EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2018/0017

BETWEEN:

ST. LUCIA ELECTRICITY SERVICES LIMITED
also known as LUCELEC

Appellant

and

VANYA EDWIN-MAGRAS

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Vicki Ann Ellis — Justice of Appeal [Ag.]

Appearances:

Mr. Mark Maragh and Ms. Shevron Pierre for the Appellant
Ms. Rowana Kay Campbell and Mr. Peter Marshall for the Respondent

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2019: April 10;
December 12.

Civil appeal — Negligence — Approach of appellate court to trial judge's findings of fact and assessment of credibility of witnesses — Causation — Whether loss suffered by respondent caused by appellant's negligence — Damages — Whether judge erred in awarding damages on the basis of the cost of replacement — Interest — Whether judge erred in awarding respondent interest on damages for the consequential loss of goods

The appellant, St. Lucia Electricity Services Limited ("Lucelec") is the exclusive supplier of electricity in Saint Lucia. The respondent, Mrs. Vanya Edwin-Magras ("Mrs. Magras"), was at all material times a customer of Lucelec. On 16th June 2015, there was an interruption in the supply of electricity to Mrs. Magras' home and as a result, her television, a number of fluorescent light bulbs, her surge protector and her Viking refrigerator (the "refrigerator")

were damaged. Lucelec effectively repaired the television and performed certain repairs to the refrigerator. However, the refrigerator never returned to the normal cooling temperature. Mrs. Magras therefore submitted a claim to Lucelec for compensation for the replacement of her surge protector, bulbs and the refrigerator, as well as for electrical expenses incurred and spoilt food connected with the electrical fault. Lucelec agreed to compensate her for all items; however, it stated that the repairs effected should have returned the refrigerator to a functioning state and declined to replace it. As a consequence, Mrs. Magras claimed damages for negligence against Lucelec arising from the electrical fault, which she said caused her refrigerator to not cool properly. Lucelec denied the claim. It contended that the failure of the refrigerator to cool properly predated the electrical fault and was caused by a thermostat retrofitted to it that was not part of the manufacturer's design.

The learned judge granted Mrs. Magras' claim. He found that, on a balance of probabilities, the electrical fault caused the refrigerator to not cool properly and held Lucelec liable in negligence. He awarded Mrs. Magras $30,369.03 representing the pre-incident value of the refrigerator, $2,660.04 representing the replacement cost of the surge suppressor and bulbs as well as compensation for electrical inspection and works, catering fees and food spoilage. He also awarded Mrs. Magras interest on the global sum at the rate of 6% from the date of the filing of the claim, until payment.

Lucelec, being dissatisfied with the decision of the learned judge, appealed. The following issues arise for this Court's determination: (i) whether the learned judge erred in finding that the electrical fault caused Mrs. Magras' refrigerator to not cool properly; (ii) whether the learned judge erred in awarding damages on the basis of the cost of replacement; and (iii) whether the learned judge erred in awarding Mrs. Magras interest.

Held: allowing Lucelec's appeal to the extent that the learned judge erred in his assessment of damages and remitting the matter to the High Court for assessment of damages; ordering Mrs. Magras to pay Lucelec's costs on the appeal of 40% of two-thirds of the applicable prescribed costs in the court below following on the assessment of damages, that:

1. An appellate court is loath to disturb the findings of fact of a trial judge but will do so if it has been shown that the trial judge was wrong, having had the opportunity to observe and hear the witnesses. In assessing credibility, a trial judge should be reluctant to employ personal characteristics of a witnesses, especially when the characterisation is unsupported by cogent evidence and based on surmise. An assessment of other available independent or objective evidence to support the witness is more reliable. In this case, the determination of whether the electrical fault caused Mrs. Magras' refrigerator to not cool properly called ultimately for findings of fact by the trial judge. The issue had to be resolved by a careful scrutiny of all of the evidence, an assessment of the credibility of the witnesses, and by drawing such inferences as were reasonable in the circumstances. There is no doubt that the learned judge's findings were based on the totality of the evidence before him and Lucelec has not demonstrated that the judge did not take proper advantage of having seen and heard the witnesses. Accordingly, there is

no basis upon which this Court can properly interfere with the judge's conclusion that, on a balance of probabilities, the electrical fault caused the refrigerator to not cool properly.

Watt (or Thomas) v Thomas [1947] 1 ALL ER 592 applied; Camden v McKenzie [2008] 1 Qd R 39; Armagas **Ltd v Mundogas S.A. ('The Ocean Frost')** [1985] 1 Lloyd's Rep. 1 applied.

2. The cost of replacement is not the appropriate measure of damages where it is unreasonable, in all the circumstances, to demand an exact replacement, such as where it is well in excess of the value of what was destroyed and where a reasonable substitute is available. It is quite clear from the judgment that the learned judge awarded damages on the basis of the cost of the new refrigerator purchased by Mrs. Magras sometime after the loss was incurred, which was in excess of the value of the damaged refrigerator. The judgment does not acknowledge that the appropriate value is that which a willing buyer would be prepared to pay to a willing seller for a similar appliance immediately prior to the loss. The learned judge therefore erred in using the cost of the new refrigerator as the basis of the assessment. This error was exacerbated by the learned judge thereafter assessing a depreciated value which was unsupported by the appropriate evidence. Accordingly, there is sufficient basis which would justify this Court setting aside the learned judge's award of damages.

   Liesbosch Dredger v S.S. Edison [1933] A.C. 449 applied; Voaden v Champion and the Owners of the Ship 'Timbuktu' [2000] All ER (D) 408 applied; Ucktos v Mazzetta [1956] 1 Lloyd's Rep 209 applied; Southampton Container Terminals Ltd v. Hansa Schiffahrts Gmbh (The Maersk Colombo) [2001] EWCA Civ. 717 applied.

3. A claimant who has been deprived of the value of his chattel is entitled to be awarded interest on the judgment sum even though he sought damages for the consequential loss of the goods. Further, the court has the discretion to award interest on damages to a claimant from the date of the loss to the date of judgment, even where prejudgment interest is not specifically provided for by statute. In this case, there is no basis for concluding that the learned judge erred in his award of interest.

