THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: BVIHCV2015/0209

BETWEEN:

LORETTA FRETT
(as Executrix of the Estate of Jeuel Simeon Frett, deceased)

Claimant

and

J.S. ARCHIBALD & CO
(a trading name)

Defendant

Before:
Eddy Ventose Master [Ag.]

Appearances:

Mr. Jamal Smith with Ms. Shanel Taylor with for the Claimant
Mrs. Patricia Archibald-Bowers for the Defendant

2016: November 30
2017: February 14

JUDGMENT

1. VENTOSE, M. [AG.]: This is an unfortunate case of professional negligence. On 20 October 2015, the court entered judgment in default of defence in favour of the Claimant with damages to be assessed. Only the Claimant has filed submissions and authorities on the assessment of damages. The Defendant filed Form 31 on 15 April

2016 indicating that it wished to cross-examine the Claimant and to make submissions to the court and has participated in the assessment to that extent.

Background Facts – The Professional Negligence Claim

2. The background facts as outlined in the statement of case of the Claimant, Ms. Loretta Frett, the widow and Executrix of the Estate of Jeuel Simeon Frett, deceased, are as follows. The Defendant is the trading name of the sole proprietorship owned by Mrs. Patricia Archibald-Bowers providing legal services as barristers and solicitors. The Defendant provided legal services to the Claimant in BVIHCV 2007/0137 *Jeuel Simeon Frett v Attorney General of the British Virgin Islands*, a personal injury claim on the death her husband.

3. The claim was commenced on 7 June 2007 against the British Virgin Islands Health Services Authority but later amended to add the Attorney General. Ellis J by order dated 23 September 2014 listed the matter for trial on 10-12 November 2014. On 5 November 2014, five (5) days before the trial was to start, the Defendant filed an application to be removed from the record. The Defendant made no appearance when the matter came up for trial on 10 November 2014 and the trial judge dismissed the claim. On 4 December 2014, the Defendant made an application to set aside the order of the trial judge dismissing the claim. Mrs. Patricia Archibald-Bowers, counsel on record, argued that she had to leave the territory with her child and had requested an adjourned date for the hearing of the application to remove counsel from the record. The trial judge rejected the application to set aside her order because the Defendant could provide no good reason why she was absent on the 10 November 2014 the first day of the trial.

4. The Claimant avers that the Defendant: (1) represented to the Claimant as having the skills and abilities of barristers and solicitors to prosecute the claim before the courts in the Virgin Islands; (2) owed a duty of care to the Claimant to attend court on 10 November 2014, or to provide the Claimant and the court with a good reason for her absence and taking any such measures as was necessary to avoid the trial due to

absence; and (3) was in breach of that duty as the Defendant failed to inform both the Claimant and the court of any valid reason for non-attendance at court on 10 November 2014 or taking any necessary steps to avoid the trial being aborted. The Claimant also states that as a result of the forgoing, the Claimant has suffered damage by way of payment of legal fees and the benefit of the outcome of the trial.

5. As mentioned earlier, the court entered judgment in default of defence in favour of the Claimant on 20 October 2015 with damages to be assessed. The Defendant's application to set aside judgment in default of defence and to file and serve a defence out of time filed on 18 April 2016 was refused by the court on 3 October 2016.

The Background Facts – The Underlying Claim

6. In BVIHCV 2007/0137 *Loretta Frett v Attorney General of the British Virgin Islands*, the Government of the Virgin Islands employed Jeuel Simeon Frett (the "Deceased"), the husband of Claimant, as a maintenance officer. The claim was originally made against the British Virgin Islands Health Services Authority (the "Authority") and amended later to add the Attorney General. The claim against the Authority was subsequently struck off. The Claimant claimed against the Defendant for breach of contract of employment and/or negligence as a result of which the Deceased in the course of his employment with the Authority developed Mesothelioma, a cancer caused by the Deceased's exposure to asbestos particles at his workplace with the Authority, which eventually resulted in his death.

