IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)

SAINT LUCIA

CLAIM NO. SLUHCV 0717 of 2002

BETWEEN:

VERONIQUE ISMAEL
(Administratrix of the Estate of
EMMANUS ISMAEL, deceased)

Claimant

AND

JUSTIN ALBERT

Defendant/
Ancillary Claimant

AND

ST. LUCIA MOTOR & GENERAL
INSURANCE COMPANY LIMITED

Ancillary Defendant

Appearances :

Mrs. Kim St Rose with Ms. L. Verneuil for Claimant
Ms. Lydia Faisal for Defendant/Ancillary Claimant
Mr. Dexter Theodore for Ancillary Defendant

2004: November 11,
2005: February 1,
April 5,
2006: December 8.

JUDGMENT

BACKGROUND FACTS

[1] EDWARDS J: This claim arises from a fatal accident which occurred along the highway at Ravine Poisson, Bexon in the Quarter of Castries, on the 17th August,

2001 at about 7:30 p.m. The Defendant Mr. Justin Albert is a minibus driver and part time contractor. On the evening of the accident, he had left the Bordelais Correctional Facility Construction site where he was then working, with 9 workers including the deceased, traveling in his Mitsubishi minibus registered H9571 as usual. They had stopped at a Restaurant to refresh themselves. Upon leaving the Restaurant, heading towards Castries, Mr. Albert's bus veered out of control on his left side of the Road, and skidded across the Road, crashing into a stonewall along the right side of the Road.

[2] The deceased Emmanus Ismael who worked with Mr. Albert, fell out of the minibus as it crashed into the wall. One of his ears was severed, and his skull was fractured. He died on the scene of the accident or on his way to the Victoria Hospital. The Post Mortem Report of Dr. King discloses that he died from respiratory failure as a result of aspirated blood and chest compression, brain damage and basal skull fracture. He was then 20 years old, and employed as a mason on the Bordelais Correctional Facility construction site. He was also the illegitimate child of Ms. Veronique Ismael.

THE PLEADINGS

[3] The deceased's mother Ms. Veronique Ismael is Administratrix of his estate. By her claim filed on the 30th July 2002 she is seeking to recover damages from Mr. Albert for her sons loss of life and consequential loss for the benefit of his estate, and on behalf of herself as his dependant, on the ground that he died because of the negligent driving of Mr. Albert.

[4] The claim comprises 2 distinct causes of action. Article 609 of the Civil Code of St. Lucia permits the claim for the deceased's losses which the deceased could have claimed had he lived, along with funeral expenses where it provides for all causes of action vested in the deceased, to survive for the benefit of his

succession. That right of action vested in the deceased is transmitted to Ms. Ismael his personal representative.

In addition to this, Article 988 of the Civil Code permits the deceased's mother to bring this action for the benefit of herself as his dependant, and for any other dependants.

[5] By his defence filed on the 3rd September 2002 Mr. Albert denied that he was at the material time driving negligently. He alleges that upon swerving to his left to avoid colliding with an overtaking car, he skidded because of the uneven surface, lost control of his vehicle, careened across the Road and collided with the stonewall.

[6] St. Lucia Motor and General Insurance Company Limited are the Insurers of Mr. Albert's vehicle. Mr. Albert has joined them as Ancillary Defendants, claiming against them an indemnity in respect of the action brought against him and his costs in defending the action. The Claimant Ms Ismael had served a copy of the Claim and Statement of Claim on the Insurers in August 2002.

[7] By their Amended Defence filed on the 21st May 2004, the Insurers have denied liability. They contend that Mr. Albert is the holder of a Commercial Vehicle Policy of Insurance which expressly provides that the Insurers shall not be liable in respect of death or bodily injury to any person in the employment of the insured arising out of and in the course of such employment. On Mr. Albert's version of the facts communicated to the Insurers on the 20th August 2001, the Insurers have averred that the death of the deceased occurred while he was an employee of Mr. Albert, and arose out of and during the course of such employment.

[8] Further, the Insurers have pleaded Condition 9 of the insurance policy as it relates to their disclaimer of liability communicated to Mr. Albert by letter dated 16th September 2002. They contend that Condition 9 required Mr. Albert to refer his

claim to arbitration within 12 months from the date of disclaimer. Mr. Albert failed to do this, hence his claim has become abandoned and incapable of being recovered by virtue of Condition 9, according to the Insurers.

[9] Mr. Albert's Reply to this Amended Defence of the Ancillary Defendant raises several collateral issues. Mr. Albert pleaded that since by his defence he had denied Ms. Ismael's claim in its entirety, there was therefore no claim subsisting between Mr. Albert and the Insurers at the date of the written disclaimer.

[10] Mr. Albert contends further that the disclaimer dated 16th September 2002 would not cause Condition 9 to be operative; and the first Defence of the Insurers filed on the 15th April 2004 had not invoked Condition 9 of the policy, thus causing Mr. Albert to believe that the Insurers had waived their right to rely on Condition 9. Besides this, Mr. Albert has pleaded that raising the issue of arbitration 17 months after the Ancillary Claim was served, cannot oust the jurisdiction of the Court, which by its Case Management Order on the 20th December 2002 directed that the Insurers be joined as an Ancillary Defendant.

THE ISSUES

[11] The issues arising from the pleadings, evidence, law and submissions of Counsel are:-

A. Whether or not the deceased's death was caused by the negligence of Mr. Albert? (See paragraphs 13 to 51 of this Judgment)

B. Whether or not the deceased was at the time of the accident acting in the course of his employment? (See paragraphs 53 to 75 of this Judgment)

C. (i) Whether or not a breach of Condition 9 of The Commercial Vehicle Policy constitutes a bar to the Insured's claim for indemnity?

(ii) Whether the Insurers can rely on Condition 9 in the circumstances? (See paragraphs 77 to 97 of this Judgment)

D. What measure of damages if any should be awarded to Ms. Ismael?

[12] Though Issue B has been identified as a preliminary issue by Counsel for the parties, I will determine Issue A first.

