BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2006

BETWEEN:

BETTITO FRETT

Appellant

and

ALLEN WHEATLEY dba WHEATLEY CONSULTING
WESLEY PENN dba ACCURATE CONSTRUCTION
NATIONAL EDUCATION SERVICES CO. LIMITED
JOHN SCHULTHEIS

Respondents

BETWEEN:

BETTITO FRETT

Appellant

and

JOHN SCHULTHEIS
PEARLINE WILLIAMS-VERGREER

Respondents

BETWEEN:

BETTITO FRETT

Appellant

and

JOHN SCHULTHEIS
MALCOLM MADURO

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal

Appearances:

Ms. Tana'ania Small Davis and Ms. Lorna Shelley Williams for the Appellants
Mr. Terrance Neale for the First Respondents
Mr. Alan Griffiths for the second Respondent

2006: September 26;
November 13.

JUDGMENT

[1] BARROW, J.A.: The first respondents succeeded in the court below on the claims they brought against the appellant alleging it was the negligence of the appellant that caused the fire which destroyed the appellant's building that they occupied as tenants, or near to which they moored their boats, resulting in loss to them. The first respondents failed on their claims against the second respondent, who had been also a tenant of the destroyed building and whom the first respondents also alleged was negligent in causing the fire. The appellant failed on his counterclaim against one of the first respondents, Mr. Wesley Penn, for arrears of rent. The appellant filed thirty-five grounds of appeal challenging the judge's findings of fact and decisions on the law.

[2] It is common ground that the first respondents (often referred to hereafter as the claimants) did not know the cause of the fire that broke out in the early morning of 25th September 2004 in the commercial building that the appellant, Betteto Frett, owned in a marina complex situate at Wickham's Cay, in Road Town, Tortola, British Virgin Islands. The Fire Department were unable to control the fire and it destroyed not only the building but also four vessels that were moored at docks near to the building. The pleaded cases of the first respondents, who had brought separate claims that were consolidated, alleged that Mr. Schulteis and the appellant failed to take the necessary steps to prevent an electrical fire form starting in the premises. The claims simply lumped "the defendants" together and made no separate allegation against either. The first respondents had obviously been told that the fire started in the area of the building that Mr. Schulteis occupied and so stated in their witness statements, but these passages were struck out as hearsay.

[3] In addition to allegations about an electrical fire the first respondents all stated that they relied on the "doctrine" of *res ipsa loquitur*. The Privy Council in Ng Chun Pui v Lee Chuen Tat[1] recently considered that maxim and Lord Griffiths, who delivered the opinion of the Board, clarified that rather than being a doctrine it was no more than a Latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence. His Lordship also stated that it was misleading to speak of the burden of proof shifting to the defendant when the maxim is invoked because the burden of proving negligence remained throughout on the claimant and did not shift.

[4] The need of the claimants to rely on the Latin maxim was great, in this case, because the witness statements of the claimants provided no information as to the cause of the fire. The statements did not speak to the fire starting as a result of an electrical fault and did nothing to prove negligence on the part of anyone. The oral testimony of the claimants took matters no further.

Submission of no case to answer

[5] At the close of the first respondents' cases counsel for the appellant made a submission of no case to answer. Instead of ruling on the submission the judge stated that she would not rule at that stage but would reserve her ruling until after the appellant and Mr. Schulteis had presented their cases. The error in so proceeding was subsequently recognized by the judge in the judgment when she stated[2]:

> "Mr. Frett made a no case submission at the close of the Claimants' case and the court indicated that it would rule on this at the end of the trial. Perhaps, in retrospect, a ruling should have been made at that time as not having done so perhaps cast a rather unfair burden on Mr. Frett to hedge his bets by calling evidence. As it is, in the light of my ruling Counsel had little choice but to call evidence and renew her submission at the close of the trial."

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[1] [1988] RTR 298

[2] At paragraph [10] of the judgment in BVIHCV2004/0162 Allen Wheatley and others v John Schulteis and Betteto Frett, delivered 21st December 2005.