7. The Claimant avers that in the course of the Deceased's employment he was instructed by an employee of the Health Department of the British Virgin Islands to assist in repairs at the Road Town Clinic (the "Clinic") that included knocking down walls and cutting holes in the ceiling. The Claimant also avers that during that time the Deceased discovered and was informed by the servants of the Authority that the building contained asbestos. The Claimant states that during the period from January to June 2001 the Deceased was frequently exposed to asbestos during his daily tasks of breaking down walls and cutting holes into the ceiling. The Claimant also

states that while performing these tasks the Deceased was exposed to the dust and debris from the building that would cover his skin and he would inhale the dust that contained asbestos. The Claimant avers that no protective clothing was provided by the Authority to protect the Deceased from inhalation and physical exposure to asbestos. The Claimant states that the Deceased became ill in 2004 and in July 2006 he was informed by his medical practitioners that he was suffering from mesothelioma.

8. Cecil Turnbull, the Deceased's immediate supervisor, in his witness statement filed on 24 March 2010, avers that the Deceased was never instructed to carry out work on the roof of the Clinic during the renovation works and that the work carried out by the Deceased consisted of tearing down kitchen cabinets and assisting with the configuration of the reception area of the building. He also avers that the Deceased did not carry out any work that involved cutting holes in the ceiling or knocking down walls of the building. Mr. Turnbull states that as maintenance supervisor he is aware that all maintenance staff received or had access to protective/industrial clothing in the form of overalls and industrial facemasks. Mr. Turnbull also states that the Deceased sometimes refused to wear his facemask because he complained that he was suffocating in them. Mr. Turnbull avers that prior to working for the government of the Virgin Islands, the Deceased worked in the United States of America but was unaware of the type of work with which he was engaged while there.

9. In a witness statement filed on 25 July 2013, Grace-Ann Marie Creque, retired Senior Administrative Officer at the Authority, avers that before the start of the renovation works an assessment was done on the building to determine the presence of, and if so the health risks posed by, asbestos in the building which housed the Clinic. The assessment revealed the presence of asbestos in the corrugated roofing of the building but that no health risks were posed by the presence of the asbestos because as long as the roofing remained undisturbed there was no risk of exposure to asbestos. Ms. Creque also avers that the Deceased was assigned to assist with the first or preliminary phase of the renovation works, which comprised routine

maintenance that was exclusively limited to the expansion of the reception area and the filing room and this aspect commenced in or around June 2000.

10. More specifically, Ms. Creque states that the Deceased assisted in the removal of kitchen cabinets to facilitate the installation of filing cabinets and the partial reconfiguration of the reception area, and that none of these tasks involved work associated with the corrugated roofing of the building which was identified with asbestos. Ms. Creque avers that while the Deceased was performing these tasks, the contract to renovate the Clinic had not yet been awarded. She states that it was the policy of the Community Health Services to provide staff of the maintenance unit which included the Deceased with overalls and industrial facemasks when carrying out their assigned duties, particularly when engaged in work involving wood sanding or exposure to saw dust.

11. The export report of Professor Terrence Seemungal dated 21 July 2013 states that, having reviewed the medical information provided to him, the case for mesothelioma is weak because at least two other diagnoses have not been considered: hepatocellular carcinoma proven on biopsy on 1 August 2006 and adenocarcinoma. Professor Seeemungal states that in his opinion it is extremely unlikely that the Deceased contracted mesothelioma because of having allegedly been exposed to asbestos particles during the course of employment between January and June 2001 while working as a maintenance officer at the Clinic. The evidence Professor Seemungal considered included: (1) a letter from Dr. T. Ibrahim dated 6 May 2005 which states that the Claimant had ascites and following herniorhaphy, microscopic examination of the hernia sac was suggestive of mesothelioma; (2) a liver biopsy dated 23 June 2006 which shows hepatocellular carcinoma; and (3) the death certificate dated 22 September 2006 which shows the cause of death as metastatic carcinoma.