THE REASON FOR THE ACCIDENT

[13] The Claimant has attributed the cause of the accident to the following conduct of Mr. Albert in her pleaded Particulars of Negligence –

(a) Driving at an excessive speed;

(b) Failing to stop, slow down or so manage or control his said motor vehicle to avoid the accident;

(c) Driving onto the wrong side of the Road and colliding with a wall off the edge of the Road;

(d) Driving in such a manner as to lose control of the vehicle;

(e) Driving under the influence of alcohol.

[14] The undisputed facts are that having stopped at the Restaurant which has a Bar also, Mr. Albert had fish broth that night. He had nothing else to drink that night, he said, although sometimes he would have "a little drink". There was also no dispute as to the existing condition of the highway at Ravine Poisson that night. The Road surface was dry, pitch asphalt with no potholes. There was no gravel on the Road surface although to the right and left off the Road that surface had

gravel. It is undisputed that the verge of the Road on Mr. Albert's driving side of the Road was somewhat lower than the shoulder of the Road.

[15] There is controversy as to how Mr. Albert was driving after leaving the Restaurant and reaching the Ravine Poisson area. There were 2 witnesses called by the Claimant who were in that area at the time of the accident.

[16] Mr. Winston Hudson a sound engineer who was standing in his yard adjacent to the main Road talking to a young lady who lived next door, deposed that he heard a screeching sound coming from the corner of the Road close to his house, and he ran to a point about 12 feet from the side of the Road as a wall on his left had blocked his vision of a part of the Road.

[17] Mr. Hudson said he saw a white van traveling towards Castries coming towards him at a speed on his right side of the Road, causing him to dash back further into the yard, running away from the van towards his right. He said that while he stood in his yard he was facing the main Road and had a clear vision of traffic going up and down the Road. He described the traffic as sparse, and testified that there were no vehicles traveling up or down the Road immediately prior to him hearing the screeching noise.

[18] He testified further that he saw 2 persons hanging out of the windows of the van and 1 fell to the ground. This van came to a stop upon colliding with the wall in front of his yard which is about 5 feet high. He later explained that it was when the van had come to a stop, that he saw the 2 men hanging out of the window and 1 falling.

[19] Upon seeing the van come to a stop, Mr. Hudson said he ran inside his house to telephone the police and on returning to the scene, saw 1 of the men lying in the gutter.

[20] He said under cross examination that as he ran towards the sound of the screeching, the screeching stopped and then he saw the van coming towards him. He was inconsistent as to how far he was from this wall. Although he had deposed that he was 12 feet from the wall, he said under cross examination that he was 3 feet from it. He admitted that there was no way he can see motor vehicles coming from Castries that are passing the wall; and that he was not paying particular attention to the Road while talking to the young lady.

[21] He was adamant that the van was not at a bend in the Road when he first saw it. He said the bend is further to his left and he could not see this bend from where he was in his yard. He said his wall was about 100 to 200 feet from the bend and he could see the front of the van more to its right side.

[22] He said he never saw the van while it was traveling on its proper driving side of the Road. He spoke to Mr. Albert who was the driver of the van, and he saw the police arrive and take measurements on the scene.

[23] Mr. Hudson is longsighted, and has difficulty reading anything close to him. He said there was nothing wrong with his sight at the time of the accident. Though night had already fallen, there were 3 lamp posts lit on the Road, one was next to the bend, another was next to the wall that blocked his vision, and the other was lower down. He insisted that though there was traffic using the Road during the 10 minutes that he had been talking to the lady before the accident, no traffic passed up or down immediately before he had heard the screeching noise.

[24] Then there was the evidence of P.C. Wang Sonson, who was in the area standing on a bridge near to the main Road with a friend at the time of the accident. He deposed:

"3. I noticed a white Mitsubushi minibus registered number H 9571 coming from a southerly direction and heading in the direction of Castries.

4. The vehicle attracted my attention because it was being driven at an excessive speed.

5. I am a driver and would estimate the speed of the vehicle to be high speed.

6. As the vehicle went around the bend, which was lower from where I was standing, I heard the sound of squeaking tyres and noticed that the people started running in the vehicles direction. At that time I did not notice any vehicle coming from the opposite direction.

7. Shortly after I walked down the Road and saw the same white minibus . . . resting against a wall on the right side of the Road.

8. I proceeded towards the vehicle and saw a crowd surrounding the motionless body of a male lying on the ground.

9. At the time I saw vehicle H 9571 it was being driven in a reckless manner dangerous to the public."

[25] Under cross-examination, he pointed out the distance between the bridge where he was and the point of the accident, which was estimated as 125 to 150 yards by the 3 Counsel for the parties. Mr. Sonson's evidence remained unshaken as to the presence of other motor vehicles on the Road after Mr. Albert's van had passed

him. He had no doubt he said, that no motor vehicle had passed him immediately after Mr. Albert's mini bus grabbed his attention according to the manner in which it was driven. It was not possible for any other motor vehicle to have passed him after the mini bus without having his attention, he testified.

[26] He said the bridge where he was is on the Eastern side of the Road and Mr. Albert's minibus was coming on the Western side of the Road. The corner that the minibus went around was about 20 yards from where he was standing. He said that there was a second corner about 130 yards away from where he was standing and the accident occurred around the 2nd corner about 10 yards away. He said he saw the minibus about 10 minutes later after he went around the corner 20 yards from where he was standing, walked a distance of about 100 yards to the 2nd corner, went around the 2nd corner, and saw a white van against a wall about 10 yards away. He was not familiar with the minibus before, but he identified it when it passed him and when he saw it stationary. To the suggestion of Learned Counsel Mr. Theodore that he was in no position to see whether there was traffic coming around the 2nd corner from where he was standing, P.C. Sonson's answer was in the affirmative.

[27] Under re-examination he said that the accident took place between the two corners. He explained also that he spent the 10 minutes standing by the bridge in conversation with a man, until someone came and told him something. He said that from the minibus approached him to the time it went around the corner, he saw it for about 20 to 25 seconds. Between 20 to 25 seconds he said the bus traveled a distance of about 100 yards before going around the corner.

[28] Police Corporal Foster Chiquot investigated the accident. On arrival at Ravine Poisson that night, he saw and spoke to Mr. Albert. His testimony was that Mr. Albert told him that he was the driver of the minibus, and that the accident was caused by one vehicle overtaking another at the corner, as a result of which, he moved left and skidded as a result to the right of the Road.