   Article 1009A of Civil Code of Saint Lucia, Cap. 4.01, Revised Laws of Saint Lucia 2015 applied; Metal Box Co Ltd. v Currys Ltd. [1988] 1 W.L.R. 175 applied; Adamovsky et al v Malitskiy et al BVIHCMAP2014/0022 (delivered 3rd February 2017, unreported) followed; **Steadroy Matthews v Garna O'Neal** BVIHCVAP2015/0019 (delivered 16th January 2018, unreported) followed.

JUDGMENT

[1] ELLIS JA [AG.]: This is an appeal from the decision of the learned trial judge in which he found the appellant liable for a loss and damage suffered when an electrical fault interrupted the supply of electricity at the home of the respondent, causing damage to her electrical appliance to wit: a Viking refrigerator (the "refrigerator"). The learned trial judge awarded the respondent the sum of $30,369.03 representing the pre-incident value of the refrigerator, as well as $2,660.04 representing the replacement cost of the surge suppressor and bulbs as well as compensation for electrical inspection and works, catering fees and food spoilage. The learned judge also awarded the respondent interest on the global sum at the rate of 6% from the date of the filing of the claim, until payment.

[2] In advancing this appeal, the appellant has sought to challenge both findings of fact and law. In considering these challenges, it is necessary to set out the relevant background.

The Background

[3] The respondent was at all material times a customer of the appellant who is the exclusive supplier of electricity in Saint Lucia. On 16th June 2015, there was an interruption in the supply of electricity to the respondent's home and as a result of this electrical fault, her Sony 46" flat screen television, a number of fluorescent light bulbs, her surge protector and her Viking refrigerator were damaged.

[4] The appellant effectively repaired and returned the flat screen television. The appellant also performed certain repairs to the refrigerator. The appellant's case is that the fault which occurred caused only a burnt fuse to the refrigerator which was replaced and which should have returned the appliance to a functioning state. However, the respondent complained that the refrigerator never returned to the normal cooling temperature between 35-40 degrees Fahrenheit.

[5] At trial, the appellant contended that the continued malfunctioning of the refrigerator was not attributable to the electrical fault. Instead, the appellant asserted that the malfunction predated the electrical fault and was likely due to the retrofitted thermostat which had been installed after purchase. The appellant argued that the thermostat was not purchased from the manufacturer but from distributors in Puerto Rico.

[6] Following repeated calls to the appellant, the respondent eventually submitted a claim for compensation for the replacement of her surge protector, bulbs and the Viking refrigerator. She also claimed compensation for electrical expenses incurred and spoilt food connected with the electrical fault. The appellant agreed to compensate her for all items; however it declined to replace the refrigerator.

[7] In the prelude to the trial, the learned trial judge entertained a number of preliminary objections advanced by the counsel for the appellant. There were a number of minor challenges raised in regard to the admissibility of evidence; however, the critical objection was twofold. First, on the application to strike out the claim as disclosing no reasonable cause of action and no reasonable prospect of success, the learned trial judge found that the respondent had a cognisable claim and that there was no basis for strike out. The learned trial judge based this decision on the fact that the appellant's pleadings accepted that there was an electrical fault that caused a burnt fuse to the respondent's refrigerator, which had been replaced, thereby putting the appliance in the condition in which it was prior to the fault. The learned trial judge ruled that this relieved the respondent of the necessity of establishing that the transformers were not working properly. According to the learned trial judge, the central remaining issue was whether the electrical fault caused the refrigerator to malfunction even after the burnt fuse was replaced, or whether, as contended by the appellant, the cooling problem predated the electrical fault.

[8] Counsel for the appellant also objected to the respondent's reliance on the doctrine of *res ipsa loquitur* as an answer to the appellant's assertion that there was no sufficient cause of action disclosed on the respondent's pleadings. The learned trial judge ruled that a respondent could rely on this doctrine despite that fact that it was not pleaded; however, he ruled that the respondent could not rely on this maxim in the circumstances of this case because the appellant had in fact offered an explanation for the failure of the refrigerator to properly cool.

[9] At paragraphs 4 and 5 of the judgment, the learned trial judge summarised the issues which arose for determination. At paragraph 4 of the judgment, he noted:

> "In summary, Mrs. Magras claims damages in negligence against Lucelec arising from the electrical fault, which she says caused her Viking refrigerator to not cool properly. Lucelec denies that it was negligent and says that the failure of the Viking to cool properly pre-existed the electrical fault and was caused by a thermostat retrofitted to it that was not part of the manufacturer's design."

The Liability Issue

[10] The determination of this appeal therefore rests on two main issues. First, whether the loss suffered by the respondent can be ascribed to the appellant's negligence and second, whether this Court is empowered to set aside the learned trial judge's decision on a question of fact.

[11] A claimant is entitled to succeed in a claim in negligence where he is able to demonstrate with cogent proof that the defendant owed a duty to the claimant and that the breach of such duty caused injury to him. In discharging the burden of proving the defendant's negligence, the claimant must show the existence of a sufficient relationship of "proximity" or "neighbourhood" between the defendant and himself and the foreseeability of damage by reason of the defendant's negligent performance resulting in injury to the claimant.[1]

[1] See: Caparo Industries Plc. v Dickman [1990] 1 ALL ER 568; Brown v Rolls Royce Ltd. [1960] 1 ALL ER 577; Whitehouse v Jordan [1981] 1 ALL ER 267.

[12] In this case, it appears to be common ground between the parties that they were engaged in a contractual relationship, that is, one for the provision of electricity. It follows that the appellant would have owed the respondent, its customer, a duty to take reasonable care so as to ensure that she suffered no injury. At trial therefore, the question for determination was whether the appellant breached the duty of care it owed to the respondent.

