SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2008/014

BETWEEN:

EASTERN CARIBBEAN INSURANCE LTD.

Appellant

and

EDMUND BICAR

Respondent

Before:

The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson K. Baptiste	Justice of Appeal [Ag.]
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore for the Appellant
Mr. Mark D. Maragh for the Respondent

2010: March 25;
May 3.

Civil Appeal – Insurance Law – insured person – person insured by the policy – permitted driver – authorised driver – right of indemnity – third party – right of recovery against the insurer where no finding of vicarious liability in respect of the policyholder – Motor Vehicles Insurance (Third-Party Risks) Act Cap. 8.02

The appellant ("the Insurer") issued a policy of insurance to John Noel in respect of his motor vehicle. The policy was issued pursuant to the Motor Vehicles Insurance (Third-Party Risks) Act Cap. 8.02 ("the Act"). The certificate of insurance provided that the persons or classes of persons entitled to drive were the policyholder and "any other person who is driving on the policyholder's order or with his permission".

During the period of coverage, one Mr. Monrose, expressed an interest in purchasing the motor vehicle but required the approval of his employers who were to assist with the purchase. With a view to facilitating the sale, Mr. Noel gave the motor vehicle to Mr. Monrose on Friday, 21st September so that Mr. Monrose could obtain the required approval and complete the sale by Monday.

Mr. Monrose, whilst driving the motor vehicle at about 2:00 a.m. on Saturday morning, collided with a vehicle driven by the respondent, Edmund Bicar. Mr. Bicar sustained serious injuries and his motor vehicle was damaged. Mr. Bicar brought an action against Mr. Monrose, as the driver, and against Mr. Noel on the ground that he was vicariously liable.

Shanks J. held that Mr. Monrose was driving with the permission of Mr. Noel and was liable for the accident. The vicarious liability claim against Mr. Noel was dismissed on the ground that Mr. Monrose was not driving at the relevant time as the servant or agent of Mr. Noel. Judgment was given in favour of Mr. Bicar as against Mr. Monrose. Neither Mr. Monrose nor the Insurer paid the judgment debt, despite demand made by Mr. Bicar.

Mr. Bicar brought a second action against the Insurer in reliance on section 9 of the Act. The Insurer contended that they could not be liable as no judgment had been obtained against Mr. Noel, the insured; and, Mr. Monrose, who was legally liable to pay the judgment debt, was "not a person who is insured by the policy".

Cottle J. found, applying section 4(7) of the Act, that the Insurer had contracted to indemnify Mr. Noel and any authorised driver. Mr. Monrose was such an authorised driver so that the Insurer was liable to pay Mr. Bicar on account of the judgment debt. The Insurer appealed on the ground that Mr. Monrose was not an authorised driver. Mr. Bicar counter-appealed on the ground that the claim was based on breach of statutory duty under section 9 of the Act and not the indemnity provisions under section 4(7).

Held: dismissing the appeal and allowing the counter-appeal with costs to the respondent:

1. An "insured person" or "person insured by the policy" under section 4(1)(b) of the Act includes not only the policyholder but any other person or class or persons as specified in the policy.

2. The policy of insurance between the Insurer and Mr. Noel extended to the policyholder, to any other person driving on the policyholder's order (in essence, his servant or agent) and to any person driving with the policyholder's permission (although not as his servant or agent). Notably, the policy contained no qualifying provisions to restrict the extension of cover to persons driving on the policyholder's order or with his permission.

3. An "insured person" or "person insured by the policy" under Mr. Noel's policy of insurance would accordingly include persons driving his motor vehicle with his permission as this was so specified in the policy, as evidenced by the certificate. There is no distinction in principle between a driver who is "permitted" and one who is "authorised".

   English and American Insurance Co. Ltd. v Stanley McDermott and Motor and General Insurance Co. Ltd. (1974) 22 WIR 451 (Court of Appeal, Jamaica), distinguished.