[29] The following day about 11:40 am he returned to the scene with Mr. Albert and took several measurements. Mr. Albert pointed out the distance his bus traveled along the short wall and it measured 38 feet. He also viewed Mr. Albert's bus at a garage at Cul de Sac in the presence of Mr. Albert. The right side of the bus was damaged on the panel, the glass from the windows was broken, and the front bumper grill and fender were damaged. The right wheel and suspension was ripped off, he said.

[30] Under cross examination he said that Mr. Albert had agreed that the brake impression which he had seen running diagonally across the Road from the left side to the right side and which he had measured as 55 feet, was caused by his minibus. He admitted that Mr. Albert had used the word "SKID". He testified that Mr. Albert told him he skidded when going around the corner as a result of 2 motor vehicles approaching him from opposite direction.

[31] He said that the 55 feet ended on the right edge of the Road facing or towards the stonewall. He acknowledged that there was a difference between a skid mark and a brake impression but said he was unable to tell the difference between the 2 at the time. He explained that he had taken the brake impression measurement the same night of the accident. There were street lamps there which allowed him to see the impression but he was unable to differentiate between a skid mark and brake impression then. He said that the shoulder of the Road on the western side of the Road was 4 inches high.

[32] He was asked whether he agreed that a motor vehicle going off the surface of the Road onto the verge 4 inches below, and then getting back on the Road again, that it is very likely that such a motor vehicle could lose control. Police Corporal Chiquot said that this was possible even if the shoulder is just 4" high.

[33] He admitted that he had taken no measurements of the distance the point of impact was from the nearest corner.

[34] On the other hand, Mr. Albert has testified that after leaving the Restaurant, he was driving within a reasonable speed and on his correct side of the Road until he arrived at Ravine Poisson.

[35] His evidence was that he was approaching a bend along the Ravine Poisson Road, traveling at an average speed of about 40 to 45 mph and never driving at any faster speed. He came upon 2 vehicles driving in a southerly direction with one vehicle overtaking the other. The overtaking vehicle encroached on the path of his bus and he said that he swerved to his left resulting in the left wheels of his bus traveling on the verge which was lower than the Road. He had difficulty regaining his correct position on the Road he said, as he felt the right wheel against the edge of the Road which was higher than the verge. His evidence was that he accelerated in order to go off the verge and back onto the Road. It was then that his minibus skidded and veered across the Road he testified, coming to a halt against a wall on the opposite side of the Road.

[36] According to Mr. Albert, he noticed that the deceased was lying on the ground near the vehicle after the impact, and he was later informed of his death.

[37] He denied that he was driving at an excessive speed, or that the deceased fell out of the window of his bus because of the speed that that he was driving, or that the bus got out of control because of his excessive speed coming around the bend. When asked by Learned Counsel Ms. Verneuil – What prevented him from stopping or pulling to the left? – his answer was "I could not stop on left because of high shoulder of the Road. I did not try to stop, I pull off Road to prevent the accident and in trying to go back on the Road the accident happened." The width of the Road where Mr. Albert said he ran off the Road was 23ft according to Cpl Chiquot. He denied that he was unable to stop because of his excessive speed. He insisted that he had accelerated to get off the side of the Road back onto the Road, owing to the shoulder of the Road being higher.

[38] It was suggested to him that had he been driving slower he would have been able to stop. His answer was: "While driving you don't have time to think."

[39] According to him, his minibus was not that extensively damaged, and the Insurers settled with him, but refused to compensate his passengers. However the evidence of Ms. Philina Hippolyte the Insurers' Claims Manager was that Mr. Albert's vehicle was written off according to her records. He denied that it was a convenient excuse for him to say 2 motor vehicles were approaching with one overtaking the other. He asserted that P.C. Sonson was fabricating his evidence if you knew where the accident happened. He placed the accident as happening in between the 2 bends.

[40] Mr. Wayne Gaston who was then a worker of Mr. Albert and a passenger in his minibus testified as to Mr. Albert's manner of driving after he left the Restaurant, and before this witness fell asleep. He said that before he fell asleep Mr. Albert was not traveling fast. He was sleeping, he said and felt the bus jolting, and go out of control. It lurched in some way and he found himself reacting to the impact with his head and hand being where the driver was, and the other part of his body behind the driver where he had been seated.

FINDINGS OF FACT

[41] Having considered the submissions of Counsel concerning the credibility of the witnesses, and the inconsistencies and discrepancies in the evidence of the witnesses for the Claimant, I make the following findings of fact –

(i) Though there was no evidence as to what the speed limit was in the Ravine Poisson area, along the highway, the Court takes judicial notice of the fact that Ravine Poisson is a built up residential area and village. The speed limit under the Road

Traffic law is less than 40 mph for residential built up areas, even where you are driving on a highway.

(ii) I accept the evidence of Police Corporal Chiquot that Mr. Albert agreed that the diagonal drag mark on the Road surface ending up on the right edge of the Road facing the stonewall was made by his minibus. Though the Police Officer omitted to measure how far the beginning of the drag mark was from the Western Side of the Road, it is obvious from the evidence that this drag mark began on Mr. Albert's left side of the Road.

(iii) The screeching sound that Mr. Hudson and P.C. Sonson heard, and which Mr. Hudson said had stopped immediately before he 1st saw the minibus coming towards him, coupled with the 55 ft length diagonal drag mark Mr. Albert admitted belonged to his vehicle, makes it more probable that Mr. Albert had been applying his brakes before crashing into the stonewall. The 55ft length drag mark was more probable a brake impression as Cpl. Chiquot testified.

(iv) There were no vehicles approaching Mr. Albert when he was approaching the bend in the Road.

(v) Mr. Albert was traveling at a fast speed when he approached the bend, and even if he was traveling at 40 to 45 mph in the circumstances that speed in negotiating a bend in Ravine Poisson is over rapid driving in my view.

(vi) I accept that Mr. Albert's vehicle veered to its left partly onto the verge of the Road because of his excessive speed and his inability to control the minibus around the bend.

(vii) Though he may have accelerated and skidded in trying to get back on the Road, upon getting back fully on the Road he probably tried to stop the vehicle by pressing his brakes, and this is what caused the screeching. However because of the over rapid speed that he was traveling at it is probable that he was unable to regain full control of the vehicle and prevent it from colliding with the stonewall. The fact that it was written off also raises a reasonable inference that Mr. Albert was probably proceeding at an excessive speed.