[13] From the pleadings and the appellant's own evidence before the learned trial judge, it is apparent that the appellant's case did not proceed on the basis that there was no negligence on the part of the appellant. In fact, the appellant admitted that there was an interruption in the supply of electricity to the respondent's residence which occurred on 16th June 2015 and which caused some damage to the respondent's refrigerator but which was repaired and should have restored the appliance to full function. The appellant's defence of this claim hinged rather on the question of causation and this strategic defence remained unchanged in the appellant's pre-trial memorandum.

[14] The question of whether liability on the part of the appellant has been established is one of fact and in the context of this appeal, this Court must determine whether it should review and disturb the learned trial judge's findings and conclusions as to the cause of the malfunction of the refrigerator's cooling system and impose its own conclusions.

[15] An appellate court is always loath to disturb the findings of a trial judge. An appellate court will however do so if it has been shown that the trial judge was wrong in law or obviously wrong on the facts having had the opportunity to observe and hear the witnesses. The correct approach to be applied was propounded by Lord Thankerton in Watt (or Thomas) v Thomas[2] at page 587 of his judgment:

[2] [1947] 1 ALL ER 582 at p. 587.

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the **witnesses could not be sufficient to explain or justify the trial judge's** conclusion.
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> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[16] Further defining the circumstances at (3), Lord Thankerton explained that:

> "The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone plainly wrong. If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge."

[17] Watt (or Thomas) v Thomas provides the following practical guidance:

> "It may be well to quote the passage from the opinion of Lord Shaw in Clarke v Edinburgh & District Tramways Co. Ltd. (1), which was quoted with approval by Viscount Sankey L.C. in Powell v Streatham Manor **Nursing Home (2). Lord Shaw said:** 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put it to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'."

[18] This dicta has since been applied by this Court in a multitude of cases including Grenada Electricity Services Limited v Isaac Peters,[3] Chiverton Construction Ltd et al v Scrub Island Group Ltd[4] and Delta Petroleum (Caribbean) Limited v British Virgin Islands Electricity Corporation.[5] These authorities all make it clear that an appellate court should attach the greatest weight to the opinion of the judge who saw the witnesses and heard the evidence, and consequently should not disturb a judgment of fact unless satisfied that it is unsound.

[19] In this appeal, the appellant submitted that it was not open to the learned trial judge to consider matters which were unsupported by the pleadings or the evidence. The appellant contended that the learned trial judge erred in fact and in law when he assessed the respondent's credibility on the basis that she was a "woman of means" and had "obvious wealth" and therefore had no reason or motive to lie. The appellant submitted that this conclusion was not supported with any cogent evidence and therefore ought not to have been considered by the court. The appellant contended that the only fact relied on by the learned trial judge to support his conclusion is that the respondent resided in Cap Estate. No evidence was led or adduced in relation to the value of property in that area, no evidence was led or adduced in relation to the respondent's income and no evidence was led or adduced in relation to the respondent's personal means.

[20] Counsel for the appellant further submitted that the learned trial judge erred when he assumed that the only motive that the respondent could have to be dishonest, was financial. He submitted that the learned trial judge paid undue regard to the assertion that the respondent was wealthy and, in so doing, came to the erroneous conclusion that she had no motive to lie and that her evidence was therefore to be preferred. Counsel concluded that in such circumstances, an appellate court is

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[3] GDAHCVAP2002/0010 (delivered 28th January 2003, unreported).
[4] BVIHCVAP2009/0028 (delivered 19th September 2011, unreported).
[5] BVIHCVAP2016/0003 (delivered 8th May 2017, unreported).

entitled to evaluate the evidence and determine whether any such conclusions can be made or what inferences, if any could properly be drawn.[6]

[21] A number of factors may inform a judicial determination as to who is to be believed and why. The late Lord Bingham in his article The Judge as Juror: The Judicial Determination of Factual Issues attempted to list the main factors of tests:[7]

> "Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue…more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:
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> (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
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> (2) the internal consistency of the witness's evidence;
>
> (3) consistency with what the witness has said or deposed on other occasions;
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> (4) the credit of the witness in relation to matters not germane to the litigation;
>
> (5) the demeanour of the witness.
>
> The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.
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> The fourth test is perhaps more arguable….The underlying theory is that if a witness is willing to lie or can be shown to have acted dishonestly in one matter, he will be willing to lie or act dishonestly in another."

[22] In his article, Lord Bingham also quoted the following succinct statement made by Lord Pearce in Onassis v Vergottis:[8]

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[6] Jewel Thornhill v The Attorney General SLUHCVAP2012/0035 (delivered 16th April 2015, unreported).
[7] Published in "The Business of Judging", Oxford 2000, reprinted from Current Legal Problems, Vol 38, (1985) pp. 1 – 27.
[8] [1968] 2 Lloyds Rep 403 at p. 431.

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on a balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

[23] Another useful judicial statement on this is found in Lord Goff's judgment in Armagas Ltd v. Mundogas S.A. ('The Ocean Frost'):[9]

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the <u>objective facts and documents</u>, to the **<u>witnesses' motives</u>**, and to the <u>overall probabilities</u>, can be of very great assistance to a judge in ascertaining the truth." (emphasis mine)

[9] [1985] 1 Lloyd's Rep. 1, p. 57.

[24] It follows that where a court is called upon to assess the credibility of a witness, the judicial officer has a number of effective tools at his disposal. Contemporaneity, consistency, probability and motive are obvious key criteria and generally considered to be more reliable than demeanour which can be distorted through the prism of prejudice.[10] A further caution is advocated by the late Lord Bingham in his article The Judge as Juror: The Judicial Determination of Factual Issues:

> "An English judge may have, or think he has, a shrewd idea how a Lloyd's broker, or a Bristol wholesaler, or a Norfolk farmer might react in some situation which is canvassed in the course of the case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ship's engineer, or a Jugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possible assume that men of different nationalities, educations, trades, experience, creeds and temperament would act as he might think he would have done or even – which may be quite different- in accordance with his concept of what a reasonable man would have done."