4. Section 4(7) of the Act requires the Insurer to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons. Section 9(1) of the Act requires the Insurer to pay to the person(s) entitled to the benefit of the judgment any sum payable in respect of liability incurred "against any person who is insured by the policy". Section 4(7) therefore establishes the connecting factor on which the liability of the Insurer in respect of an injured third party is grounded under section 9(1) of the Act.

5. Section 4(7) of the Act creates the statutory exception to the normal rules of privity so as to take account of a liability arising in respect of a person who was permitted or authorised to drive other than the policyholder. The section ensures that an authorised driver is in the same position as the policyholder in respect of the right to an indemnity from the insurer.

6. The grounding of liability of the Insurer to pay a judgment debt in respect of which the authorised driver has become legally liable to pay is not dependant on a finding of vicarious liability on the part of the policyholder. The obligations may arise, though connected, quite separately and independently of the other once it can be shown that the driver falls within the category of persons specified under the particular policy as being covered thereunder.

7. Mr. Monrose, being a permitted driver, fell within the class of persons specified under the policy as being a "person insured by the policy". Accordingly, Mr. Monrose would be entitled to be indemnified by the Insurer in respect of the liability arising as against him in favour of Mr. Bicar in respect of the judgment debt, pursuant to section 4(7).

8. Section 9(1) of the Act gives fullest effect to the statutory exception to the rules of privity. Under section 9(1) of the Act, it is the right of the third party to recover from the Insurer in respect of a legal liability covered under the policy arising whether from the acts of the policyholder or from the policyholder's authorised or permitted driver. Accordingly, Mr. Bicar (the third party) is entitled to invoke section 9(1) of the Act to recover from the Insurer the judgment in his favour against Mr. Monrose, who, as a "permitted" or "authorised" driver, was a "person insured by the policy of insurance".

Matadeen v Caribbean Insurance Ltd. [2002] UKPC 69 (Trinidad and Tobago), followed.

JUDGMENT

[1] GEORGE-CREQUE, J.A.: This appeal raises two narrow construction points. One is on the meaning to be given to a provision contained in a policy of

Insurance issued by the appellant ("the Insurer") pursuant to the Motor Vehicles Insurance (Third-Party Risks) Act ("the Act") of Saint Lucia,[1] and the other, the construction to be placed on section 9(1) of the Act in terms of who is to be treated as "any person who is insured by the policy" in relation to an injured third party who has obtained the benefit of a judgment seeking to recover payment from an insurer.

The Background

[2] The matter arose in this way:

(a) The Insurer issued a policy of insurance pursuant to the terms of the Act to one, John Noel, in respect of his motor vehicle. A copy of the certificate of insurance showed the period of coverage to be from 12th April 2001, to 17th March 2002.[2] The certificate of insurance also carried this notation as item 5:

> "Persons or Classes of persons entitled to drive:
> (a) The Policyholder.
> (b) Any other person who is driving on the policyholder's order or with his permission."

This was subject to a proviso which is not germane to this appeal. The certificate also contained a limitation as to user which is also not germane to this appeal.

(b) Sometime in September 2001, Mr. Noel and one, Mr. Monrose, entered into negotiations for the purchase by Mr. Monrose of Mr. Noel's motor vehicle. Mr. Monrose's employers were to assist him in raising the purchase monies for the vehicle but he was to bring the motor vehicle to them for their approval whereupon they would give him a cheque for the purchase price. Mr. Noel gave his motor vehicle to Mr. Monrose on Friday, 21st September 2001, so that he could take it to his employers for

[1] Cap. 8.02 of the 2005 Revised Laws of Saint Lucia.
[2] At p. 22 of the Record

their approval with the hope that a sale of it would come about. Mr. Noel expected to receive word and hopefully the purchase money by Monday.