[42] I conclude therefore that the Claimant has proven that Mr. Albert was driving in the manner alleged at paragraphs (a) to (d) of the Particulars of Negligence pleaded in the Statement of Claim (reproduced at paragraph 13 above). This manner of driving was the sole cause of the accident.

THE LAW OF NEGLIGENCE

[43] Article 985 of The Civil Code provides that "Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect; or want of skill and he is not relievable from obligations arising."

[45] ". . . [W]here the plaintiff relies on . . . Article 985 . . . the onus is on the plaintiff to prove as a precondition of the defendant's delictual liability that the damage was caused by the defendant's fault." (PER Sir Vincent Floissac in North Rock Limited v Jardine and Another 44 W.I.R. 162, 164.

[46] Sir Vincent Floissac went on to explain that the word fault is to be understood in its technical sense to signify the concept which is expressed in the word "act, imprudence, neglect, or want of skill," appearing in Article 985 and which is defined in Article 985 D (1) as –

> "Negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would apart from this article give rise to the defence of contributory negligence."

[47] In interpreting Article 985 the Court must apply the English Law of Tort. The English Rules of evidence also must be used to determine whether Ms. Ismael has discharged her burden of proof; since the trial took place before The Evidence Act of St. Lucia No. 5 of 2002 came into operation on the 1st November 2005.

[48] Ms. Ismael must therefore prove on a balance of probability that Mr. Albert owed the deceased a duty to take care, that Mr. Albert was negligent or in breach of that duty to take care, and that the injuries the deceased suffered resulting in his death, were caused by that negligence or breach of the duty.

[49] The facts found in this case compel the conclusion that Mr. Albert owed a duty to the deceased since the law imposes a duty on the driver of a motor vehicle to observe ordinary care or skull towards persons using the highway, including his passengers; who he could reasonable foresee are likely to be affected.

[50] In my opinion, Ms. Ismael has discharged her burden of proof by proving Mr. Albert's negligence in terms of paragraphs (a) to (d) of the Particulars of Negligence.

[51] I conclude therefore that the deceased's injuries and death were caused by Mr. Albert's fault and he is not relievable from obligations thus arising.

[52] Issue B will now engage my attention.

COURSE OF EMPLOYMENT

[53] Mr. Albert testified that his team of about 10 workers lived in Millet and Dennery. He provided transportation service for them with his minibus to and from the Bordelais Construction site daily. He said that each morning the passengers would embark near Kentucky Fried Chicken outlet on Bridge Street where he parked his bus to await their arrival. He also dropped them off at that point after work every day. He said that he did not provide this transportation service gratuitously and each passenger in his employ would pay the requisite fare to him for his transportation service. Most of them paid on a daily basis, but others paid on a weekly or fortnightly basis.

[54] His evidence was that he deducted the transportation costs from his workers' pay where they authorized him to do so. The witness Wayne Gaston was one of those who authorized such deductions from his pay. Mr. Albert testified that the normal rate from Millet to Castries was $2.75 and from Castries to Dennery was $3.00. It would be $5.75 to go from Millet to Castries to Dennery return each day.

[55] He said he never charged his workers the extra $1.00 which was payable from Dennery to Bordelais. This was apparently because Bordelais was their destination for work, and his transportation was convenient for all those who used it to get to work in time for 7:30 am everyday. The persons who were traveling on his bus had done so regularly for several weeks and he never provided his employees with this transportation service on the basis of their working relationship with him. He said that it was usual for them to stop off at the Restaurant along the Dennery Highway on their way from work, particularly on a Friday.

[56] Mr. Wayne Gaston confirmed that he paid Mr. Albert to transport him, and every body was paying the normal fee. He testified that he did not know exactly if deceased was paying Mr. Albert. He worked from Sunday to Friday, and he

boarded the bus from Millet. Ms. Ismael testified that the deceased paid Mr. Albert transportation costs fortnightly for him to take him to and from work.

[57] Mr. Albert gave a statement to the Insurers on the 20th August 2001. He said in that Statement that: "At the time on board my vehicle there were about nine passengers most of which are within my employment."

[58] Mr. Bertrand Doyle testified for the Insurers. He is a Chartered Insurance Practitioner, a registered/licenced Insurance Adjuster, and an Insurance Claims Consultant. His evidence was that on the 2nd September 2001 he interviewed Mr. Albert along with Mr. David Fitz. Mr. Albert's statements to Mr. Doyle were consistent with his written statement dated 20th August 2001.

[59] Mr. Doyle testified that as a result of his observations that Mr. Albert's Insurance Policy did not extend cover in respect of death or bodily injury to any person in Mr. Albert's employment arising out of and in the course of such employment, he asked Mr. Albert how he could be sure that the passengers in the vehicle were his employees. His evidence was: "The defendant advised that he did not have a Route Band to carry passengers in the district where the accident occurred and as a result he only carried his employees."

[60] Mr. Doyle said that he subsequently advised Ms. Philina Hippolyte the Claims Manager to send a letter to Mr. Albert, and he drafted the letter dated 12th September 2002 which she prepared and sent to Mr. Albert dated 16th September 2002.

[61] Under Cross Examination Mr. Doyle admitted that he did not ask Mr. Albert whether his passengers paid fares to him, neither did Mr. Albert tell him that.

[62] He said that he was aware that Mr. Albert's vehicle was registered with an "H" plate, signifying that he was licensed to carry passengers for hire or reward, though they are not the only type of passengers that the motor vehicle can carry.

[63] Mr. Doyle said that Mr. Albert told him that he could not use the vehicle for carrying passengers in the area because he had no Route Band, and the only way he could use it was if he was carrying his employees. Mr. Albert also told him, he said, that he had been stopped by police in that area because they saw him with people in the motor vehicle, and he was not charged because he was able to show them that they were his employees.

[64] Ms. Hippolyte also testified about Mr. Doyle's instructions to her, and her observations concerning Mr. Albert's Claim file. She said she believed that Mr. Albert was in breach of the insurance contract and acting illegally by carrying workers to Dennery and Bordelais and back. She admitted that she would not have authorized payment for loss for damage to Mr. Albert's bus in circumstances where there was a breach of contract. She said that Mr. Fitz dealt with Mr. Albert's Claim before her and she saw a Voucher saying that Mr. Albert was paid monies or loss arising from the accident.