[25] I am satisfied that there is some merit in the challenge levied against the learned judge's assessment of the respondent's credibility. In any trial which involves the adjudication of facts, a trial judge has the unenviable task of deciding whose evidence, and how much evidence, to accept. This task presents inherent difficulties and a trial judge should always be reluctant to employ personal characteristics of a witness (such as wealth, social background and status, sex, place of origin or residence) in assessing credibility. This is especially so when the characterisation is unsupported by cogent evidence and based on surmise. Much more reliable is an assessment of what other independent or objective evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence which is available. In the words of Keane JA in Camden v McKenzie:[11]

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[10] Wetton (as Liquidator of Mumtaz Properties Limited) v Ahmed and others [2011] EWCA Civ 610, per Lady Justice Arden at paras. 11, 12 and 14.

[11] [2008] 1 Qd R 39 at para. 34.

> "The rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."

[26] However, an appellate court mindful of its remit, must consider whether the trial judge's conclusions as to liability should be disturbed on the basis of his assessment of the respondent's credibility. As Viscount Simon observed in Watt (or Thomas) v Thomas:

> "...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[27] In this case, it has not been demonstrated that the trial judge did not take proper advantage of having seen and heard the witnesses. Neither is it suggested that he did not assess the demeanour of the witnesses. Rather, what is argued is that the reasons given by the trial judge for the findings of fact which are the subject of the appeal are unsatisfactory.

[28] In examining the case under review, there can be no doubt that conflict exists between the evidence of the appellant's witnesses and that of the respondent's. In such circumstances, the trial judge is obliged to weigh the totality of the evidence and elicit such inferences as are reasonable in all the circumstances. This requires a close examination of the evidential material which informed the

decision of the trial judge. Critical in this context was the appellant's pleaded case which conceded not only that there was an electrical fault which occurred on 16th June 2015, but that it caused a burnt fuse in the respondent's refrigerator which had to be replaced, in an attempt to put the refrigerator in the pre-fault condition. However, the respondent contended that notwithstanding the purported repairs, the appliance never returned to the normal (pre-fault) cooling temperature. Therefore, in this appeal, the critical question was whether, on a balance of probabilities it was open to the learned trial judge to conclude that the electrical fault which occurred on 16th June 2015, caused the respondent's Viking refrigerator to stop cooling properly.

[29] The litigation strategy employed by the appellant involved raising doubts as to the functioning of the refrigerator prior to the electrical fault. The appellant relied heavily on the evidence of Mr. Darryl Clyne, a refrigeration technician whose report provided:

> "…A thermostat which is not part of the original design of the refrigerator was installed in the refrigerator. This thermostat appears to be a retrofit and was connected to the wires which were supposed to have been assigned to the sensors which are supposed to be controlled by the circuit board. In other words, the retrofitted thermostat, and not the original sensors, was found to be connected to the circuit board.
> Even after adjusting the temperature setting on the retrofit thermostat, the temperature did not reduce sufficiently.
> The fridge was low on Freon - After adding more Freon however, a temperature no lower than 44.2 degrees Fahrenheit was attained…
>
> Conclusion
> It was puzzling that after replacing the circuit board, and adding Freon up to the required level, the fridge still was not cooling to a satisfactory temperature of 38 degrees Fahrenheit.
>
> However, the discovery that a retrofitted thermostat and not the original sensors, is connected to the circuit board and the fact that the adjustment of its settings proved ineffective, begs the question as to whether this configuration (which is not the original design) permitted the fridge to attain the optimal temperature before the circuit board was damaged."

[30] It is apparent that Mr. Clyne was not examined under oath. His report was not tested in oral examination and the learned trial judge was entitled to take this factor into account in determining what, if any weight should be attached to it.

[31] At paragraph 15 of the judgment, the learned trial judge treats with Mr. Clyne's report in the following terms:

> "Mr. Clyne stated that the retrofit thermostat was not part of the original design, as indeed it was not. He did not say, however, that the retrofit thermostat was not developed by the Viking manufacturers for refrigerators distributed in this region of the world. It is not known whether Mr. Clyne, in running his diagnostics on the Viking, inquired of Mrs. Magras where she got the retrofit thermostat and who installed it. In this regard, it is regrettable that, being such an important figure in this claim, he was not made a witness and could not be cross-examined on those important comments in his report. The Court would have been keenly interested in his response to Mrs. Magras and Mr. St. Mark's stated position that the kit was specially developed by the manufacturers of Viking refrigerators exported to this region and that the Viking worked well after it was installed. Would this crucial piece of information, apparently not known to Mr. Clyne, have changed the conclusion in his report? We shall never know now."

[32] Mr. Clyne's report was however relied on by the appellant's other witness, Mr. Allison Marquis, an electrical engineer who, in commenting on the retrofit thermostat, observed:

> "13. I was advised by Servitech [*Mr. Clyne's employer*] and do verily believe that this does not conform with the design configuration of the refrigerator and was the cause of the continued malfunctioning ...
>
> 14. ...the above clearly suggests that the Claimant's refrigerator was not in good working order before the fluctuation on 16th June, 2015 which resulted in the ill-advised installation of the retrofit thermostat."[12]

[33] At paragraphs 20 – 22 of the judgment, the learned trial judge continues with his assessment of the appellant's witnesses:

[12] See: witness statement of Allison Marquis at paras. 13-14.

"[20] Three important observations must be made regarding this statement from Mr. Marquis. Firstly, Mr. Marquis is an electrical engineer and not a refrigeration expert. He freely admitted this under cross-examination. Secondly, his conclusion is based on the report of Mr. Clyne (on behalf of Servitech) who was not cross-examined. Thirdly, Mr. Clyne's report does not state that the retrofit thermostat was the cause of the continued malfunctioning of the Viking. The report does not support the assertion so positively advanced by Mr. Marquis that the retrofit thermostat 'was the cause of the continued malfunction.' Mr. Marquis reaches this conclusion on his own. Mr. Clyne stated that:

> 'However, the discovery that a retrofitted thermostat and not the original sensors, is connected to the circuit board and the fact that the adjustment of its settings proved ineffective, begs the question as to whether this configuration (which is not the origin[al] design) permitted the fridge to attain the optimal temperature before the circuit board was damaged.'.