[6] With respect, there is no question that the judge's refusal to rule after the submission was made was a material irregularity. As the current edition of Phipson On Evidence[3] suggests, the legal position is best appreciated by reference to criminal authorities. At paragraph 11-72 of that work appears the following passage:

> "The Court of Appeal has made it clear, in R v Smith, [[1999] 2 Cr. App. R. 238] that if a submission of no case to answer is wrongly rejected by the trial judge, an appeal must be allowed even where the defendant has subsequently admitted his guilt under cross-examination. Such a conviction is unsafe since the defendant is entitled to an acquittal after the evidence against him has been heard, and to allow a trial to continue beyond the end of the prosecution case would be an abuse of process and fundamentally unfair."

[7] It seems to me that it was similarly an abuse of process and unfair to the appellant, as the judge subsequently appreciated, to have continued the trial without ruling on the submission since the appellant *may* have been entitled at that stage, depending on the merits of the submission, to judgment in his favour.

[8] Counsel for the first respondents argued, in effect, that the appellant suffered no harm by the judge's refusal to rule on the no case submission because the submission was bound to fail for two reasons. Firstly, counsel submitted, the maxim of res ipsa loquitur operated to supply an inference of negligence which, left uncontradicted, amounted to proof of negligence on the part of the appellant and, secondly, the report of an expert who had investigated the cause of the fire on behalf of Mr. Schulteis' insurers served, at the time of the submission, as evidence of negligence on the part of the appellant and Mr. Schulteis.

Res ipsa loquitur

[9] Consistent with her decision that it was appropriate to rule on a submission of no case to answer at the end of the trial, after the defendants had called evidence, the judge did give detailed consideration to the operation of the Latin maxim. The

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[3] 16th edition (2005) paragraph 11-20 at footnote 97.

judge concluded, based on the principles distilled in Ng Chun Pui, that for the claimants to withstand the challenge of a no case submission, without the court taking into account the evidence called on behalf of the defendants, the claimants needed to have established certain matters at the close of their case. The judge identified these as follows:

> "1. that the precise cause of the fire is unknown to them;
>
> "2. that a fire arising in a building in these circumstances is not normally something that would occur in the ordinary course of things without negligence on someone's part;
>
> "3. that either Mr. Frett and or Mr. Schulteis were occupiers of the building or in management or control of it at the relevant time;
>
> "4. that either Mr. Frett and or Mr. Schulteis owed a duty of care to them to ensure that anything they did or omitted to do in or about the building did not result in harm to them, [and] that they breached that duty which breach resulted in damage to them."

[10] Counsel for the appellant argued that the judge was wrong to conclude, in relation to the second of the requirements that she listed, "prima facie a fire in a commercial building does not in the ordinary course of things happen if those in control use proper care."[4] The process of reasoning by which the judge arrived at that conclusion is therefore put under scrutiny. Counsel for Mr. Schulteis had argued that there was no presumption or inference of negligence from the fact of a fire starting and had relied in support of that argument on dicta of Lord Wright M.R. in Collingwood v Home and Colonial Stores Ltd[5] accepting the finding of the trial judge that "a short-circuit might be caused by rats or water escaping and in other ways. His conclusion, therefore, is on the facts that the fire was an accidental fire."

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[4] Paragraph [21] of the judgment
[5] [1936] 3 All ER 200 at 206

[11] In response to that argument and the reliance on the case cited the judge said:

> "Is fire in a building such as the one in the present case ordinarily caused by negligence? The dicta in Collingwood is (sic) merely obiter and must be read in context. Lord Wright M.R. did not determine this issue but in the dicta relied on he was merely quoting the trial judge's finding of facts in the particular case before him which concerned an electrical fire which arose in a basement. Furthermore, and more importantly, the case was not at all concerned with the maxim of res ipsa loquitur. In any event, and with all due respect to the learned trial judge, it is common knowledge that in this part of the world rats do not ordinarily enter premises and cause damage resulting in fire, without negligence on someone's part for example, in failing to detect the presence of the rats in time, or failing to maintain the building thus making it possible for rats to enter or allowing the building to be kept in an unsanitary state. Likewise, water seepage does not ordinarily occur and cause damage leading to fire without negligence on someone's part. I, therefore hold, in these circumstances, that prima facie a fire in a commercial building does not in the ordinary course of things happen if those in control use proper care."[6]

[12] Counsel for the appellant challenged the judge's statement that it is common knowledge that in this part of the world rats and water seepage do not cause damage leading to the outbreak of fire without negligence on the part of someone. I must agree with counsel's objection that what the judge described as a matter of common knowledge calls for evidence as to the facts in each case. Further, surely a conclusion of negligence, which is a conclusion of law, can only be made on a case-to-case basis and must depend on the particular facts of a case. But even if the falsity of the premise is overlooked, the judge's inference of negligence on "someone's part" takes the case no further because it is only if that "someone" is, prima facie, the appellant that the case can proceed. In this case there was no evidence that the appellant was the "someone" who would have been negligent in failing to exclude rats or prevent water seepage. Counsel for the appellant pointed out that Mr. Schulteis operated both a nightclub and a restaurant in the portion of the building that he occupied and these operations would readily attract rats, so the responsibility for rats (if any) being in the building would have lain with Mr. Schulteis rather than with the appellant.

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[6] At paragraph [21] of the judgment

[13] Actually, the discussion is a digression because advertence to rat damage or water seepage is purely anecdotal since, at the close of the claimants' case, there was not even a hint of these as possible causes of the fire. The advertence should have served merely to highlight for the judge's consideration the full range of possible causes, in a situation where on the state of the evidence no cause was even potentially established as the actual cause, and no cause had been ruled out as a possible cause. As counsel argued, a fire in a commercial building was equally consistent with Act of God, accident, arson or negligence on the part of someone for whom the appellant bore no responsibility. I find irresistible the appellant's submission that the judge misled herself in arriving at the holding that the mere occurrence of a fire, in the particular circumstances, was prima facie evidence of negligence on the part of the appellant.

[14] In relation to the third of the requirements for res ipsa loquitur to operate that the judge listed, counsel argued that the judge was also wrong to conclude that this requirement was satisfied because the appellant was in control of "some area of the building". The decision of the judge on this aspect was as follows:

> "[22] On the third issue I find that Mr. Frett was in management and control of the building although he shared such control to some extent with his tenants including Mr. Schulteis and at least two of the claimants – Mr. Penn and Mr. Maduro. He cannot escape by saying he was only the landlord as the evidence of the Claimants is that he rented out parts of the building, thus in the ordinary course of things he would have retained responsibility for common areas and he occupied part as an office. Furthermore, under the Registered Land Act Cap 229, section 52 (c) the law implies in every lease, save where it is expressly provided otherwise, a covenant on the part of the landlord where part only of a building is let, to keep the … common passages and common installations, in repair. And, Charlesworth and Percy on Negligence 7th edn. Para 7-09 is instructive as it bears this out. The landlord is regarded as the occupier of those areas over which he has retained such control and the control need not be entire or exclusive. I therefore find that both Mr. Frett and Mr. Schulteis were in control of some areas of the building and in all the circumstances were properly sued."

[15] Counsel for the appellant argued that the judge again created evidence where none existed because there was no evidence that there were common areas.

More importantly, I find, on the evidence given for the claimants there was no evidence of where the fire started. Given that the fire could have started in an area for which the appellant was not responsible and, indeed, could have started in an area for which one of the claimants or Mr. Schulteis was responsible, it was wrong for the judge to have concluded that the appellant was properly sued. In my view, because the claimants simply could not say that the fire started in an area for which the appellant was responsible the judge was bound, at that stage, to have concluded that third requirement for the maxim to operate had not been satisfied and should have so ruled.

[16] In my view, two of the four requirements stated by the judge, for the maxim res ipsa loquitur to operate, were not satisfied and therefore the maxim could not assist the complainants in resisting the submission of no case to answer. However, while on that view the complainants did not have the benefit of any inference of negligence, it is the submission of counsel for the complainants that the complainants' case had the benefit of the contents of the expert's report.

The expert's report

[17] It was hotly contested whether the report of the expert was available to assist the case for the complainants at the stage of the submission of no case to answer. The key to this dispute is provided by the answers to the questions, what did the parties agree about the production of the report, and what was the status of the report before its actual production into evidence in the course of the trial?

[18] It is accepted that counsel agreed that the report could be produced as evidence without the need to call the expert who made the report to testify and to produce the report. There is no document in which the terms of that agreement are to be found. The information before this court was simply that it was agreed that the report could or would be produced without its maker being called as a witness. Counsel for the appellant submitted that it was agreed that the witness need not

be called but it was *not* agreed that the report was thereby put into evidence by consent. I understood counsel to be saying that this agreement meant that at the point when the report was to be produced into evidence it would be done from the bar table, and not from the witness box. Indeed, this is what happened.

[19] On the first day of the actual trial[7], counsel for Mr. Schulteis stated to the court that counsel for the claimants and for the appellant had indicated that they did not wish to cross-examine the expert. Counsel went on to ask the court "formally" for permission that "the report may be introduced in evidence notwithstanding that the witness is not called to attend, in [light of the] fact that both counsel had indicated they don't require the witness to attend for cross-examination, …"[8] The judge agreed to the request and went on to raise concerns that it was the duty of an expert to report to the court and not to a party and said "If we are really going to treat it as expert evidence, then I have to be satisfied *when it comes at a relevant stage. I don't want you to address me on that now*, but I will ask you to consider these to satisfy the Court that we could really treat these as expert evidence having regard to the relevant rules."[9] (Emphasis added). It is clear that the judge understood that the report would be produced into evidence at a later stage and the implication is inescapable that the judge was treating the report as not yet a part of the evidence in the case.

[20] The ghost of any doubt is laid to rest by the application that counsel for Mr. Schulteis made, after the case for the appellant who was the second defendant) had been closed, in terms: "My lady, the witnesses' evidence is concluded and I think the only aspect of the evidence that remains is for me to introduce into evidence the expert's report. I have had a discussion with my friend Mr. Neale [counsel for the claimants] and I think I have for your Ladyship to open the report

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[7] Transcript for Tuesday 29th November, 2005 at page 10, l. 9 (volume 2 record of Appeal, p. 309)
[8] at page 12, l. 1 (or volume 2, p. 311).
[9] At page 12, l. 24 (or volume 2, pp. 311-312)

and go through it."[10] It was at this point that the report became evidence in the case.

[21] On the basis of that material I am satisfied that the report of the expert formed no part of the evidence at the close of the case for the claimants and, therefore, was not available as evidence, at the time the appellant made his submission of no case to answer, to found or to support an inference of negligence on the part of the appellant. It is a premise that the judge herself stated in the judgment, when she considered the issue of res ipsa loquitur:[11] "Further, what both Mr. Frett and Mr. Schulteis are seeking to do is to attribute knowledge of the cause of the fire to the Claimants via *the expert evidence which forms no part of their case* but is the cornerstone of Mr. Schulteis' case. …" (Emphasis added).

[22] It follows from the conclusion I have reached as to the state of the evidence at the time that counsel for the appellant made the submission of no case to answer that, in my view, the judge should have upheld the submission and should have proceeded to dismiss the claim against the appellant (and Mr. Schulteis).

The counterclaim

[23] The appellant had counterclaimed against the second-named claimant, Mr. Wesley Penn, and the judge considered and dismissed the counterclaim in the two paragraphs that I now reproduce.