[65] Learned Counsel Ms. Faisal sought to raise as a collateral issue, the question as to whether Mr. Albert was acting illegally by using his minibus to travel to and from work at Bordelais and at the same time transport his workers for a fee. However, since this was never pleaded as part of the Insurer's defence. I shall not consider it any further.

[66] In support of her apt submissions, Counsel Ms. Faisal relied on the judicial statements in Smith v Stages and Another [1989] 1 All E.R. 833 (H.L.) which referred to previous cases in which the principles governing this breach of law on course of employment were considered and applied. Smith v Stages is

considered as the leading authority in this area, having established guidelines for future cases.

[67] "The fundamental principle is that an employee is acting in the course of his employment when he is doing what he is employed to do, to which, it is sufficient for the present purposes to add – or anything which is reasonably incidental to his employment." (PER Lord Golf of Chivieveley at page 3 of his Judgment delivered 23/2/89 in Smith v Stages).

[68] The authorities show that the first consideration is the ascertainment of what the worker was employed to do. (Per Lord Thonherton in Canadian Pacific Railway Co. v Lockhert [1942] A.C. 591 at page 600.

[69] The next consideration is whether or not it is an obligation for the worker to travel in the way in which he is traveling. ". . . [W]hen a man is going to or coming from work along a public road as a passenger in a vehicle provided by his employer, he is not then in the course of his employment, unless he is obliged by the terms of his employment, to travel in that vehicle, or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment. That distinction must be maintained for otherwise there would be no certainty in this branch of law:" Vandyke v Fender [1970] 2Q B 292, 305.

[70] "The paramount rule is that an employee traveling on the Highway will be acting in the course of his employment if and only if, he is at the material time going about his employer's business. One must not confuse the duty to turn up for one's work with the concept of already being "on duty" while traveling to it." (PER Lord Lowry in Smith v Stages at page 23 of his Judgment delivered 23/2/89).

[71] "An employee traveling from his ordinary residence to his place of work, whatever the means of transport, and even if it is provided by his employer, is not on duty and is not acting in the course of his employment, but if he is by his contract of service to use the employers transport, he will normally be, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so" (PER Lord Lowry in Smith v Stages at page 24 of his Judgment delivered 23/2/89.

[72] Ms. Faisal applied the reasoning in the authorities and these judicial pronouncements to the instant case. She urged the Court to find that the deceased was not acting in the course of his employment for the following reasons –

(i) He was employed as a mason and his place of work was the site of the Bordelais Correctional Facility. His duties commenced and ended there. His duty was to turn up at Bordelais site.

(ii) The deceased was not paid for traveling to work, his duty was to arrive at work, his duty was to arrive at work at 7:30 am. He was not in receipt of any traveling allowance.

(iii) At the end of the day, Mr. Albert was not concerned where he headed and was not responsible for ensuring that he got home. At all material times, finding his way home was his own responsibility and he had no recourse against Mr. Albert if he encountered difficulty in doing so.

(iv) Mr. Albert had not obligation and was under no contractual obligation to provide transportation to the workers; further he charged them the requisite fares for the journey, as emerged in the evidence of Mr. Albert, Mr. Gaston and Ms. Ismael.

(v) Mr. Gaston stated in re-examination that if Mr. Albert did not provide transportation on a given day, he would take another bus to work.

(vi) There was no evidence of any contract of service between Mr. Albert and the deceased or his other workers which could lead to a conclusion that the deceased was acting in the course of employment.

(vii) The evidence showed that it was a convenient and a less expensive arrangement for the deceased and other workers to use Mr. Albert's bus as a means of transportation to and from the work site.

[73] For all these reasons, Ms. Faisal has urged the Court to find that the deceased was not in the course of his employment while traveling with Mr. Albert, at the time when he met his untimely death.

[74] Learned Counsel Ms. St. Rose while adopting these careful submissions of Ms. Faisal, focused on the pay slip of the deceased exhibited by Ms. Ismael. It shows that the Employer of the deceased was NH International (Caribbean) Ltd and not Mr. Albert. She also emphasized as did Ms. Faisal, that the accident happened at approximately 7:30 pm at the end of a work day after all the occupants had stopped to refresh themselves at the Restaurant. This fact supports the conclusion that the deceased was not traveling in Mr. Albert's bus as an employee in the course of employment they argued.

[75] Learned Counsel Mr. Theodore viewed it differently. He argued that it is necessary to look at the totality of the evidence in deciding the issue. He submitted since the deceased was habitually picked up by Mr. Albert in Millet and dropped off there on workdays, it is immaterial whether or not he did pay for

transportation. According to Mr. Theodore, the deceased's day started when he got into his employer's bus on a morning and it ended when he got off again in the evening.

[76] Though I agree with Mr. Theodore that it is a question of fact whether the deceased was in the course of his employment at the time of the accident, in my opinion the weight of the law cited by Ms. Faisal, and the evidence are against him. I endorse the submissions of both Counsel Ms. Faisal and Ms. St. Rose. In my view the deceased was not in the course of his employment at the time of the accident. I now turn to consider Issue C concerning the Arbitration Clause in the Policy of Insurance.

ARBITRATION AS CONDITION PRECEDENT

[77] Condition 9 of the Insurance policy with Mr. Albert states –

> "All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree by an umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any rights of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claims shall for all

purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder." (My emphasis).

[78] Condition 10 of the Policy has reversed the burden of proving a breach of a condition in the Policy by providing:

> "In any action suit or other proceedings where the Company alleges that the Insured failed to observe any of the Terms of the Policy in so far as they related to anything to be done or not to be done by the Insured, the burden of proving that any of the Terms of the Policy have been complied with shall rest upon the Insured."

[79] Learned Counsel Mr. Theodore has obviously relied on the stipulated reverse burden in Condition 10 when he submitted that Mr. Albert has the onus to satisfy the Court that he did not fall foul of any exception or condition contained in the policy.

