him to electrical supply in 1960. In

1968 the poles that are on his land now were put down in 1968 and his property that gets electricity from those poles. There were two wires running on top of each other carrying electricity to his home. The lines run through a mango tree, which the appellant occasionally trims but had not done so for some time prior to the fire. After he left his house he saw that the overhead lines had busted away and were swishing on the ground sparking. Later that day he saw employees of the appellant trim the branches of the mango tree through which the lines had been entangled. The evidence indicated that the mango tree was not on his property. Some weeks later his electrical supply was reconnected.

Veronica Peters

[16] The wife of the respondent was in the house when the fire started and ran outside. She said that she saw the electrical lines leading to her house on fire. She saw that the overhead electrical lines were broken and on the ground. She also noticed that the leaves and branches of a mango tree through which the lines had been entangled prior to the fire were scorched. Later on that morning employees of the appellant cut and trimmed the branches of the mango tree.

Brenda Joseph

[17] A neighbour saw the fire from her house and went to look. She said that she noticed fire coming from an electricity pole leading to the house.

Margaret Forbes

[18] A neighbour went to see the fire. When she got there she said that she noticed two electrical wires had busted away from the pole and appeared live and sparking and dancing around and people were running away from them. Later that morning, about 7.30 am she saw a team of men dressed in Grenlec uniform trimming the mango tree.

[19] The witnesses called by the appellant did not rebut this testimony. **Emmanuel Francis** a linesman employed by the appellant confirmed that on arrival at the scene while the fire was still in progress he saw that a wire leading from the pole to the house was broken and on the ground. The other end was attached to the house. **Glenn Phillip** was the production manager of the appellant. He admitted that the electricity pole outside the house was burnt. However he testified that the pole he saw was not the pole that was there at the time of the fire and that it had been burnt in the compound of the appellant before it was installed. The respondent contradicted this evidence. **Dennis Sylvester** an electrician visited the site shortly after the fire. He admitted that the respondent drew his attention to the cables from the pole, which he alleged were black with smoke, which indicated that the fire had started on the pole and traveled along the wire to his building. He said that the cables were indeed black but not as a result of fire and smoke but it was from blight, a parasite fungus, from the tall trees overhanging the cables. He also said that he did not observe any scorching at the point where the wires entered the house.

Breach of the Duty of Care

[20] There was direct evidence of the breach of duty by the appellant by their own witnesses. For example, there was evidence that the appellant had failed in its obligation to trim the trees. Emmanuel Francis a linesman for some 15 years said that one of his duties is to clear lines from trees. He noticed that the power line was burst and was on the ground with live power in it. He then cut the power to the area. He testified that he noticed that a branch from the mango tree was in the pathway of the line and he reported that it had to be cut. This evidence was also inconsistent with some of the theories expressed by Mr. Mitchell. For example, it contained direct evidence of the supply line having been burst by arcing which did not result in a blow out of the fuses in the transformer because the Linesman Francis had to cut the power to the area.

[21] Glenn Phillip the Distribution Manager acknowledged that the appellant was in violation of its obligation to keep the Mango tree away from the lines.

ASP Maitland

[22] A trained forensic investigator with some 26 years experience who had been in charge of the Fire Investigation Unit of the Police force since 1986 was on duty at the scene of the fire. In his witness statement he said:

> "It was also identified that that the electrical wire which is referred to as the supply line was burnt from the pole to the building and the line from which Mr. Peters supply line was connected. I identified that there is an area where these wire passed through a couple of mango branches and that on that morning question, I saw that both lines were twisted around each other which I think was the cause of the fire as there were clear evidence that fire passed through the line which supplied electricity to the Peter's home."

[23] It was against this factual background that **Louis Belgrave** gave evidence on behalf of the respondent. He is an electrical engineer and was consulted when the parties were preparing for court. Unlike the other experts he studied the statements of the investigating officers ASP Maitland and Supt Williams and of the other witnesses in the police and case files. He made a visit to the scene, albeit four years later. He concluded that it was most likely that the fire was caused when the two live wires running from the Pole to the house touched and did not separate which would have caused heat and eventually lead to the fire.

[24] The learned trial Judge accepted the opinion of this witness. I reject the criticisms of counsel for the appellant about this finding of the judge. The theoretical base of the opinion was consistent with that of the other experts. His opinion had the advantage of being consistent with the primary facts derived from eye witness testimony.

The Doctrine of Res Ipsa Loquitur

[25] The appellant contended that the doctrine only applies where the exact cause of an accident remains unexplained, and that once a particular act or omission is established as the cause of the harm the question is whether the cause thus established connotes negligence. Counsel contended that in this case there were alternative hypotheses and the respondent had failed to prove the causation because the judge erred in concluding that the burden of proof had shifted to the appellant.