12. The following are derived from the expert report of Professor Seemungal: Malignant mesothelioma is a tumour arising from the mesothelial or submesothelial cells of the

lining of the lung, the lining of the gut, or the lining of the heart. It may occur in other organs with low frequency but over 80 per cent of all cases of all mesotheliomas occur in the lung. The most common risk factor of mesothelioma is asbestos but it is not the only risk factor and that approximately 20 per cent of cases of mesothelioma have no known cause. There is also a long time lag between exposure to asbestos and the development of mesothelioma on average of 30-40 years. There are no known cases of diagnosed mesothelioma due to asbestos with a latency of less than ten (10) years. The diagnosis of malignant pleural mesothelomia is based on histology but it requires the use of immune-histochemistry on biopsy specimens because several other tumours may have the same appearance of mesothelioma on histology. The main tumour markers for use in diagnosing mesothelioma are carcinoembryonic antigen (CEA), Ber-EP4 and calretinin. In addition before a diagnosis of asbestos as a cause of mesothelioma is made a detailed examination of the occupational history of the patient for at least 15 years or longer is necessary.

13. Specifically in relation to the Deceased, Professor Seemungal states as follows: the Deceased was at an appropriate age for consideration of the diagnosis of mesothelioma because he had a history of alleged exposure to the major risk factor, asbestos. The latency in the Deceased's case was only four (4) years. If the Deceased's diagnosis is in fact mesothelioma then the source of his alleged exposure is unlikely to have been his job between 2000/2001; if it is not then the alleged exposure is of little relevance. The evidence of accepted diagnostic methodology for mesothelioma is absent and that the Deceased's case was one of suspected mesothelioma as well as suspected hepatocellular carcinoma and that he could have had one or the other or even both. None of this evidence is contradicted in Professor Seemungal's responses to questions put to him by the Defendant dated 29 July 2014.

14. The examination and cross-examination of the Claimant focussed on whether the sum of US$80,00.00 allegedly paid to the Defendant for legal services was for the negligence claim or included other matters. The Claimant during examination states that Dr. Joseph Archibald Q.C. and Ms. Anthea Smith dealt with two matters on her

behalf, namely: (1) the probate of the estate of her late husband; and (2) the negligence claim. There was another matter the Defendant states relating to Olga Gordan. From the cross examination, it was clear that the Claimant was billed by the Defendants for the following services: first, the probate of the estate of the Deceased, second, the claim by Olga Gordan (the sister of the Deceased), and third, the claim against the Attorney General and British Virgin Islands Health Services Authority. The Claimant could not recall whether she was billed separately for those items and whether this was stated on the receipts she received. The Claimant could not produce the receipts she received for the total amount of US$80,000.00 she claims she paid to the Defendant for various legal services. However, the Claimant states she remembers making four (4) payments of: US$20,000.00; US$30,000.00, and two payments of US$15,000.00, totalling US$80,000.00.

15. In a letter to Mrs. Patricia Archibald-Bowers dated 2 October 2014 from the Claimant but "signed" by her daughter, Stacy Winter, the Claimant states that she writes out of concern for the progress of the matter, the subject of the claim which was commenced against the Attorney General of the British Virgin Islands. In that letter, the Claimant seeks advice about the status of her matter in light of the death of Dr. Joseph Archibald Q.C. who had previously handled the case. The Claimant recounts to Mrs. Archibald Bowers the circumstances in which the Authority was struck out as a defendant in the matter and the preparations that needed to be made for trial that was scheduled to take place on November 10-12 2014. The Claimant also notes that she has paid over US$75,000.00 to the Defendant for legal services.

The Applicable Legal Principles

16. The law to be applied in relation to negligence of solicitors or attorneys and the measure of damages to be paid as a result is well settled. Lord Evershed MR in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, 575 stated as follows:

> In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.

17. In the same case, Parker LJ stated

> If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remain to be surmounted. In other words, unless the court is satisfied that her claim was bound to fail, something more than nominal damages ought to be awarded.

18. The court must examine the factual matrix of the case to determine whether the Claimant lost something of value because of the negligence of the Defendant or whether the claim is bound to fail. The court must determine whether the Claimant has lost a right of value or whether the Claimant has substantial prospect of success. The applicable principles were succinctly stated by Sir Murray Stuart-Smith in *Hatswell v Goldbergs (a firm)* [2001] EWCA Civ 2084; [2002] Lloyd's Rep PN 359:

> [48] The process for the court is a two-stage process. First, the court must be satisfied that the claimant has lost something of value. An action which is bound to fail (or … has no substantial prospect of success and is merely speculative) is not something of value. It is only if the claim passes that test that the court has to evaluate in percentage terms of the full value of the claim what has been lost.