[21] That statement is hardly conclusive about the cause of the Viking's failure to adequately cool. In fact, on a strict analysis of that sentence, the use of the phrase 'begs the question' means that the statement that follows that phrase contains a conclusion the premise of which lacks support. But all that I think Mr. Clyne meant by that statement was that he was querying whether the failure of the Viking to cool was caused by the retrofit thermostat.

[22] It is on the assumption - not supported by the conclusion of Mr. Clyne – that the Viking was failing to cool because of the retrofit thermostat, that Lucelec concluded that all that the electrical fault damaged was the Viking's circuit board and fuse, so that when these were replaced the refrigerator was restored to its pre-June 2015 condition. Mr. Marquis based his conclusion - that the Viking was restored to its condition before the electrical fault - on an assumption for which there was no finding of fact by Mr. Clyne and only a speculation..."

[34] The learned trial judge clearly gave little weight to Mr. Clyne's report. As indicated, his report was untested and clearly raised more questions than it answered for the trial judge. In no way could the report be said to have conclusively determined that the retrofitted thermostat was the cause of the purported malfunction and not the admitted electrical fault. Notwithstanding this, Mr. Marquis opined on liability after drawing inferences from the observations

contained in that report. In my view, the learned trial judge was entitled to conclude, that Mr. Clyne's report (which underpinned the evidence of the appellant's main witness) was speculative and therefore of little assistance in defining liability in this case. At their best, Mr. Clyne's observations amount to surmise and conjecture. The learned trial judge's conclusions as regards the evidence of Mr. Marquis simply targeted his credibility, but more importantly, it reflected the position that this witness had not been sufficiently informed for the inference which he drew to be persuasive.

[35] In my view, whether the retrofitted thermostat was purchased from the manufacturer or was manufacturer approved or not would hardly be conclusive of whether it was in fact fit for the purpose, fully functional and therefore able to effectively keep the refrigerator at a proper cooling temperature. From the respondent's case, it appears that this thermostat was installed in order to correct a defect in functioning. The respondent's evidence is that following its installation, she had no further problems with the refrigerator until the electrical fault of 16th June 2015. It was therefore essential that the appellant treat with this evidence and unfortunately it was not particularly persuasive in doing so. The learned trial judge reflects his concerns at paragraph 16 of the judgment:

> "In his report, Mr. Clyne also stated that, 'a number of visits have been done at the customer's house to ascertain the cooling capacity of the appliance although I cannot verify as to how the appliance operated before the board got burnt.' Mr. Allison Marquis, electrical engineer and witness for Lucelec, under cross-examination, candidly stated that he could not say how the Viking operated or cooled before the electrical fault."

[36] The learned judge also had to consider that there was positive evidence that addressed this critical issue. First, the learned judge had the benefit of hearing the respondent herself. He clearly observed her during her oral testimony and according to him: 'she appeared to be a frank, calm and honest witness who answered all questions put to her directly without any prevarication'.

[37] The respondent's evidence was unequivocal and the learned trial judge found it conspicuous (as he was entitled to do) that she was not robustly taxed on this issue in cross examination. Moreover, her evidence was not uncorroborated. Mr. Edmund St. Mark, a refrigerator technician, and the person who installed the retrofitted thermostat kit also testified that the refrigerator was cooling properly between 35 and 40 degrees Fahrenheit after the kit was installed.

[38] The learned trial judge would necessarily have to weigh her evidence against that of the appellant. Having weighed the totality of this evidence, the trial judge concluded at paragraph 23 of the judgment that:

> "I am satisfied that the greater weight of the evidence, the evidence that has the most convincing force is that the electrical fault caused the Viking to not cool properly. What is this evidence? It is the fact that, as I have found, the Viking was working properly, with the retrofit thermostat, before 16th June 2015; there was an electrical fault which damaged a television, surge protector, bulbs and the electrical circuitry of the Viking at Mrs. Magras' house; this was not the first electrical fault at her house; there was at least one, and perhaps two, previous instance/s of an electrical fault resulting in Lucelec having to pay substantial sums in compensation to her. This is sufficient to incline me to the view that the electrical fault caused the Viking to not cool properly afterwards. This is not to say that all doubt is completely removed. But it does not have to be where the standard of proof is on a balance of probabilities. It is certainly superior evidentiary weight to Lucelec's suggestion that the retrofit thermostat caused the malfunction, especially when that suggestion is predicated on the false assumption that the retrofit kit did not come from the manufacturer of the Viking. And especially when both Mrs. Magras and Mr. St. Mark's evidence was that the unit cooled properly with the retrofit thermostat."

[39] I find some force in the appellant's argument that there was simply no evidence that the prior electrical faults and prior settlements were in any way connected or related to the incident which occurred on the day in question and upon which the parties had joined issue. However, given the weight of the evidence in this case, I am satisfied that the learned trial judge was entitled to draw the conclusions which he did.

[40] Ultimately, in order to succeed in a claim in negligence, a claimant must prove that **the defendant's negligence is** the cause in fact of a particular injury damage or loss, which means that a specific act must actually have resulted in injury to another. In its simplest form, cause in fact is established by evidence that shows that a tortfeasor's act or omission was a necessary antecedent to the plaintiff's injury. Courts analyse this issue by determining whether the **claimant's** injury would not have occurred "but for" the defendant's conduct. If an injury would have occurred independent of the defendant's conduct, cause in fact has not been established, and no tort has been committed.

[41] Matters of causation are decided on the balance of probabilities (i.e. 51%). Since the burden of proof rests with the claimant, the onus is on him or her to argue that had the defendant not acted negligently, harm would likely not have occurred. Thus, if a court finds that there is a 51% chance that a defendant caused a **claimant's harm, they will hold the defendant entirely responsible for the harm.**

[42] Whether the admitted electrical fault caused the cooling system to malfunction called ultimately for findings of facts by the learned trial judge. This issue had to be resolved by a careful scrutiny of all of the evidence. The judge had to make specific findings of fact to determine what actually happened, and then he had to draw inferences to determine whether the facts found support a conclusion of negligence.[13] In my view, the judge was entitled to find that Mr. Marquis' conclusion, that the retrofitted thermostat was the proximate cause of the cooling malfunction, was not based on a sound premise of precise facts.