[26] The doctrine is set out in 33 Halsbury's Laws of England Fourth Edition (Reissue) Paragraphs 664-668. The basic proposition is set out at Para 664:

> "Under the doctrine of *res ipsa loquitur* a plaintiff establishes a prima facie case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care"

[27] We were referred to many authorities including the Trinidadian case **Trinidad and Tobago Electricity Commission v Bridgemohan Sookram and Another** (1999) 57 WIR at 473, where de la Bastide CJ at page 482 said:

> "It is trite law that he who alleges must prove. The burden of proving an allegation of negligence is on the party who makes it. By their pleading the respondents relied in this case, in part, on the doctrine of 'res ipsa loquitur'. This doctrine, as explained by Megaw LJ in **Lloyde v West Midlands Gas Board** (1971) 2 All E R 1240 at 1246 applies, where, although the precise cause of an accident cannot be established, it is proved to have happened in such a way that prima facie it could not have have happened without failure on the part of the defendant to take due care for the plaintiff's safety. Once this has been established, the

evidential burden shifts to the defendant to show that the accident could have happened without his negligence; see **Bennett v Chemical Construction (GB) Ltd** (1971) 3 All ER 756."

[28] Reliance was placed on an old Canadian case of **Crepin v Ottawa Electrical Company** (1931) 1D.L.R 792 where the headnote proclaims that:

> "electric power lines strung near branches must have special care to avoid short circuits. Where inadequate precautions are taken to guard against results of natural growth and a branch causes a short circuit resulting in injury, *res ipsa loquitur* applies".

[29] The legal proposition was culled from consideration of a wide range of authorities. The appellant sought to distinguish this proposition by urging that it was based on the civil code of Quebec and not on the common law. My perusal of the case reveals that many common law cases were cited with approbation and the deciding rationale of the Latchford CJ was almost exactly consonant with the circumstances of this case. He said that:

> "in the present case the defendant did not satisfy the onus cast upon it by the very nature of the accident. The rain and wind which prevailed when the boy was injured were such as occur every summer in Canada, and often every summer. So frequent are such occurrences here that an electric transmission-line like that of the defendant in this case should be reasonably expected to guard against the consequences of the location of a high voltage line maintained through a large tree whose swaying branches in a storm could, and in this case did, bring two highly charged wires into contact, with a break in one at least of them as the ordinary result. That interference with the line was anticipated is established by the fact that, whenever a storm arose, the repair-gang of the defendant gathered at a central point whence they could be called in the emergencies that were likely to arise. It is obvious, I think that proper inspection of the line, as it passed through the tree causing the short circuit, would have obviated the contacts which broke the wire. That such an inspection was not had is the true effect of the jury's finding, and the defendant should bear the consequences."

[30] In addressing the nature and extent of the duty of care, this case shows that 60 years ago a court considered that a special duty of care existed whenever a high voltage line passed through a large tree. It is clear that this was known to the appellants because the linesman Francis, and the manager Phillip both admitted

the existence of this special duty of care, and its breach, in their testimony and the dramatic behaviour of the appellant in trimming the tree even before the fire was extinguished is a clear demonstration of their acceptance of the linkage between the fire and the passage of the wire through the branches of the tree. This was not an afterthought by the respondent that arose during trial on the evidence because in the statement of claim filed in April 1997 the particulars of negligence which were pleaded included "failure to fell, lop or trim trees overhanging and encroaching upon the electric wire and/or other apparatus and disentangle the same from the branches of such trees". The factual problems of the appellant started early because in its defense it simply "made no admissions to that effect" and failed to allege any other possible cause of the fire.

[31] Counsel for the appellant contended that the leaned trial Judge applied the principle wrongly by shifting the burden of proof onto the appellant. He criticised the passage in which the learned trial judge stated his conclusions "In short, the defendant has failed to produce evidence to show that it was not negligent as alleged by the claimant or even to counteract the inference of negligence". He urged that this had the effect of causing the burden of proof to shift to the appellant. He relied on **NG Chun Pui v Lee Chuen Tat** (1988) RTR 298, where Lord Griffiths said at 301:

> "So in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case. Resort to the burden of proof is a poor way to decide a case; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants."

In my judgment the learned trial judge applied the principle precisely as set out by Lord Griffiths. If the quotation that had been criticised was read in its context it would be seen that the learned trial judge had examined the evidence and made primary findings of fact. In a nutshell I think that the criticisms of counsel failed to take into account the meaning to be applied to the opening phrase "where the maxim applies". At paragraph 44 of his judgment Sylvester J stated as follows:

> "where the maxim applies, a presumption of fault is raised against the defendant. A burden is cast upon it). The defendant can only discharge that burden by showing either: (i) that it was not negligent; or (ii) that the accident probably happened in a manner which did not show negligence on its part."
>
> "Accordingly,I hold that the fire which destroyed the Claimant's house was an electrical fire.
>
> From this primary fact, on review of the evidence I accept the evidence of the two experts of the Claimant and hold that the fire was caused by the two supply lines or conductors coming into contact with each other through the mango branches causing heat and fire to be conducted along the line to the Claimant's premises and causing it to ignite and eventually to be burnt."