(c) It transpired however, that Mr. Monrose, whilst driving the motor vehicle in the early hours of Saturday morning (around 2:00 a.m.) collided with a vehicle being driven by the respondent, Mr. Bicar. Mr. Bicar sustained serious injuries and his motor vehicle also sustained damage. Mr. Bicar brought an action against Mr. Monrose as the driver of the vehicle and also against Mr. Noel on the assertion that Mr. Noel was liable vicariously for the negligent acts of Mr. Monrose.

(d) The trial judge, Shanks J., found that Mr. Monrose was liable for the accident and that he was driving the motor vehicle with the permission of Mr. Noel. He concluded however that Mr. Monrose was not driving at the relevant time as the servant or agent of Mr. Noel and thus Mr. Noel was not vicariously liable. He gave judgment in favour of Mr. Bicar as against Mr. Monrose in the sum of $79,719.00[3] but dismissed Mr. Bicar's claim against Mr. Noel. There was no appeal from Shank J.'s findings.

(e) Mr. Monrose failed to pay the judgment debt. The Insurer also failed to pay the judgment debt despite demand made by Mr. Bicar.

(f) Mr. Bicar brought a second action but as against the Insurer, in reliance on section 9 of the Act on the basis that Mr. Monrose (being the driver of Mr. Noel's vehicle with his permission) was a person insured under the policy in respect of the liability covered and therefore the Insurer was obliged to pay such sum as was stipulated under the Act in satisfaction of the judgment obtained against Mr. Monrose.

[3] The Insurer had also brought an action against its insured (Mr. Noel) seeking to avoid the policy as well as for a refund of monies paid out by them in respect of damage to Mr. Bicar's vehicle. The two actions were consolidated and heard together by Shanks J.

(g) The Insurer contended that they cannot be liable as their insured was Mr. Noel and no judgment had been obtained as against Mr. Noel and accordingly they could only attract liability if Mr. Noel had been found liable, which he was not.

(h) This second action came up for hearing before Cottle J. He concluded that the Insurer was liable to pay Mr. Bicar on account of the judgment debt. He arrived at this conclusion by engaging the principle of indemnity and utilizing the indemnity provisions contained in section 4(7) of the Act and quoted in support a passage from MacGillivray on Insurance Law[4]. The learned judge had this to say at paragraph 12 of his judgment:

> "….The insurers must pay not because Mr. Monrose is the servant or agent of the insured who then himself becomes vicariously liable, but because they contracted with Mr. Noel to indemnify him and any authorised driver."

At paragraph 13, he found that Mr. Monrose was an authorised driver.

The appeals

[3] The Insurer appealed against the finding that Mr. Monrose was an authorised driver at the time of the motor collision and the finding that the Insurer was liable to pay to Mr. Bicar on account of the judgment obtained against Mr. Monrose. Mr. Bicar filed a counter-notice in which he contends that in as much as the trial judge may have based his decision in favour of Mr. Bicar on section 4(7) of the Act, the learned judge erred and failed to consider adequately or at all, that Mr. Bicar's claim was based on breach of statutory duty in relation to section 9(1) and (2) of the Act. Mr. Bicar seeks to uphold the learned judge's decisions but for the reasons advanced by Mr. Bicar and not those relied on by the trial judge.

[4] 10th Ed., para. 29-18

The policy of insurance

[4] An appropriate starting point for the consideration of the issues raised in this appeal is Mr. Noel's policy of insurance. Neither the policy nor a copy thereof was tendered in evidence although the Insurer's representative sought in their defence and the witness statement of Ms. Girard filed on their behalf, to quote verbatim from a provision contained in the policy. Clearly, at the very least, a copy of the policy must have been in their possession and one would have thought that this would have been disclosed in keeping with the general duty of disclosure. This however, was not the case. It would have been unrealistic for Mr. Bicar, being a third party, to counter any statement made by the Insurer as to what specific provision the policy contained. It is not expected that he, as a third party, would have a copy of the policy in his possession. Accordingly, in my view the court must be taken to have been guided by what was in fact produced which was the certificate of insurance and the statements contained therein as reflecting certain provisions contained in the policy. This court can only be similarly guided.