[80] On the authority of Motor Union Insurance Co. Ltd v Lindsey (1959) 1 W.I.R. 534 at page 536 F and page 538 C-F, Mr. Theodore argued that the onus to refer a dispute to arbitration lies on the insured and not the insurer. He contended that since Condition 9 made arbitration a condition precedent to bringing the action, then the failure of Mr. Albert to refer a dispute to arbitration must necessarily result in the failure of his claim.

[81] In Motor Union there was a Condition identical to Condition 9 in the insurance policy which fell for the consideration of the Court. The Court of Appeal held that the failure of the Respondent to refer the dispute to arbitration was a complete answer to the claim. Rennie J.A. at page 535 declared: "I cannot agree that a duty was imposed on the Appellant to submit the difference [issue as to whether Insurers were obligated to indemnify the Insured Respondent a further sum of £554.65 6s. 4d. to satisfy the Respondent's judgment debt

arising from a motor vehicle accident] to arbitration. The appellant was not the claimant seeking to prove its claim; it was endeavouring to resist the claim. In other words, it was not looking for the appropriate tribunal in which to launch a proceeding . . . In my view the reference of the matter to arbitration was a condition precedent to the bringing of an action and the failure of the Respondent to refer it to arbitration must necessarily result in the failure of his claim."

[82] Learned Counsel Ms. Faisal made no submissions on this issue.

[83] However Learned Counsel Mrs. St. Rose has referred the Court to Section 7 of the Arbitration Act Cap. 2:06 of the Revised Laws of St. Lucia 2001. It states:

> "If any party to an arbitration agreement, or any person claiming through or under him commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to the Court to stay the proceedings . . ."

[84] Relying on this provision, Mrs. St Rose submitted that the Insurers not having applied for a stay of the proceedings, and indeed having attended Court and taken steps in the action, are now barred from availing themselves of this objection.

[85] Mrs. St Rose also relied on Chitty on Contracts Vol –1, 28th ed., paragraphs 16-036 and 16-038. It is stated at paragraph 16-036 that: "If contrary to an agreement to refer a matter to arbitration, one party resorts to legal proceedings in an English Court in respect of that matter, the Court has jurisdiction to hear the dispute. The existence of the arbitration agreement, .

. . affords no defence to the action. The appropriate course is for the other party to apply to stay the legal proceedings."

[86] At paragraphs 16-038 it is pointed out that a stay can be sought of a counterclaim as well as a claim, or of part of the legal proceedings only, under Section 9 of The Arbitration Act 1996 U.K. which is equivalent to our Section 7. Also, paragraph 16-039 in dealing with the time when the application for stay should be made, states in substance that steps taken in the proceedings by a defendant may evince an intention to abide by the legal proceedings and a waiver of the defendant's right to ask for arbitration.

[87] However, in the instant case, though the Insurers filing of their Defence on the 15th April 2004 may have evinced their intention to waive their right to ask for arbitration, in my view this would not preclude their invocation of Mr. Albert's breach of Condition 9 to deny liability under the policy. This is exactly what they have done by filing their Amended Defence. The Criteria for Stay of Arbitration Proceedings as provided by Section 7 of The Arbitration Act and the result of the breach of Condition 9 are 2 different things in my view. In any event the pleadings of Mr. Albert did not invoke Section 7 of the Arbitration Act.

[88] I do not accept the contention of Mr. Albert at paragraph 1 (ii) of his Reply to the Amended Defence of Ancillary Defendant, that at the date of the letter written on the 16th September 2002 by Ms. Hippolyte the Insurers' Claims Manager, there was no claim subsisting as between Mr. Albert and the Insurers, because of his Defence to Ms. Ismael's claim.

[89] In my opinion there was a 'difference arising out of the policy' as well as a disclaimer of liability as at the 16th September 2002.

[90] In my view, there are factual differences between the instant case and the case Motor Union supra which Counsel Mr. Theodore relied on. The Appellant in

Motor Union had in a timely manner apparently availed itself of the defence afforded it by the arbitration clause in its policy, and apparently at the first opportunity it was presented with.

[91] The Insurers in the instant case waited for 17 months before availing itself of the Condition 9 defence. The mere fact Condition 9 states that Arbitration is a condition precedent to the Insurers' acceptance of liability, this is not necessarily conclusive.

[92] The law recognizes that the Insurers may not be permitted to rely on Condition 9 where they elect to waive the breach of Condition 9 or where they are estopped by their conduct from insisting upon its performance.

[93] The law recognizes also that though failure to raise a particular ground of objection is not in itself a waiver, the taking of objection on other grounds may be a waiver on the ground of objection which is not specifically raised: (General Principles of Insurance Law by E.R. Hardy Ivamy (1966) citing Fowlie v Ocean Accident & Guarantee Corporation (1902) 33 C.R. 253).

[94] It was held in Fowlie that reliance upon an exception coupled with lapse of time, amounted to a waiver of full proof of loss.

[95] I therefore find that the Insurers Defence filed on the 15th April 2004 by pleading only their 'Course of employment' defence, communicated to Mr. Albert and Ms. Ismael that this was their only objection. I therefore hold that their said Defence was a waiver on Mr. Albert's breach of Condition 9 which was not specifically raised in that Defence. The Insurers were served with the Ancillary Claim on the 17th January 2003. They had more then 16 months to raise the Arbitration Condition and did not do so.

[96] Having waived Condition 9 on the 15th April 2004, it would be unreasonable and unfair to Mr. Albert, for the Court to permit the Insurers to rely on Condition 9 which they subsequently pleaded in their Amended Defence of the Ancillary Defendant 1 month later.

[97] My answer to the 2 questions posed for Issue C therefore is that though the breach of Condition 9 of the Policy is a bar to the Insurer's claim for indemnity, the Insurers have waived their entitlement to rely on Condition 9 by their conduct coupled with lapse of time.

[98] Finally, I turn to consider the question of damages.

ASSESSMENT OF DAMAGES

[99] The traditional practical approach to the calculation of the damages under the Fatal Accidents Act, 1846 U.K. provision equivalent to Article 988 (2) of The Civil Code was stated by Lord Wright in Davies v Powell Duffryn Associated Collieries Ltd (No. 2) [1942] 1 All E.R. 657 at 665:

> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years purchase."

