EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**: SLUHCV2014/0799**
Between

Melchisedech Albert
Michael Albert

Claimants

AND
Sherwin Aaron
Sheldon Aaron

Defendants

Before:
Ms. Agnes Actie Master

Appearances:
Mrs. Antonia Auguste-Charlemagne for the claimant
Mr. Dexter Theodore for the defendants

2016: December 14

JUDGMENT

1. **ACTIE M.**: The claimants obtained judgment in default of acknowledgement of service on 8th December 2014 with an amount to be decided by the court. The matter arose from a motor vehicle accident when a vehicle owned by the second defendant and driven by the first defendant collided with a vehicle jointly owned by the claimants. The claimants' vehicle was a total wreck. The matter now comes before this court for an assessment of damages.

Special Damages

2. The claimant pleaded and particularized various heads as special damages for a total sum of $50,501.00. The defendants conceded the sum of $15,500.00 for the insured and uninsured loss claimed but challenged the respective sums of $5600 and $28,860.00 for loss of use claimed by the claimants.

Loss of Use

3. The claimants were taxi drivers and members of the Gros Islet Direct Taxi Company Inc. and the Holiday Taxi Limited. They aver that they were deprived of the use of their vehicle as it was rendered a total loss. The claimants claim for loss of use for the months of May and June 2014 as follows :
    (1) $5600.00 for Sandal Grande Transfers.
    (2) $ 28,860.00 for Holiday Taxi (tours and transfers @ $481.00 a day)
    (3) Transfer of four (4) guests from the scene of the accident to Sandals Grande at US $30.00 equivalent to ECD $81.50

4. The claim for $5600.00 is supported by a letter from the Gros Islet Direct Taxi Company Inc. The sum of $28,860.00 is supported by a letter from the Holiday Taxi Ltd. The claimants were compensated by their insurers on 21st May 2014 in the sum of $30,500.00 for the loss of the vehicle.

5. The claimants aver that identified a suitable replacement vehicle and paid the sum of $32,000.00 on 2nd June 2014 for the purchase of the said vehicle. The vehicle was foreign used vehicle imported by one Ronald Parris. The vehicle was delivered to the claimants on the 17th June 2014.

6. The defendants contend that the claimants are not entitled to the full amount claimed for loss of use. The defendants aver that the accident occurred on the 3rd May 2014 and the claimants were aware by 7th May 2014 that the vehicle was a total loss. The defendants further aver that the claimants were paid by their insurer on the 21st May 2014 and they were under a duty to mitigate their loss. The defendants aver that the claimants could have mitigated their loss by hiring a vehicle for the tours and transfers.

7. The defendants aver that the claimants should be compensated for loss of use for a minimum of two weeks or for no later than 21st May 2014 when they received compensation from their

insurer. The defendants further aver that the claimants are to be paid net profits and not gross profits and allowances to be made for possible contingencies. The defendants in support of their contention cite the decisions of The **Racine [1906]P 273** and **The Llanover [1947] 80.**

8. The claimant/judgment creditors concede that they were compensated by their insurer on 21st May 2014. They aver that they commenced searching for a replacement vehicle from the date of the accident but due to impecuniosity had to wait until they were compensated. They aver that they became aware of a suitable used vehicle that was being imported from Japan to arrive on St Lucia on 30th May 2014. They aver that they paid the purchase price of the said vehicle on the 2nd June 2014. However the vehicle was released from Customs on the 17th June 2014. The claimant avers that the delay in the release of the vehicle was through no fault of theirs but that of the vendor who had an issue with the Customs and Excise department.

Law and analysis

9. The basic rule is that where a profit-earning chattel, which is used by the plaintiff in the course of his/her business is destroyed, the plaintiff is entitled to loss of profits during a reasonable period required to replace the lost article in the market. The cost of a substitute, reasonably hired, may provide the measure of damages[1]. An individual is entitled to damages for the inconvenience due to the loss of use of a profit earning chattel.

10. The text **McGregor on Damages[2]** citing the case of **Liesbosch Dredger v S.S. Edison** states:

> " It is now settled that in assessing damages for total loss of a profitable chattel "that the measure of damages in such cases is the value of the chattel to the owner as a going concern at the time and place of the loss. In assessing the value regard must naturally be had to pending engagements, either profitable or the reverse.

11. The defendants state that the claimants are to be compensated from the date of the accident to the 21st May 2014 when the claimants received their compensation from their insurer. The defendants main contention is that the claimants were under a duty to mitigate their loss and

[1] **Halsbury's** 4th edition[1]
Moore V DER Ltd (1971) 3 All ER 517.
[2]17th Edition at paragraph 32-053
Ch. 32 (1933) AC449

should not be compensated beyond the date on which they were compensated by their insurer.

12. The starting point is that the onus is always on the defendant to compensate the claimant for the loss occasioned by the defendant's breach. The payment made to the claimants by their insurer did not absolve the defendants' obligations to compensate the claimants for the destruction of their profit earning vehicle. The payment made by the claimants' insurer did not enure to the defendants' benefit.

13. The proper approach when dealing with the issue of loss of use in such an instance is to determine whether or not the claimants acted reasonably in the circumstances. The reasonableness of the claimants' action or inaction is a question of fact taking into consideration all the surrounding circumstances.

14. In **Malcolm Joseph** and **Doris Joseph v Alison Charles** Barrow J (Ag) [3]as he then was said

> "The primary obligation, I would think, was on the wrongdoer to pay compensation for the damage that he had caused. It was the defendant who had the primary duty to act promptly. I reject the proposition that because the claimant had comprehensive insurance cover that displaced the defendant's primary obligation. That insurance cover was for the benefit of the claimants, not for the benefit of the defendant. It is settled law that a claimant need not take steps to mitigate his loss by recovering from a third party what may be payable by the third party to the claimant: **The Liverpool (No. 2)** [1963] P. 64.

15. The claimants in response to the defendants contention relies on the dictum of Davies L.J.in **Moore v Der** where he states:

> " Although the plaintiff must act with the Defendant's as well as his own interest in mind, he is only required to act reasonably, and the standard of reasonableness is not high in the view of the fact that the defendant is an admitted wrongdoer….where the sufferer from a

[3] **GDAHCAV 2002/0077**

breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from who have themselves created the emergency. The law is satisfied if a party is placed in a difficult situation by reason of the breach of duty owed to him acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the other party in breach can suggest that other measures less burdensome to him have been taken. Whether the plaintiff has acted reasonably is in every case a question of fact, not law. "

16. It is the evidence that the claimants' vehicle was destroyed on 3rd May 2014 and they immediately thereafter commenced searching for a suitable replacement vehicle but were unable to purchase another vehicle immediately after the accident due to impecuniosity. The claimants were compensated by their insurers on the 21st May 2014 and waited for a vehicle which was expected to arrive in St. Lucia on the 30th May 2014. The claimants paid the seller for in full for the vehicle on 2nd June 2014. The vehicle was released by the Customs Department to the vendor on 17th June 2014. The claimants aver that the delay in the release was through no fault of theirs but that of the vendor. The claimants state that the vehicle underwent minor servicing and maintenance and started work one week later after delivery.

17. I am of the view that the claimants acted reasonably in the circumstances. I accept the evidence that they took immediate action after the accident to identify a suitable replacement of their profit earning vehicle which had been rendered useless by the defendants in the accident. It is the claimants' evidence that they were impecunious and had to await compensation from their insurance company to purchase a replacement vehicle. The defendants have not provided any evidence to the contrary. It is also the claimants' evidence that they paid for the replacement vehicle within 12 days of being compensated by their insurer. I accept the claimants' evidence that the delays and difficulties experienced in the clearance of the vehicle at the Customs Department were matters which were beyond their control.

18. I take into account all the relevant facts and will allow the amounts claimed from the months of May and June 2014. However the sums claimed will be discounted by the various monthly fees and taxes paid by the claimants to the respective associations and for other incidentals as presented in the submissions. I also take cognizance of the fact that a lump sum award is being made for the amount claimed for the daily trips at $481 a day and will discount the figure by 10% to take into account vicissitudes in daily transfers and shuttle services.

19. Accordingly the loss of use claimed in the sum of $5600.00 for the Gros Islet Taxi Association Inc. for transfers is discounted by the monthly membership fees of $30.00; 10 % income tax ; 5 % company dues. $5600 – $60 – $560 – $280 = $4700.00.

20. The loss of use sum of $28,860 claimed for tours and transfers for Holiday Taxi @ $481.00 per day is to be discounted by monthly dues of $50.00; $11.66 being a percentage of the annual fee of $70.00 towards liability insurance; $ 28860–$100-$50-$11.66 = $28,721.66. less 10% This amount will be further reduced by 10% taking into consideration vicissitudes such as cancellations etc --$28,721.66 - $2872.16 = $25,987,84 less $3000.00 for gas = $22, 987.84

21. The sum of $81.50 claimed for the transfer of four (4) guests from the scene of the accident to Sandals Grande is unchallenged and is accordingly allowed.

ORDER

22. In summary it is ordered and directed that the defendants shall pay the claimants Special Damages as follows:-

    (i) Sum as agreed by the parties - $15,500.00

    (ii) Loss of Use:

    (a). Gros Islet Direct Taxi Company

    - Sandals Grand transfers (May and June) - $4700.00

    (b) Holiday Taxi (Tours and transfers (May to June)- $22, 987.84

    (c) Transfer fee for four (4) guests from accident scene to Sandals Grande of $81.50

    Total Special Damages in the sum of $43,269.34

(iii) Prescribed Costs pursuant to 65.5 on the global sum in the sum of $3,894.24

(iv) Interest at the rate of 3% from the date of the accident to the date of assessment of damages and at the rate of 6% from the date judgment until payment.

Agnes Actie
Master