19. The relevant principles were summarised by the court in *Mount v Barker Austin (a firm)* (1998) 14 LDAB 98, [1998] PNLR 493 (at 510D to 511C) as follows:

(1) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value ie that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success.

(2) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

(3) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

(4) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure.

20. The most recent exposition of the principles as outlined in *Chweidan v Mishcon de Reya Solicitors [*2014] EWHC 2685 (QB) are as follows (at [94]):

i) The Claimant must prove that the claim had a real and substantial, rather than merely a negligible prospect of success.

ii) If the court decides that the Claimant's chances were more than merely negligible then it will have to evaluate them. That requires the court to make a realistic assessment of what would have been the Claimant's prospects of success had the original litigation been fought out.

iii) This means that the court should assess the likely level of damages which the Claimant would most probably have recovered had the underlying action proceeded to judgment and then apply an appropriate fraction to that sum to reflect the uncertainties of recovering such damages.

iv) In some loss of a chance cases it may be appropriate to view the prospects on a fairly broad brush basis whilst in other cases it may be correct to look at the prospects in greater detail. In my judgment, whilst a broad brush approach is appropriate here the evidence and arguments in relation to the issues that would have arisen in the action have been canvassed extensively and clearly, enabling a more detailed approach than might otherwise be adopted.

v) On the other hand the oral and documentary evidence available is more limited than what would have been available in the employment tribunal action and I have, obviously, not heard from witnesses who would have given evidence in that action. It is also possible that the claim might have settled. These features must be factored into any assessment and it would be wrong in any event, to conduct a trial within a trial or to make any firm findings in those circumstances as to what the EAT or an employment tribunal would have decided.

vi) If there are "separate hurdles", the percentage prospects on each should be multiplied together to give an overall lower percentage prospect.

21. The first question that must be determined is whether the Claimant has lost something of value i.e. that her claim had a real and substantial rather than merely a negligible prospect of success. It is only if the Claimant is successful on this hurdle do the other questions arise for determination.

The Claimant's Submissions

22. Counsel for the Claimant submits that there was a real issue for trial and it was not fanciful but there was a realistic prospect of success in this particular case. Counsel also submits that the court must then determine the percentage of the overall prospect of success in the case and that the report of the court approved expert may shed some light on the percentage of success. Counsel states that the critical aspect of the case was the length of time that the Deceased worked at the Clinic where it is alleged that he contracted mesothelioma from the asbestos. Counsel also states that looking at the evidence the likelihood of success would be about 50% or 33% at the lowest end.

23. Counsel submits that the gross salary of the Deceased as mentioned above was US$16,254.00 per year. Sharlene David in an affidavit sworn on 12 February 2016 avers that via letter of appointment dated 19 May 2003, the Deceased gross salary was $16, 254.00 per year. Using a multiplicand of US$16,254.00 and a multiplier of 16, Counsel submits that the loss of income would be US$261,364.32, of which 33% should be awarded. Counsel correctly acknowledges that since no special damages were pleaded none can be awarded for medical expenses to the Claimant on behalf of the Deceased. Counsel submits that US$60,000.00 should be awarded for pain and suffering and loss of amenities.

24. The submissions of counsel do not assist the court in determining the core issue in this case, which is whether the Claimant has lost something of value. Only if the Claimant has lost something of value must an assessment be done of the prospects of success of the underlying negligence claim. The Claimant has therefore not proven its case at all. In any event, the court will make its own assessment as to whether the Claimant has lost something of value because of the negligence of the Defendant.

What has the Claimant by the Defendant's negligence lost?

25. The Claimant's case is that the Deceased, an employee of the Authority, contracted mesothelioma because of his exposure to asbestos while working at the Clinic during the period January to June 2001. The evidence of Mr. Turnbull was that the Deceased was never instructed to carry out work involving the roof of the Clinic during the renovation works and that the work carried out by the Deceased consisted of tearing down kitchen cabinets and assisting with the configuration of the reception area of the building. This was corroborated by Ms. Creque who stated that the work on the roof that contained the asbestos commenced after the work with which the Deceased was engaged was completed.

26. Both Mr. Turnbull and Ms. Creque made clear that it was the usual practice to provide employees with protective clothing, including overalls and facemasks. Mr. Turnbull stated that the Deceased refused to wear his facemask on occasions. In addition Ms. Creque stated that an environmental assessment of the building was done to determine whether asbestos was present in the building, and that the conclusion was that it was present but that no danger was posed by the presence of the asbestos as long as the corrugated roofing that contained the asbestos remained undisturbed. She made clear that it was the contractor's workmen who carried out all of the major aspects of the renovation works that included removing the roofing and not employees of the Authority, including the Deceased.

27. Professor Seemungal's conclusion was that: (1) the case for mesothelioma is weak because at least two other diagnoses have not been considered: hepatocellular carcinoma proven on biopsy on 1 August 2006 and adenocarcinoma; and (2) it is extremely unlikely that the Deceased contracted mesothelioma because of having allegedly been exposed to asbestos particles during the course of employment between January and June 2001 while working as a maintenance officer at the Clinic.

28. The first reason given by Professor Seemungal is persuasive since there is no medical evidence that conclusively diagnoses the Deceased with mesothelioma. As Professor Seemungal states in his report, there are well known tumour markers for

mesothelioma and none of them were present in any of the reports presented to him. The letter from Dr. T Ibrahim, which states that microscopic examination of the hernia sac was suggestive of mesothelioma, cannot be taken as a diagnosis in the strict sense. Diagnostic methods comprise the following steps: (a) examination and data gathering; (b) comparison of the data with normal values; (c) recording any significant deviation; and (d) attributing the deviation to a particular clinical picture (the deductive medical or veterinary decision phase or the diagnosis for curative purposes *stricto sensu).* Any claimed method, to constitute a diagnostic method, must contain all of the four (4) steps outlined above (See *CYGNUS/Diagnostic method* G 01/04 [2006] EPOR 15). Professor Seemungal's conclusion that the evidence of accepted diagnostic methodology for mesothelioma is absent is unassailable.

29. In addition, Professor Seemungal states that the Deceased's indications are also consistent with two other diagnoses namely, hepatocellular carcinoma proven on biopsy on 1 August 2006 and adenocarcinoma. It is of critical importance that the death certificate dated 22 September 2006 shows the cause of death as metastatic carcinoma not mesothelioma. If the Deceased was exposed to asbestos as alleged, the latency period of four (4) years is relatively short in light of evidence which shows that: (1) the average time lag between exposure to asbestos and the development of mesothelioma is 30-40 years; and (2) there are no known cases of diagnosed mesothelioma due to asbestos with a latency of less than ten (10) years. Taking into account these considerations, Professor Seemungal's conclusion that, if the Deceased's diagnosis is in fact mesothelioma, then the source of his exposure is unlikely to have been his job between 2000/01, is also unassailable.

30. The evidence outlined above revealed: (1) it was an open question whether the Deceased was engaged in work that put him in direct contact with the corrugated roof that contained the asbestos; (2) there was no clear diagnosis of mesothelioma; (3) if the cause of death of the Deceased was mesothelioma, it is highly unlikely that it was caused by his work during the six-month period at the Clinic because: (a) the latency period of four (4) years is far from the average of 30-40 years; and (b) there has not

been any known case with a latency period of under ten (10) years. Applying the principles set out at [16]-[21], the Claimant has not shown that she has lost something of value because of the negligence of the Defendant, as the court is of the considered opinion that the claim was one that was bound to fail. No issue of possible settlement of the matter arises because the matter was set down for trial at which date the Defendant did not appear. The loss of chance is assessed at nil. Consequently, it is not necessary for me to go on to the second stage to make a realistic assessment of what would have been the Claimant's prospects of success had the original litigation against the Attorney General been fought out.