The Damages Issue

[43] The appellant also takes issue with the learned j**udge's award of damages** and the methodology applied in arriving at this award. Counsel for the appellant advanced that the aim of an award in damages in negligence is to put the respondent in the position she would have been in had the damage not occurred. If it had been

[13] Ibid, n. 3.

determined that the refrigerator was irreparable, intrinsically, this would entitle the respondent to the purchase price of the refrigerator less depreciation or the reasonable repair cost. However, the appellant contends that there was no evidence either as to irreparability or the reasonable repair cost. Counsel for the appellant argued that rather than conduct an appropriate assessment, the trial judge simply assumed a replacement cost measure of damages without more.

[44] Counsel for the appellant relied **on this Court's** decision in Vernatius James v Ferguson John t/a Chambers of John & John (A firm)[14] in which the Court held that where there is a clear inconsistency between the sum awarded and the evidence of the loss, an appellate court will be in a position to disturb the trial **judge's award of damages**.

[45] It may be unreasonable in a particular case to award the cost of reinstatement; it must be because the loss sustained does not extend to the need to reinstate. Before a court can proceed to assess damages, it is critical that the judge be satisfied on a balance of probabilities that the appliance has been destroyed and not merely damaged. This is because damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved. It follows that the reasonableness of an award of damages is to be linked directly to the actual loss sustained.

[46] Where a claimant asserts the right to recover the cost of replacement of the property, he must therefore persuade the court that it would be reasonable for him to insist upon replacement and not repair. Where, the property is not destroyed but merely damaged, the normal measure of damages is the amount by which its value has been diminished. This will usually be ascertained by reference to the cost of repair.[15] The estimated cost of the repairs can be recovered by indicating **the amount by which the property'**s value is reduced. If the cost of repairing the

[14] SLUHCVAP2007/0025 (delivered 22nd October 2009, unreported).
[15] The London Corporation [1935] P. 70 per Greer LJ.

property exceeds its total value, then, unless the chattel is in some way unique or irreplaceable, no more than its value can be recovered.

[47] In this appeal, the respondent sought compensation for the replacement of the refrigerator which is currently stored in her garage at home. The learned judge noted that the appellant had tried but was unsuccessful in repairing the refrigerator. At paragraph 26 of his judgment, the learned judge dealt with the contention that the damages should be limited to the replacement cost of a compressor (based no doubt on Mr. St. Mark's evidence that the compressor may have been malfunctioning.). The trial judge concluded:

> "…without some conclusive finding that a new compressor would restore the Viking to its pre-incident position, it would be idle and speculative to make an award based on this assumption. In any event, Mr. Clyne, the refrigeration technician relied upon by Lucelec never made any such recommendation. He never mentioned the compressor at all in his report."

[48] It is apparent that the trial judge was therefore satisfied that the assessment should proceed on the basis that the appliance was destroyed and not simply damaged. No doubt this explains his order that, once the respondent had received compensation, the appellant is entitled to possession of the refrigerator in order to salvage its value.

[49] In this case, the respondent purchased the refrigerator in 2011 at the cost of US$5,799.00 or EC$15, 672.09.00. The appellant submitted that if the measure was determined to be replacement and not repair value, the trial judge ought rightly to have used the purchase price of the old refrigerator less depreciation. Instead, the judge referred to the "original cost of the refrigerator" as EC$40,369.03,[16] which is, as per the respondent's own evidence, the cost of the new refrigerator purchased by the respondent following the incident. The trial judge then used this sum to erroneously arrive at the "pre-accident value", of the damaged refrigerator. This amounts to some EC$7,316.00 less than the cost of

[16] See para. 27 of the judgment – tab 1, p. 19 of the core bundle.

the new refrigerator purchased by the respondent, which was the actual award made.[17]

[50] The learned judge's analysis of the appropriate measure of damages begins at paragraph 25 of the judgment. He states:

> "**[25]** Mrs. Magras seeks compensation for the replacement of her Viking currently stored in the garage at her home. I agree with Mr. Maragh that the measure of damages is to attempt to restore a claimant to her pre-incident position had the tort not occurred. The Pre-incident position of Mrs. Magras is that she had a properly functioning Viking refrigerator that was four years old. LUCELEC tried but was unsuccessful in restoring her to that position by repairing the refrigerator...
>
> [26] Mrs. Magras seeks compensation in the sum of $40,369.03 for the replacement of her Viking. That sum includes the cost of the unit, plus freight, insurance, duties, brokerage services and transportation."

[51] Counsel for the respondent submitted that the learned judge's award of damages should not be disturbed because to further reduce the sum awarded would be an injustice to the respondent. He submitted that the learned judge's analysis reveals that he accepted that the respondent was entitled to damages sufficient to restore her to the position which she was in prior to the electrical fault. He further submitted that the sum of $40,369.03 is not just the cost to replace the Viking refrigerator but also includes freight, duties, brokerage and transportation, all of which the respondent would have to pay to get a new Viking refrigerator to Saint Lucia.

[52] Counsel for the respondent submitted that the learned judge was clearly using the global sum of $40,369.03 (inclusive of duties, freight, insurances etc.) when he referred to the "original costs of the refrigerator" and the "pre-accident value" that he awarded at paragraph 28 of the judgment. Counsel submitted that the respondent was entitled to an award which would reflect a separate sum for

[17] $23,615.29 – see p. 303 of the record of appeal.

freight, insurance, duties, transportation and brokerage because it was never disputed or suggested by the appellant at trial or in its defence that the Viking refrigerator was available in Saint Lucia.

[53] The parties do not differ as to the basis of assessing the normal measure of damages. The respondent relied on the House of Lord's case of Livingstone v The Rawyards Coal Company,[18] in which Lord Blackburn stated:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." (emphasis mine)

[54] Counsel submitted that to award damages based on the price of the old Viking refrigerator when the said Viking refrigerator was not available, would not put the respondent in the position to replace the Viking refrigerator. According to counsel, such an award would require the respondent to bear the depreciation costs of the Viking refrigerator plus an additional US$2,893.00 necessary to purchase a similar Viking refrigerator. Counsel submitted that this would offend the legal principles which inform the appropriate measure of damages because prior to the electrical fault, the respondent had a properly working Viking refrigerator and, but for the appellant's negligence, would not have to purchase another.