> "[69] On his counterclaim Mr. Frett is claiming $29,250.00 for arrears of rent. Mr. Penn did not give any evidence on this aspect of the case although he denied that he was so indebted. The breakdown of the claim is interesting. It states:
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> Rent due and owing from April to December 2002
> 9 months at $1,500.00
> $13,500.00
> Rent due and owing from January to December 2003

[10] Transcript for Wednesday 30th November 2005 at page 4, l. 15 (volume 2, p. 544).
[11] At paragraph [20]

@$750.00
$9,000.00

Rent due and owing from January to September 2004
@$750.00 per month $ 6,750.00

$29,250.00

> "[70] Mr. Frett has not in his counterclaim explained the variation in the rent neither has he done so in his evidence at the trial. Despite the fact that Mr. Penn omitted, as it turned out inadvertently, to address the matter in his witness statement and was denied leave to do so at the trial, Mr. Frett still has to satisfy the Court on a balance of probabilities that the money is owed as he claims. I am not so satisfied for the reason already adverted to as it strikes the Court as incredible that any businessman will allow a tenant to owe rent for approximately 30 months without taking steps to evict him and had it not been for the fire we are left to assume that this situation would have continued – this is just not believable. Further, I view Mr. Frett's eagerness to tell us from the stand that both Mr. Penn and Mr. Wheatley were at some point inmates at Her Majesty's Prison and hence his accommodation, as lacking in sincerity. His counterclaim is therefore dismissed."

[24] The appeal against this aspect of the judgment is advanced in the short submission for the appellant that there was no evidence to challenge the counterclaim and this left the counterclaim uncontested, so it ought to have been allowed in full. The submission for Mr. Penn proceeded on the footing that the judge "heard the evidence of the Appellant and was of the view that not only was same "just not believable" but [was] also "lacking in sincerity", the result of which was that the learned Judge held that the Appellant had failed to prove his claim on a balance of probabilities. Counsel for Mr. Penn made the point in his written submissions that the judge had the advantage of seeing and observing the demeanour of the witnesses and that the court of appeal, "not having had this advantage should not overturn the learned Judge's finding of fact unless it can be shown that same was wrong in law or that she took into consideration irrelevant matter or arrived at a decision which no reasonable judge could have arrived at on

the facts." Counsel relied on Quillen v Harney Westwood & Reigels No. 2[12] and Watt or Thomas v Thomas.[13]

[25] The proposition in the last mentioned case goes somewhat further than counsel's statement of it. The headnote states, in part:

> "The appellate court is, however, free to reverse [the judge's] conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

[26] In the two paragraphs containing her reasons for dismissing the counterclaim the judge with respect, quite fairly eschewed any gratuitous finding that the demeanour of the witness or the manner in which he gave his evidence led her to disbelieve the witness. The judge stated she did not believe the appellant's evidence because of three reasons or factors; these were: 1) the appellant did not either in his pleaded counterclaim or in his evidence explain the variation in the rent; 2) it struck the judge as incredible that any businessman would allow a tenant to owe rent for approximately 30 months without taking steps to evict him and would apparently have allowed the arrears to continue had there not been the fire; and 3) the appellant lacked sincerity in his "eagerness" to testify that he had accommodated Mr. Penn because Mr. Penn had been incarcerated. The evidence that the judge described as "just not believable" calls for examination.

[27] This is the relevant portion, in the appellant's cross-examination:[14]

> " Q. … you are alleging that for a period of approximately two and a half years, no rent was paid to you. And you made no demand for this rent until after this claim was filed. Is that correct?
> "A. No, that's not correct.
> "Q. What demand did you make prior to the fire?
> "A. I have been asking Mr. Penn for my money for the longest while before he and Allen went to prison. When they went to prison they said to me, we

[12] (1999) 58 WIR 147
[13] [1947] A.C. 484
[14] Volume 2, Record of Appeal, at p. 523, l. 1 to p. 524, l. 9.

> can't afford to pay the full rent but when we come out we will pay the full rent of $1,500.00 a month.
> "Having come out of prison, they said things are a bit difficult for them right now, they haven't gotten any Government contracts and they'll (sic) like to continue to pay me the $750 until such time they catch their hand. Up to today they have not catch their hand, yes.
> "Q. But my question to you in terms of demand, when did you make this demand and was it a written demand or oral demand?
> "A. Verbal demand.
> "Q. And when did you make this demand.
> "A. I made the demand after they came out of prison to Mr. Penn on several occasions.
> "Q. To?
> "A. To Mr. Penn, Wesley Penn, on several occasions.
> "Q. But you never took steps to enforce what you said was rent outstanding?
> "A. No
> "Q. And you have no documentary evidence of any rent outstanding?
> …"

[28] To my mind, the explanation for the variation in rent appears clearly in that passage. I readily gather from that passage that when Mr. Penn went to prison he told the appellant he could "not pay the *full rent*". Having come out of prison Mr. Penn said things were difficult for him at that time and he would like to continue to pay "*the $750*". The full rent, as the testimony expresses, was $1,500.00. I, therefore, gather from the appellant's testimony that for some period of time, which covered both a period (or the period) of Mr. Penn's incarceration and the period after he was released, Mr. Penn paid only $750 to account of the rent of $1,500 that he was obliged to pay and not the full rent. The failure of the judge to appreciate that the appellant gave an unchallenged explanation for the variation in the rent caused her to make a finding (that the appellant had given no explanation) that was materially inconsistent with the evidence.

[29] In addition, the judge failed to appreciate the weight and bearing of the circumstances when she criticized the appellant as eager to testify that Mr. Penn had been incarcerated and, accordingly, dismissed the appellant's evidence as lacking sincerity. The cross-examination shows that counsel for Mr. Penn made no issue of the appellant's repeated references to Mr. Penn's incarceration and both

counsel and the appellant treated it as a simple fact. It may well have been a notorious fact in Tortola with a population of about 15,000, and the appellant's statement that Mr. Penn said he had been expecting to receive "Government contracts" after he came out of prison should have alerted the judge that there might have been some depth to the appellant's testimony. Counsel apparently saw nothing "eager" or insincere in the appellant referring to the fact of Mr. Penn's incarceration and I cannot think of any other way in which the appellant could have stated his explanation both for the variation in the arrears of rent claimed, and for allowing the arrears to continue for as long as they did. The judge would have benefited from noting that counsel did not challenge the inherent "believability" of the appellant allowing the rent to continue accrue in arrears because his client was imprisoned and, hence, unable to pay the full rent. Counsel's challenge was on the basis that the appellant never demanded arrears of rent and that this went to show that there were no arrears, otherwise the appellant would have demanded.

[30] In my view, had the judge not misdirected herself that there had been no explanation in the appellant's evidence for the variation in rent, and had she appreciated the relevance and import of the appellant's testimony about the imprisonment of Mr. Penn, the judge would not have concluded that it was "incredible" that "any businessman" would have allowed "a tenant" to owe arrears of rent for so long. Had the judge properly directed herself and appreciated the evidence she would have considered that it was entirely credible, in the particular circumstances, that the appellant (not "any businessman") should have allowed Mr. Penn (not "a tenant') to owe arrears of rent consequent upon his incarceration.

[31] It would have been perfectly open to the judge to have decided, based on the impression that the appellant made upon her in giving his testimony, because (hypothetically) of his demeanour or his body language or his halting way of speaking or any of the other telling indicators of unreliability of a witness, to reject the appellant's evidence as untrue or incapable of belief. In such a case the judge would have disbelieved the witness. In this case the judge disbelieved the facts.

She did so not because the witness was not credible but because, she decided, the situation that the witness described was not credible. As I have tried to point out, the judge reached that conclusion on a number of wrong bases. I would conclude that the judge had no proper basis for dismissing the counterclaim and, instead, should have given judgment for the appellant on his counterclaim.

Conclusion and costs

[32] For the reasons I have given I would allow the appeal. I would order that judgment be entered in the court below dismissing the claims against the appellant (the dismissal of the claims against Mr. Schulteis stands) and ordering that the appellant recover from Mr. Wesley Penn the sum of $29,250.00, with interest from the date of the filing of the counterclaim until the date of this court's judgment, at the rate of 5% per annum.

[33] In accordance with rule 64.4 of Civil Procedure Rules 2000 (CPR 2000) I would order that the claimants pay the costs of the appellant and of Mr. Schulteis both here and in the court below, on the basis of prescribed costs. I take the damages awarded to each claimant in the court below as the value of his, her or its claim for the purpose of quantifying costs. In each instance the court awarded interest on damages at 5% per annum from the date of the filing of the claim until the date of judgment (21st December 2005). I add the pre-trial interest that the judge awarded as part of the value of the claim for the purpose of quantifying costs. I would also order that Mr. Wesley Penn pay the prescribed costs of the appellant of the counterclaim.

[34] The court awarded damages to the first-named claimant, Mr. Allen Wheatley, of $40,025.00 and interest that I calculate[15] at $2,288.36. I quantify prescribed costs below, on the basis of the table in Part 65 Appendix B of CPR 2000, on the

[15]The starting date, when the claim was filed, was 29th October 2004

combined sum of $42,313.36, at $12,078.34. I award two-thirds of that sum, amounting to $8,052.33, as prescribed costs of the appeal.

[35] The court awarded damages to the second named claimant, Mr. Wesley Penn, of $45,525.00 and interest that I calculate[16] at $2,603.14. I quantify prescribed costs below, on the basis of Appendix B, on the combined sum of $48,128.14, at $13,532.04. I would award two-thirds of that sum, amounting to $9,021.36, as prescribed costs of the appeal. In addition, I would award prescribed costs on the counterclaim of $29,250.00 and interest that I calculate[17] at $2,871.25. Because the appellant prosecuted his counterclaim as ancillary to his defence and did not have to file a separate statement of case and witness statement and did not have to engage counsel solely on account of the counterclaim I consider it fair, in the exercise of the discretion impliedly given in rule 65.5(3) which speaks of a general rule, to order that the costs of the counterclaim should be quantified using the reduced rate of 20% in Appendix B applicable to a claim exceeding $50,000.00 but not exceeding $100,000.00. On that basis I quantify prescribed costs below, on the combined sum of $32,121.25, at $6,424.25. I would award two-thirds of that sum, amounting to $4,282.83, as the costs of the appeal in respect of the counterclaim.

[36] The court awarded damages to the third named claimant, National Educational Services Co. Ltd, of $10,000.00 and interest that I calculate[18] at $571.81. I quantify prescribed costs below, on the basis of Appendix B, on the combined sum of $10,571.81, at $7,047.87. I would award two-thirds of that sum, amounting to $4,698.58, as the costs of the appeal.

[37] The court awarded damages to the fourth named claimant, Mrs. Pearline Williams-Verger, of $51,559.00 and interest that I calculate[19] at $2,948.16. I quantify prescribed costs below, on the basis of Appendix B, on the combined sum of

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[16] The starting date, when the claim was filed, was 29th October 2004

[17] The starting date, when the counterclaim was filed, was 26th November 2004. In this instance, interest runs to the date of this court's judgment.

[18] The starting date, when the claim was filed, was 29th October 2004.

[19] The starting date, when the claim was filed, was 29th October 2004.

$54,507.16, at $14,901.43. I would award two-thirds of that sum, amounting to $9,934.29, as the costs of the appeal

[38] The court awarded damages to the fifth named claimant, Mr. Malcolm Maduro, of $161,320.00 and interest that I calculate[20] at $8,959.16. I quantify prescribed costs below, on the basis of Appendix B, on the combined sum of $170,279.16, at $34,541.87. I would award two-thirds of that sum, amounting to $23,027.91, as the costs of the appeal.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[20] The starting date, when the claim was filed, was 11th November 2004.