31. The Claimant also avers that she has suffered damage by the payment of legal fees and the benefit of the outcome of the trial. The latter point namely "the benefit of the outcome of the trial" was examined earlier. Counsel for the Claimant states that the principle of assessment of damages for breach of contract is that "as long as the Claimant has suffered damage that is not too remote, she must, so far as money can do it, be restored to the position she would have been had the particular damage not occurred". Counsel submits that the Claimant paid in excess of US$80,000.00 in legal fees to the Defendant and that that sum "should be the only recoverable sum for breach of the contract".

32. If one goes back to basic principles of the appropriate measure of damages for breach of contract, it would be clear that the claim for the loss of legal fees in this case is misconceived. The purpose of the award of damages for breach of contract is to put the Claimant in the position (as far as money would permit) she would have been in had the contract been performed in accordance with its terms. The question then is: in what position would the Claimant have been had the Defendant attended the trial and prosecuted the Claimant's matter? The simple answer is that the Claimant would have had the opportunity of having her matter proceed to judgment with the possibility of an award of damages. Of course, the Claimant would not know until judgment what the outcome would be, but that is all she could possibly expect had the Defendant properly performed its contractual obligations to her. And, the loss

of opportunity is exactly the measure that is provided for in the negligence claim. This is a case where the measure of damages in contract and tort are the same, that is, to compensate the Claimant for the lost opportunity to receive an award of damages at judgment in her matter. This is so because the breach of contract occurred as a result of the negligent performance by the Defendant.

33. The decision of the Court of Appeal of England and Wales in *Anglia Television v Reed* [1971] 3 All ER 690, which was relied in support of an alternative measure of damages by the Claimant, is not applicable to the situation with which we are presented here. It will be remembered that in *Anglia Television*, the Claimant sought to recover expenses that it incurred before the contract had been entered into. Lord Denning MR stated the principle (at 692) as follows:

> If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken.

34. In the case at bar, there was on-going performance of the contract until the point of breach whereas in *Anglia Television* there was no performance so the principle articulated by Lord Denning MR does not apply. It is doubtful in any event whether the payments (the consideration) made under the contract with the Defendant amounts to "wasted expenditure" which usually arises where one party in reliance on the contract had incurred some expense "related" to the contract itself. In *Anglia Television*, in relation to a contract to employ an actor in a television play, the Court of Appeal held the fees paid to designers, directors, other actors and staff were recoverable even though they were pre-contractual expenditure. Alternatively, in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 37, in respect of a contract to purchase the right to salvage a wreck, the High Court of Australia held that the cost of preparing an abortive salvage operation was recoverable as post contractual expenditure.

35. It seems to me wrong in principle to allow the Claimant to recover the sum of US$80,000.00, because she has received some of the contractual performance that she paid for. Her case is simply that in light of the fact that the judge dismissed the matter (because of the negligence of the Defendant) all monies paid by her to the Defendant should be repaid. The reliance interest measure of damages for breach of contract is not suited for this type of case. The Claimant did not argue that there was a total failure of consideration under the contract or unjust enrichment by the Defendant because both of these would be inapplicable on the facts. The action is only available where the Claimant has not received any of the promised contractual performance or the contract is itself void, for example, because of illegality. There was no total failure of consideration because the payments made by the Claimant to the Defendant were for the legal services the Claimant received to date. The claim for repayment of the US$80,000.00 therefore fails.

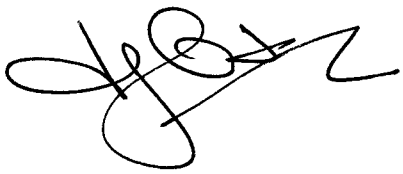
Conclusion

36. For the reasons set out above, the order of the court is as follows:

(1) The Claimant is awarded nominal damages in the sum of US$500.00.

(2) The Claimant is entitled to prescribed costs based on the award of damages of US$500.00.

(3) The Claimant is entitled to interest on the sum of US$500.00 at a rate of 5% from the date of assessment until payment.



Eddy Ventose

Master [Ag.]