[32] Despite the evidence that the appellant had failed in its obligation to trim the trees this case was in a category where it was not possible to state precisely what act caused the fire. When the judge concluded that the fire was caused by the supply lines coming into contact with each other through the mango trees and the resulting fire was conducted along the line to the respondent's premises causing it to ignite and be burnt he was entitled to conclude as a matter of law that a prima facie case of negligence had been made out. The appellant attempted to show that it was not their negligence. They relied on a hypothesis, that the fire might have started inside the house as a result of "tired wires". The judge did not accept it. The hypothesis had the disadvantage of not being grounded on a factual basis, and it actually seemed to be inconsistent with the evidence. In any event the persons who put forward the hypothesis seemed willing to recant when confronted with the eyewitness evidence of the fire on the supply lines to the house. It follows

that in the absence of rebuttal he was entitled to find the appellant liable. In my view his statement "where the maxim applies" must be taken to mean where a prima facie case of negligence has been made out. I reject the contention that a wrong legal principle was applied.

[33] The facts found by the learned trial Judge supported the conclusion that the fire started outside the house along the supply lines under the control of the appellant. The evidence supported the conclusion that the intertwining of the wires through the branches of the mango tree caused the ignition, which led to the house and caused the fire. The learned trial judge concluded that in the circumstances there was prima facie evidence of negligence and the maxim of *res ipsa loquitur* as raised against the appellant cast a burden upon it to show that it was not negligent or that the incident probably happened in a manner, which did not show negligence on its part.

[34] There is no doubt that there was sufficient evidence for the judge to find that the fire started outside the house. The objections raised by the appellant which point to alternative conclusions that could be drawn are incapable of satisfying any legal test which would enable the decision to be set aside. In my view the appeal must fail.

Costs

[35] The appellant is entitled to the costs of this appeal and has drawn our attention to the claim for approximately $400,000.00. Part 65.5(2), however, makes it clear that when prescribed costs are to be ordered in favour of a claimant, the value of the claim is the amount agreed or the amount ordered by the court. The parties have not agreed and the court has not made an order. Part 65.6 provides a procedure for the value of the claim to be determined at case management conference. The parties did not utilize the process in this case. No material has

been placed before this court on this issue and we have no means of assessing the probable order of the court on the assessment of damages.

[36] It is open to us to mirror the order of the learned trial Judge and order that the costs be assessed when the damages are assessed. The concern I have is that the process of assessment may take a long time and the respondent could be forced into a situation where, although he had the benefit of a judgment in his favour, he has to fund several further stages of litigation before a stage is reached where he can be put in costs. This could create a difficulty as he is an individual litigant opposed to a statutory cooperation whose means are substantially greater than his, and there is the obvious risk of his inability to continue funding litigation indefinitely, as opposed to the appellant whose financial position is much better. It seems to me that in the interests of justice, and in pursuance of the overriding objective, even if the court is unable at this time to finally assess the costs that will become due an order ought to be made.

[37] The concept of interim or provisional orders is not addressed in the rules of court but it is not novel. The case of **Mars UK Ltd v Teknowledge Ltd** 8th The Times July 1999 is a case where an interim order for costs was made. The English rules make specific provision in rule 44.3(8) for the court to make an order for an amount to be paid on account even though the costs have not been assessed. In that case there was a claim for a large costs order, but it was envisaged that the assessment would take a long time and the learned trial Judge made an order for an interim payment in a sum that was less than the minimum that it was considered could be ordered to ensure that the litigant was not out of pocket for too long.

[38] Although, I do not rule out the possibility that the court may be able to schedule a hearing for the assessment of damages quickly, I think that provision should be made for the respondent to obtain payment of costs on this appeal without having to wait until the assessment of damages has occurred. The proceedings have

reached the stage of interlocutory judgment. The order of the court that we are affirming, is to assess the damages and the costs that are due. In the circumstances, any interim order or payment should be taken into account in the final assessment and the assessing Judge could make such adjustments as are required to give effect to our intention that the costs on appeal should accord with the prescribed costs provision of part 65 of the rules, which in effect means that they should be based on the amount of the assessed damages. In the circumstances I would make an interim assessment of costs based on the figure of $400,000.00. This provides a calculation of $38,333.33. I would vary the order of the learned trial Judge to direct the assessing officer to assess the costs of the trial, appeal and assessment hearing, setting off the costs ordered on this appeal.

[39] I would dismiss the appeal and order that the appellant pay the respondent's costs on appeal. I make an interim order for costs in the sum of $38,333.33. I vary the order of the learned trial Judge to include a direction to the judge assessing the damages to assess the costs of the trial, appeal and assessment hearing setting off the costs ordered on this appeal.

Sir Dennis Byron
Chief Justice

I concur

Albert Redhead
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]