[55] Counsel for the respondent found further support in the fact that the respondent had to purchase another model refrigerator in order to obtain the same refrigerator capacity and space which she had prior to the electrical fault. It follows that the respondent has paid an additional US$5,160.00 just to have the same refrigerator space. Nevertheless, he argued that the respondent has only claimed the cost of a similar 36-inch Viking refrigerator since it was the same brand and was the

[18] (1880) 5 App Cas 25 at p. 39.

nearest Viking commercial refrigerator of that kind, size and brand that could possibly attempt to restore her to the pre-accident position.

[56] Counsel for the appellant further submitted that the learned trial judge failed to invite submissions on the issue of depreciation. Counsel for the respondent however, submitted that the learned judge was entitled to apply such sum as he deemed fit for depreciation. The issue of depreciation was addressed by the learned trial judge at paragraph 27 of the judgment where he noted:

> "No evidence was put before the Court as to what would be the value of the refrigerator after four years of use. I do not think that this should prevent the Court from making an award. Doing the best that I can under these circumstances, I deduct the sum of $10,000.00 for depreciation from the sum claimed by Mrs. Magras. I arrived at this figure by taking the original cost of the refrigerator ($40,369.03) and dividing it by the number of years that it is likely to function adequately (15 years)."

[57] Counsel for respondent was unable to provide any case law which would support a formula for depreciation of this kind. However, he argued that the learned judge was correct to consider depreciation since at the time of the electrical fault, the refrigerator was 4 years old. Counsel concluded that EC$10,000.00 for depreciation is more than generous to the appellant given the fact that the Viking refrigerator is a commercial refrigerator which was unlikely to devalue quickly in 4 years. He further submitted that the cost of a similar Viking refrigerator in 2016 was only EC$7,859.99 or US$2,893.00 more than the Viking refrigerator which the respondent purchased in 2011. Therefore, in calculating depreciation, the judge did not give the respondent the additional cost for a new Viking refrigerator or the cost for the old Viking refrigerator. Consequently, the sum awarded by the learned judge for the Viking refrigerator was EC$13,615.29 and not EC$23,615.29 claimed by the respondent.[19]

[58] The goal of damages in tort actions is to make the injured person "whole" through the award of money to compensate for injuries caused by an accident or incident.

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[19] See: amended statement of claim, core bundle, p. 214; email from Vanya Edwin Magras to Allison Marquis, core bundle, p.289 which breaks down the case.

The measure of damages for injury to personal property is the difference between the market value immediately before and after the injury, unless the property is destroyed, in which case it is simply the fair market value of the item at the time and place of the destruction. In principle, the claimant is entitled to such a sum of money as would enable him to purchase a replacement in the market at the prices prevailing at the date of destruction or as soon thereafter as is reasonable.[20]

[59] In Liesbosch Dredger v S.S. Edison, it was not questioned that, when a vessel is lost by collision due to the sole negligence of the wrong-doing vessel, the owners of the former vessel are entitled to what is called *restitutio in integrum*, which means that they should recover such a sum as will replace them so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage. The court held that:

> "The sum awarded as damages was restricted to the market price of a comparable dredger at the time of the loss, together with the cost of transporting her and insuring her to Patras."

[60] At paragraph 24 of the judgment in Voaden v Champion and the Owners of the Ship 'Timbuktu',[21] Colman J provided a useful analysis of how the value of the item should be assessed:

> "24. In order to establish the capital value of a vessel the best evidence will normally be that of the amount which a willing buyer would be prepared to pay to a willing seller of the same vessel immediately prior to the loss. If such evidence is not available, it is necessary to investigate the price at which comparable vessels were being sold at the relevant time and place. A similar exercise is familiar to those concerned with the valuation of residential or commercial real property. However, it is an exercise which, although capable of producing relatively clear evidence of value in the case of a house or other property having characteristics which are commonly found in a particular locality, may give rise to acute problems of comparison where the house or property is highly unusual or has some special features not ordinarily found in the neighbourhood. In such a case it may be extremely difficult to find comparables having sufficiently similar characteristics to enable any

[20] Liesbosch Dredger v S.S. Edison [1933] A.C. 449.
[21] [2000] All ER (D) 408.

> evidence indicative of the market value of the property in question to be derived from them; see, for example, *Living Waters Christian Centres Ltd v. Henry George Fetherstonhaugh*, (1999) CA Transcript QBCMF 98/0304/3 where the problems of evidence derived from comparables **having dissimilar characteristics are more fully discussed."** (emphasis mine)

[61] In my judgment, the assessment methodology employed by the trial judge is flawed. It is clear from the judgment in this appeal that a similarly appropriate analysis was not conducted. It is quite clear from the evidence that the sum of $40,369.03 does not reflect the original cost of the refrigerator but rather the cost of a new refrigerator purchased by the respondent sometime after the loss was incurred. It was therefore wrong to apply it as the basis of assessment. This error would be exacerbated by thereafter assessing a depreciated value which was unsupported by appropriate evidence. The judgment does not acknowledge that the appropriate value is that which a willing buyer would be prepared to pay to a willing seller for a similar appliance immediately prior to the loss. As in Voaden v Champion, this would require either evidence of the attempt to sell the item prior to the loss, or evidence as to the market value of comparables or any expert evidence opining on valuation. Such an analysis would be critical in the circumstances of this case where it had been contended that the refrigerator had a defect in the cooling system which necessitated the installation of a retrofitted thermostat. The import of this is made evident in the following dictum in Voaden v Champion:

> "35. In relation to this last matter it is to be observed that the principle of replacement value which must be applied involves arriving at an absolute value as distinct from an assumed value. That is to say the fact that the owner may have assumed that the vessel was in sound condition at the relevant time and was therefore in a condition which would have attracted a sound condition price following a buyer's survey and would therefore not have offered or sold the vessel for less than that price is entirely irrelevant. If there is evidence that, upon a buyer's survey, a defect would be likely to be discovered and that it would be considered by a buyer that the price ought to be reduced by an amount equivalent to the cost of repairing the defect, the value of the vessel for the purposes of quantifying the claimant's loss is the reduced price and not the asking price. What the claimant has lost and what must be replaced is a

defective vessel and the market value of replacement vessels is the cost of a sound vessel less the market cost of repairing the defect. For this purpose the fact that, in the hands of a skilled "do-it-yourself" owner such as Mr Watkiss the defect could have been repaired at a fraction of the price that might be charged by a commercial repair organisation is again irrelevant, for what is available on the market is priced by reference to ordinary buyers' reasonable repair costs and not to repair costs peculiar to the claimant." (Emphasis mine)

[62] The fact that the respondent could not purchase the same Viking refrigerator because it was not available must also be viewed within that context. Where a comparable appliance is unavailable and the cost of replacement is greater than the market value, a judge must appreciate that the claimant will not be entitled to the cost of a replacement where it is unreasonable to demand an exact replacement. Where, as is alleged here, there is no precise equivalent available, a claimant may be allowed a recovery which exceeds the amount he could have obtained by selling property[22] but the cost of producing an exact replacement will be refused where it is well in excess of the value of what was destroyed and a reasonable substitute is available.

[63] In Ucktos v Mazzetta,[23] the claimant's boat was destroyed by the defendant's negligence. It was an unusual boat and the cost of constructing a boat of similar design, construction and performance would have been very expensive. However, a boat of a comparatively similar design, construction and performance was available at lower price. The court held that the cost of a replacement chattel was in excess of the value of property destroyed and so the claimant would only be entitled to recover the value of a reasonable substitute. The damages awarded were therefore assessed at the "reasonable cost of another craft which reasonably meets his needs and which is reasonably in the same condition".

[22] See: Clyde Navigation Trustees v Bowring (1929) 34 L1 L. R. 319.
[23] [1956] 1 Lloyd's Rep 209. See: Dominion Mosaics and Tile Co. v Trafalgar Trucking [1990] 2 All E. R. 246.

[64] In Southampton Container Terminals Ltd v Hansa Schiffahrts Gmbh (The Maersk Colombo),[24] the claimants operated the container terminal in Southampton. A crane was struck and damaged beyond repair by the defendants' vessel. **The damages were held limited to the crane's market or resale and did not** extend to the very much higher replacement costs. The court found that it was unreasonable to replace as the expense would be out of all proportion to the benefit.

[65] On the authority of Vernatius James v Ferguson John, I am satisfied that there is sufficient basis which would justify setting aside the award of damages in this case. The matter should be remitted to the learned trial judge for assessment of damages.

[66] It is however, right that I should comment on one aspect of the assessment. In Liesbosch Dredger v S.S. Edison, Lord Wright observed:

> **"It follows that** the value of the Liesbosch to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (1.) the market price of a comparable dredger in substitution; (2.) costs of adaptation, transport, insurance, etc., to Patras; (3.) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the Liesbosch and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due **to the appellants' financial position**..."

It follows that once destruction is made out, the respondent would be entitled to recover the market price of a comparable appliance at the time of the loss, together with the cost of transporting it to the jurisdiction.

The Interest Issue

[67] The appellant accepts that an award of interest is discretionary; however, the appellant asserts that in the exercise of his discretion, the learned trial judge failed to consider settled legal principles in making a determination. Counsel for the

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[24] [2001] EWCA Civ. 717.

respondent contended that the trial judge failed to consider that the claimant had not in fact been kept out of money in relation to any sums except possibly the value of her refrigerator. The appellant submitted that the respondent, by her own choice, refused to accept payments which were offered and is therefore not entitled to interest on the sum of $2,660.04.

[68] Although at common law there are no cases which specifically award interest where a claimant's goods have been destroyed, statutory interest was awarded in Metal Box Co Ltd. v Currys Ltd.[25] where goods stored by the claimants were negligently destroyed in a fire for which the defendants were responsible. The court in that case held that a claimant who had been deprived of the value of his chattels is entitled to be awarded interest on the judgment sum even though he was seeking damages for the consequential loss of the goods. In Adamovsky et al v Malitskiy et al[26] Michel JA made it clear that prejudgment interest is also appropriate:

> "It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest."

[69] Under article 1009A of the Civil Code of Saint Lucia,[27] a court in awarding judgment has the discretion to include interest at such rate as it deems fit. In Steadroy Matthews v Garna O'Neal,[28] Michel JA further settled as a matter of legal principle that even where states do not specifically provide for prejudgment interest by statute, the court has the discretion to award interest on damages to a claimant from the date of the loss to the date of judgment.

[25] [1988] 1 W.L.R. 175.
[26] BVIHCMAP2014/0022 (delivered 3rd February 2017, unreported).
[27] Cap. 4.01, Revised Laws of Saint Lucia 2015.
[28] BVIHCVAP2015/0019 (delivered 16th January 2018, unreported).

[70] I am guided by the clear statement of legal principle set out by McNeill J in Metal Box Co Ltd. v Currys Ltd. where he said that he was aware of:

> "no authority for the proposition that the plaintiff who has been deprived of his chattel by the defendant's tort and who is kept out of the value of the chattel…should not be awarded interest in the judgment sum. To my mind to hold otherwise would be to confuse damages for consequential loss with interest."

[71] I therefore find no merit in the appellant's contention that the learned judge erred in this award and would dismiss this ground of appeal.

Conclusion

[72] I would allow the appellant's appeal to the extent that the learned judge erred in his assessment of damages and remit the matter to the High Court for assessment of damages.

[73] I would also order the respondent to pay the appellant's costs on the appeal of 40% of two-thirds of the applicable prescribed costs in the court below, in view of the appellant's partial success on the appeal, following on the assessment of damages pursuant to rule 65.13 of the Civil Procedure Rules 2000.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar