GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO 2002/0077

BETWEEN

MALCOLM JOSEPH
DORIS JOSEPH

Claimants

AND

ALISON CHARLES

Defendant

Appearances:

Mr. Cajeton Hood for the Claimants
Mr. Dickon Mitchell for the Defendant

2003: January 16, February 6

JUDGMENT

[1] BARROW, J [Ag]: Judgment was entered on 19th November 2002 for the claimants for damages to be assessed. The claim arose out of an accident on 14th August 2001 when the defendant drove his vehicle into the claimants' commercially operated passenger bus and caused damage to it. The cost of repairs, cost of survey report, towing charge and the claimants' cost of attending to passengers in the bus who were injured by the accident in the total sum of $10,790.00 have already been awarded. The only head of damages remaining to be determined, apart from the claim for reimbursement of the cost of the claimants' attorney's letter in the sum of $650.00, is for loss of use. The sum claimed is $34,500.00 for loss of use from 14th August to 23rd December 2001, amounting to 115 days, at the rate of $300.00 per day. The claimants also asked in the claim for interest at the rate of $7.55 per day until judgment or sooner payment.

[2] The defendant took issue with the amount of income and profit that the claimants said that they lost daily and also with the period for which the claimants claimed they are entitled to

be compensated for loss of use. Evidence on the assessment was given by witness statements and there was no cross-examination.

LOSS OF INCOME AND PROFIT

[3] I will deal firstly with the evidence of loss of income and profit. The first named claimant, who I shall call the claimant hereafter, stated that he had a contract with the Call Center Grenada Inc. which produced an average monthly income of $1800.00. Maudlyn Baptiste, the Human Resources Manager of that entity, gave a witness statement that confirmed this figure. I accept this income as proved.

[4] The claimants also had a contract to transport ten school children daily and this produced an average monthly income of $300.00. The defendant did not challenge this figure and I accept it as proved. The total monthly income from these two contracts was $2100.00 and since each contract was for transportation for 5 days for the week which can be extended to 20 days per month the daily income from these two contracts alone was $105.00.

[5] In the breakdown that the claimant attached to the later of his two witness statement the claimant did not separate this contract income from the general income that the bus earned and I presume he included the one in the other. He gave figures showing a total average monthly income of $13,104.00, total average monthly expenditure of $5,020.00 and therefore a monthly profit of $8,084.00 or a daily profit of $310.92. The breakdown appears as follows:

Exhibit MJ1

DETAILS OF THE INCOME AND EXPENDITURE RELATED TO BUS # HF918.

INCOME

Cost of one fare, Grenville to Sauteurs	= $3.50
Capacity of bus	=18
Maximum taking per round trip	=$3.50 x 18 x 2 =$126.00
Average number of daily round trips	=8
Average number of days worked per month	=26
Average maximum earnings per month	=$126.00 x 8 x 26

	=$26,208
Assuming an average operation at 50% capacity	=$13,104 per month
EXPENDITURE	
Average daily gas expenditure	=$70.00
Average monthly expenditure	=$70 x 26 =$1820.00
Quarterly expenditure on tyres	=$1,200.00
Monthly expenditure	=$300.00
Driver's salary @ $50.00 per day	=$1,300.00 per month
Conductor's salary per day @ $30.00 per day	=$780.00 per month
Lunches @ $20.00 per day for 2 persons	=$520.00 per month
General care and maintenance of bus	=$300.00 per month
Total monthly expenditure	=$5,020.00
Overall monthly profit	=$8,084.00
Daily profit	=$310.92

[6] It will be seen that most of the figures in the income portion of the breakdown are certain, namely the fare, the capacity of the bus, the maximum that could be earned per round trip, the specific number of days worked per week and therefore the average number of days worked per month and the average maximum earnings per month. Two figures are estimations, the average number of daily round trips and the average operation at fifty percent capacity. I believe that these figures are properly to be treated as estimations and not as mere guesses because the claimant and the driver would surely know the average number of trips the bus made per day and, perhaps less distinctly but still reliably, the average number of passengers the bus carried per trip. I am quite certain that the claimant must have been studying closely over the months or years of the operation of the bus the figures that the driver and conductor reported to him and the money they gave him daily, for obvious reason. No evidence or argument was put before me why I should not accept

these figures except that they were not proved by documentation. The same could be said in relation to the estimations made by the claimant as to some items of expenditure.

[7] The proper approach to this argument by the defendant is shown by the decision in Grant v Motilal Moonan Ltd (1988) 43 WIR 372. In that case a car crashed into the appellant's house and damaged some articles. On the assessment of damages the appellant produced a list that she had compiled on which she wrote the prices of articles but she was unable to produce receipts and could not remember when she had purchased articles. The respondent did not call evidence but submitted that the appellant had to provide strict proof. The master held that the values had not been so proved and the appellant challenged this decision. The Trinidad and Tobago Court of Appeal held that although special damages must be proved strictly the appellant had prima facie established the cost of the articles and as the respondent had not attempted to challenge the values placed on them the only courses of action open to the master were to accept the appellant's claim in full or to apply her mind judicially to each item and its value; and as the values were not unreasonable they would be allowed in full.

[8] This decision is clear authority for the proposition that values do not have to be proved by documentation and the decision readily lends support to the view that reasonable and informed estimations may be accepted as proof, especially in the absence of contrary evidence.

[9] In this case the claimant's estimations are supported in part by the witness statement of the driver who operated the bus, Benedict Charles, who confirmed the number of trips per day and that he would hand over an average of between $300.00 and $400.00 per day to the claimant after paying expenses such as gas, lunch and incidentals.

[10] It seems to me that I must accept the claimant's figures as reasonable and they seem sufficiently borne out and confirmed by the evidence. I therefore find his loss of profit to be $310.92 per day. Counsel for the defendant drew the court's attention to two unreported decisions in which the sums awarded for loss of use of damaged motor vehicles were $100.00 per day or close to that figure, being Suit No. 218 of 1993 from St. Vincent and the Grenadines, Honey Bun Bakery Ltd. v Hackshaw and Moore and Claim No.

1998/0657 from Grenada, Medford v Thomas and Amade. These decisions can have no impact on the sum that I award for loss of use in this case since the award must be based solely on the facts in the case.

[11] I think that the figure of $310.92 per day requires to be adjusted to take account of the vicissitudes of life. A vehicle which runs an average of sixteen trips per day is obviously a highly used one and that makes it far more subject to the risk of accident than, say, a private motor car used to transport the owner to and from work. The sizeable deductible of $4,000.00 that the claimants' comprehensive insurance policy required the claimants to bear for any accident seems a pointer to this truth. In addition, I consider that there is the risk of accident caused by the fault of the claimant's driver in which event there would have been no compensation for loss of use. In short, there is always the possibility that the claimant's bus may not have earned the figure shown by the breakdown. Apart from accidents there would be other factors, such as mechanical breakdown, or sickness or emergencies, to name some. I think I should provide for these contingencies by using a discount of twenty percent. That yields a daily rate of $310.92 x 80% = $248.73 which I round off to $250.00 as the amount of profit that the claimants lost by the defendant's negligence.

THE PERIOD OF LOSS

[12] I turn now to the period for which this sum ought to be awarded. The contention of the defendant is that the claimants had comprehensive cover and could have collected from their own insurers as early as 22nd August 2001. The claimants ought to have mitigated their loss by so doing and should not be allowed to recover for any loss of use beyond, say, twenty one days, according to the insurers for the defendant.

[13] The evidence of the claimant is that he went to the defendant's insurers, Worldwide Insurance Ltd, on 21st August 2001 and they indicated they would settle the claim subject to the contents of an investigative report they were then awaiting. It was only when his attorneys-at-law received a letter from the defendant's insurers dated 4th October 2001 denying liability that he learned for the first time that the defendant's insurers were denying liability. The version from the defendant's insurers is that at the outset they advised the

claimant that they had to investigate the accident and that in the meantime the claimant should claim on his own insurers. The defendant's insurers' letter of 4th October 2001 telling the claimant that he should claim on his own insurers so as to mitigate his loss was merely a repetition of their earlier statement to this effect, said the defendant's re-insurers.

[14] It is unquestionably the obligation of the victim of a tort to take such steps to mitigate his loss as are reasonable in the circumstances. What is reasonable, however, is a question of fact to be considered in light of the particular circumstances of a given case. In this case I believe it was reasonable for the claimant to wait some time to see whether the defendant (or his insurers) would pay the claimant for the damage that the defendant caused. The primary obligation, I would think, was on the wrongdoer to pay compensation for the damage that he had caused. It was the defendant who had the primary duty to act promptly. I reject the proposition that because the claimant had comprehensive insurance cover that displaced the defendant's primary obligation. That insurance cover was for the benefit of the claimants, not for the benefit of the defendant. It is settled law that a claimants need not take steps to mitigate his loss by recovering from a third party what may be payable by the third party to the claimant: The Liverpool (No. 2) [1963] P. 64.

[15] However, it is not the law that the claimant was entitled to sit by and wait until he could collect from the defendant. The obverse of the proposition that the defendant was not entitled to rely upon the fact that the claimants had comprehensive insurance is that the claimant was similarly not entitled to rely upon the fact that the defendant had accident insurance to relieve the claimant of the obligation to mitigate his loss. Where, however, a claimant delays carrying out repairs because of his impecuniosity the claimant will not be prejudiced by this circumstance. This was famously expressed by Lord Collins in Clippens Oil Co. v Edinburgh and District Water Trustees [1907] A.C. 291 at 303 thus:

> "In my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act."

[16] In Martindale v Duncan [1973] 1 Lloyd's Rep. 558 the facts were quite similar in that the claimant, whose taxi was damaged, was waiting first for the defendant's insurers to pay the cost of repairs and had in mind to claim from his own insurers if the defendant's insurers failed to pay. During the ten weeks of waiting the plaintiff hired a substitute car. The defendant challenged the award of the cost of hire for this period on appeal, arguing that the impecuniosity of the plaintiff was no excuse for not mitigating his damage by having the repairs done at an earlier date. The court of appeal dismissed the appeal on the basis that the plaintiff had acted reasonably in looking to the respective insurers to put him in funds. The decision is readily applicable to the facts of the instant case and while the delay in effecting repairs is significantly longer in the instant case this was largely due to the length of time that it took for the defendant's insurers to get the report that they required before they would decide how to act.

[17] There were two reasons why it took so long for the claimants' vehicle to be repaired. The first reason is that the claimant was waiting for the defendant to pay him. I find that the claimant, not having been told that the defendant was not going to pay him, thought that the defendant (through his insurers) was going to do so. It is to be noted that even in the letter from the defendant's insurers dated 4th October 2001 the claimant is not being told that the defendant would not pay; he is being told that insurers were still awaiting receipt of a report from their own investigator. In argument counsel for the defendant conceded, properly so, in my respectful view, that the claimants would perhaps be entitled to recover for loss of use up to this point. It was after this letter was received that it came home to the claimant that he was not going to be paid in the immediate future. He then took steps to collect from his own insurers so that he could repair the bus. The claimant collected $6,000.00 from his insurers on 14th October and was then left to find the shortfall of $4,000.00 to make up the amount needed to repair the bus. The claimant did not have to hand the amount that he needed to make up and it took some time for him to raise it. There was no evidence of how he raised it or when he did so.

[18] The second reason that delayed the repair of the bus is that parts had to be obtained from Trinidad. There was no evidence of how long it would normally take or how long it actually took to obtain parts from Trinidad. Dexter Calliste had given an estimate to the claimant as early as 16th August 2001 of the cost of repairing the damage and had estimated that it would have taken fourteen days to repair the bus. I do not know if it matters that this early estimate was for less than one half of what the repairs actually cost.

[19] The repaired vehicle was delivered to the claimant on 23rd December 2001. The evidence falls short of showing why it took so long and I cannot award compensation for loss of use for the entire period. I believe that it would be fair to allow for loss of use up to the date of the letter from the defendant's insurers, 4th October, and then for the period up to 14th October 2001 when the claimant collected from his own insurers. (Interestingly, the defendant's witness, Chris Henriques, branch manager of the defendant's re-insurers, said that on 17th October 2001 he met with the claimant and offered to pay him $135.00 per day for loss of use so the fact that settlement negotiations were going on even then suggests that it was reasonable for the claimant to have relied upon the prospect of payment for as long as he did.) Loss of use for the two weeks that it had been estimated it would take to fix the vehicle would also seem reasonable and I would add to that a notional further one week for parts to arrive from Trinidad. According to this time frame the repairs should have been completed by around 4th November 2001, some forty-nine days earlier than they were in fact completed. I would therefore fix the period for loss of use at 66 days as opposed to the 115 days claimed. At the rate of $250.00 per day this produces an award of $16,500.00 for loss of use and I award that sum as the damages to be recovered by the claimants from the defendant. I also award interest to the claimants commencing from the expiration of the period for loss of use, 4th November 2001, to the date of this assessment, 6th February, 2003 at the rate of 3 per cent per annum.

[20] I have heard counsel as to costs and award costs to the claimant in the sum of $4,000.00 as agreed.

Denys Barrow SC
High Court Judge (Ag.)