[99] A However, the common law in England relating to non-pecuniary loss for bereavement has been modified by a sympathetic provision introduced by the

Administration of Justice Act 1982. Consequently Section 1A of The Fatal Accidents Act 1976 as inserted by Section 3 (1) of the Administration of Justice Act 1982, provides that an action under the Act may consist of or include a claim for damages for bereavement; which claim however is restricted to spouses and parents. More precisely the claim may only be for the benefit of the deceased's wife or husband or both parents of a legitimate, or the mother of an illegitimate deceased minor who was never married: Mc Gregor on Damages 16th ed. (2003) para. 36-020. This sympathetic provision does not apply in the instant case since Article 213 of The Civil Code states that "Minority" ceases at the age of 18 years. However I am of the view that it would apply in an appropriate case where the deceased is under 18 years old, by virtue of Article 917 A (1) of The Civil Code of St. Lucia, land Caribbean Home Insurance Co. Ltd v Webbs National Ice Cream (St. Lucia C.A. No. 4 of 1993 deceased 31/10/94 (Ag.) at pages 728.

[100] In Cookson v Knowles ([1978] 2 All E.R. 604) which Counsel Mr. Theodore referred to, the House of Lords approved the guidelines which I will follow to some extent, in determining the pecuniary loss suffered by Ms. Ismael as a result of the deceased's death. Both Counsel Mr. Theodore and Ms. St. Rose also provided invaluable assistance by their submissions and the following local decisions in High Court Cases:

(1) Veronica Auguste v Tyrone Maynard and Another: High Court St. Lucia No. 440 of 1984 delivered by Matthew J. 30/9/86;

(2) Fenton Auguste v Francis Neptune: St. Lucia C.A. No. 6 of 1996 delivered by Singh J.A. 24/11/97;

(3) Catherine Philbert v Emily Raye: St. Lucia No. 415 of 1989 delivered by D'Auvergne J. 13/5/91;

(4) Mary Jallim v Joseph Ghirawoo: St. Lucia No. 0483/2003 Shanks J (Ag) delivered 18/2/05

[101] The guidelines dictate that I now consider the evidence of Ms. Ismael. She deposed that the deceased was born on the 18th December 1980 and up to the time of his death lived with her at her home in Millet. He was earning $840.00 fortnightly as a mason. He earned a further $100.00 per week on average from gardening with her, as she sometimes paid him more or less upon selling the produce from her garden. Although she said that the deceased gardened with her on Saturdays, Sundays and on holidays, the pay slip she presented had him working 6 days per week.

[102] He left school at 16 years and worked as a labourer with several persons and then with Mr. Albert. He was an apprentice mason up until a few weeks before his death when Mr. Albert regarded him as a mason.

[103] He was in perfect health up to the time of his death. He had no children. He had a girlfriend in England who sometimes returned to St. Lucia to visit him. Ms. Ismael was not aware of any plans he had to get married.

[104] He had 2 sisters younger than him. He assisted his mother with the educational and other expenses for his youngest sister Karlene in the sum of approximately $1000 per year. She was 10 years old at the time of his death. He assisted Ms. Ismael with her electricity bill providing approximately $100.00 per month. Karlene presently attends St. Joseph Convent School.

[105] From his salary he paid Mr. Albert fortnightly for his weekly transportation services. Assuming he worked 6 days per week as a mason, his weekly transportation costs from Millet to and from Bordelais would be $34.50 or $138.00 monthly. There was no other evidence concerning his living expenses or personal expenses.

[106] The Cricks Funeral bill tendered and other evidence disclose that funeral expenses for the deceased were $4,161.00. In her Statement of Claim she claimed the following as Particulars of Special Damage:

Loss of clothing and shoes	-	$300.00
Funeral expenses - Clothing	-	170.00
- Transport	-	600.00
- Obituaries	-	175.00
- Funeral home	-	3216.00
		$4161.00

[107] Ms. Ismael has also claimed Damages on behalf of the deceased's estate under Article 609 of the Civil Code; Damages on behalf of the deceased's dependant under Article 988 of the Civil Code; Interest pursuant to Article 1009A of the Civil Code on the sum found to be due to her from 17/8/2001 and Costs.

[108] There is no dispute that Ms. Ismael is the sole dependant of the deceased, since she qualifies under Article 988 (3) of The Civil Code being a parent of the deceased; who is one of the persons listed thereunder, for whose benefit the action is given.

[109] Despite Mr. Theodore's assessment of the evidence of Ms. Ismael, concerning the income of the deceased, I accept her evidence that at the date of his death he was earning $2,080.00 monthly. I also find that the weekly sum of $100 he earned for gardening part time with his mother, does not reflect the true value of his services to his mother in her gardening endeavours.

[110] I therefore find that his contributions in assisting his mother amounted to $190.00 monthly at the time of his death.

[111] In determining the multiplier I have borne in mind that his mother was then 38 years and he was 20 years, In the absence of evidence regarding the history of family longevity, I find that he probably would have continued assisting his mother financially after his sister had finished school, for a total of 16 years. While his sister remained in school, his assistance would probably increase so as to meet additional expenses relating to the completion of her education at St. Joseph's Convent School.

[112] I have also borne in mind that there is the probability that the deceased would marry or become involved in a full time relationship with a woman, causing his assistance to his mother to vanish or at least be reduced.

[113] The approach Mr. Theodore has urged me to adopt requires that I calculate her loss of dependency to the trial date, allowing for probable changes in both earnings and living expenses during the period. I should also calculate the rate of dependency after the trial up to the time, I estimate her dependency would come to an end, allowing for the imponderables of life.

[114] Counsel Ms. St. Rose has not suggested the Multiplier that should be used. In England, the current approach used calls for reliance on the Actuarial Tables/Ogden Tables in ascertaining the multiplier or number of years purchased, when assessing awards in Personal Injury and Fatal Accident cases.

[115] In the absence of such tables for this jurisdiction it would seem from Mc. Gregor on Damages 16th ed. para. 36-039 that "the Court is entitled to regard this conventional method of computation as inappropriate and, to arrive simply at an overall figure after consideration of all of the circumstances." Having looked at all of the circumstances and the cases brought to my attention, I consider a multiplier of 16 years to be reasonable.

[116] Using the approach of Matthew J. In Auguste v Maynard supra at page 7 to 8 of his Judgment, the pre-trial dependency from the date of his death to the trial date being approximately 5 years would be 5 x $190 x 12 = $11,400.00. The post trial dependency for the remaining 11 years would be 11 x $200 x 12 = $26, 400.00. The value of the dependency would be therefore $11,400.00 + $26,400.00 = $37,800.00.

[117] Though Mr. Theodore probingly cross-examined Ms. Ismael concerning the Special Damages claimed, I accept her evidence though she provided no receipts for the transportation costs and clothes and shoes costs. Article 988 (10) of The Civil Code states –

> "For the purposes of an action brought under this Article, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought."

[118] I therefore award the sum of $4,161.00 as Special Damages, inclusive of funeral expenses.

SURVIVAL ACTION – ARTICLE 609

[119] Article 609 of The Civil Code states –

> "(1) On the death of any person after the commencement of this Chapter, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his succession . . .
>
> (2) . . . [T]he damages recoverable for the benefit of the succession of that person –

(a) shall not include any exemplary damages

(b) . . .

(c) where the death of that person has been caused by the act or omission which gives rise to the cause action, shall be calculable without reference to any loss or gain to his succession consequent on his death, except that a sum in respect of funeral expenses may be included.

(4) . . .

(5) The rights conferred by this article for the benefit of the successions of deceased persons shall be in addition to and not in derogation of any right conferred on the dependants of deceased persons by the provisions of Article 988, and so much of this Article as relates to causes of action against the successions of deceased persons shall apply in relation to causes of action under the said article as it applies in relation to other causes of action not expressly excepted from the operation of paragraph (1) of this article.

(6) . . ."

[120] The current position relating to the law in England is set out in Mc Gregor on Damages 17th ed. (2003) para 18-011. There, it has been stated that because the decision in Gammell v Wilson [1982] A.C. 27 inexorably led to large awards to the estate of the deceased, there was legislative intervention, "and Section 4 of the Administration of Justice Act 1982 amended section 1 (2) of the 1934 Act

so that it now provides, by a new sub-section (a) (ii) that damages in an action for the benefit of the estate "shall not include any damages for loss of income in respect of any period after the person's death." In addition section 1 of the Administration of Justice Act 1982 eliminates any right of the estate to claim damages for the non pecuniary loss of expectation of life so that the estate may now claim, apart from entirely proper accrued losses of the deceased by way of lost earnings and medical expenses before death, only for his pain and suffering, generally minimal or even non-existent in a fatal injury, and for his loss of amenities of life which may loom quite large as the Courts have given an objective quality to this head of damage."

[121] Learned Counsel Mr. Theodore canvassed his view that this current law of England applies to St. Lucia by virtue of Article 917 A (1) of The Civil Code which states that "from and after the coming into operation of this article the law of England for the time being relating to . . . torts shall mutatis mutandis extend to . . . [St. Lucia] . . ." Mr. Theodore also relied on the decision of our Court of Appeal in Caribbean Home Insurance v Webbs National Ice Cream St. Lucia C.A. No. 4 of 1993 delivered 31/10/04 by Joseph, Monica J.A. (Ag.)

[122] I do not share the view of Learned Counsel Ms. St. Rose and Matthew J. in Auguste v Maynard supra. In my opinion Gammell v Wilson supra is no longer binding authority in the instant case because of Article 917 A (3) of The Civil Code. It states that "Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail."

[123] The Law of England for the purposes of Article 917 A (1) is the current law of England "for the time being relating to . . . torts". Section 917 A (1) is ambulatory. I have pondered on the provisions in Article 609, and in my opinion the current law of England does not conflict with any Article 609 provision. None of these provisions reveal any preference for the common law reflected in Gammell

v Wilson to be applied in survival actions over the current law of England as stated at paragraph 120 above. The local statutory provisions are silent on the point in issue. If there is silence, then there can be no statutory conflict in my opinion.

[124] Consequently, the exercise carried out utilizing the approach of Matthew J in Auguste v Maynard at pages 9 to 10 seems to be no longer relevant in my view, by virtue of the current law of England.

[125] According to the exposition on the current law in Mc Gregor Damages at para. 36-130, the estate in effect steps into the shoes of the deceased and therefore cannot claim for any losses other than those for which the deceased could have claimed had he lived. This is underlined by Article 609 (2) (c) of the Civil Code which provides for the damages to be calculated without reference to any loss to the estate consequent upon the death save and except funeral expenses.

[126] Having already addressed the award for funeral expenses at paragraphs 117-118 above, there only remains the question of interest on the award. On the authority of Cookson v Knowles [1978] 2 All E.R. 604, Jefford v Gee [1970] 1 All E.R. 1213; and Fenton Auguste v Francis Neptune (supra para 100) – the sum of $4,161.00 and $11,400.00 attract the payment of interest at the rate of 3% per annum from the date of the accident up to trial. The interest for 5¼ years at 3% per annum on $15,561.00 = $2,450.85.

[127] Pursuant to Article 1009 A of the Civil Code, I think this a fitting case to order that there shall be included in the sum of $26,400.00 interest at 6% on this full amount for the period between the date of the filing of the action to the date of judgment which is approximately 4 years and 5 months. This interest amounts to $6,996.00 assuming my calculations are correct.

[128] The total amount of damages awarded to Ms. Ismael inclusive of the interest on damages is therefore = $51,407.85.

[129] There will be prescribed costs paid to the Claimant pursuant to PART 65.5 (2) (a) and Appendix B of CPR 2000 being $14,281.57.

CONCLUSION

[130] I therefore enter Judgment for the Claimant in the sum of $51,407.85 and Costs $14,281.57 with interest on this Judgment debt at the rate of 6% from the date of this Judgment until full and final payment.

[131] On the Ancillary Claim, I enter judgment for the Defendant/Ancillary Claimant against the Ancillary Defendant in the sum of $65,689.42 plus costs $17,137.88 being prescribed costs pursuant to PART 65.5 (2) (a) and Appendix B of CPR 2000 with interest at 6% per annum on the judgment debt from the date of this Judgment until full and final payment.

DATED THIS 8TH DAY OF DECEMBER 2006

_____

OLA MAE EDWARDS
HIGH COURT JUDGE