[5] I have already referred to the notations contained in the certificate. It is clear on a reading of those notations that coverage under the policy extended not only to the policyholder but also to any other person driving on the policyholder's order (in essence as his servant or agent) and also to persons driving with the policyholder's permission though not as the servant or agent of the policyholder. Shanks J. found that Mr. Monrose was driving with Mr. Noel's permission. Accordingly, in my view Mr. Monrose although not driving as Mr. Noel's servant or agent at the relevant time would none the less, given the breadth of the coverage under the policy, fall into the class of persons covered under the policy. Mr. Monrose, being a "permitted driver" to that extent may be categorised, in my view, as an authorised driver. I can see no distinction in substance between a driver who is "permitted" and one who is "authorised".

The Act – its objective

[6] It is worthwhile to have regard to the policy behind the Act. It expressly states that it is "[a]n Act to make provision for the protection of third parties against risks arising out of the use of motor vehicles."[5] Parliament also took cognisance of the fact that it is commonplace for persons other than the policyholder to drive vehicles and sought by legislated provisions to create a statutory exception to the general contractual principles with regard to privity so as to afford an avenue to a third party to recover compensation from an insurer even though the third party or the driver per se are not strictly speaking privy to the contract of insurance between the policyholder and his insurer.

The Act – its provisions

[7] Section 4(1) of the Act states as follows:

> "In order to comply with the requirements of this Act, a policy of insurance must be a policy which -
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> (a) is issued by a person who is an insurer; and
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> (b) insures such person, persons or classes of persons as may be specified in the policy[6] in respect of any liability which may be incurred by him… or them in respect of injury to persons being carried in or upon …. the motor vehicle or the death of or bodily injury to or damage to the property of any person caused by or arising out of the use of the motor vehicle on a public road."

This provides clear recognition that an "insured person" under the Act includes not only the policyholder but also any other person or classes of persons as specified in the policy. "Insured persons" under Mr. Noel's policy of insurance would accordingly include persons driving his vehicle with his permission as this was so specified in the policy, based on the certificate.

[8] Section 9(1) being the provision under which Mr. Bicar grounded his claim against the Insurer, states as follows:

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[5] My emphasis
[6] My emphasis

> "If, after a certificate of insurance has been duly delivered under this Act to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy of insurance under section 4(1)(b)…is obtained against any person who is insured by the policy then, although the insurer may be entitled to avoid or cancel …the policy, he or she shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgements."[7]

[9] It is not disputed that Mr. Bicar has the benefit of a judgment against Mr. Monrose, the permitted driver. Mr. Monrose is therefore a person legally liable to pay Mr. Bicar the amount of the judgment in his favour. What the Insurer contends, in essence, is that since he has not the benefit of a judgment against Mr. Noel through a finding of vicarious liability then Mr. Bicar is precluded from invoking section 9(1) of the Act as Mr. Monrose is "not a person who is insured by the policy" and Mr. Noel has not become "legally liable to pay" Mr. Bicar in respect of the judgment.

[10] Mr. Theodore, counsel for the Insurer, placed heavy reliance on the case of English and American Insurance Co. Ltd. v Stanley McDermott and Motor and General Insurance Co. Ltd.[8] decided by the court of appeal of Jamaica. This was a case involving a claim under section 16(1) of the Motor Vehicles (Third-Party Risks) Act which is in pari materia to section 9(1) of the Act. The facts may be summarised thus:

> SM was knocked down by a car driven by W and owned by F. F had a policy of insurance issued by EA Co. by which EA Co. undertook to indemnify F in the event of an accident arising out of the use of his car against all sums which he shall become legally liable to pay in respect of injury to any person. The EA Co. also undertook to indemnify to the same extent any authorised driver who was not entitled to indemnity under another policy. W was an authorised driver of F's vehicle. W however,

[7] My emphasis
[8] (1974) 22 WIR 451

had a policy issued to him by MG Co under which MG Co. undertook to indemnify W "whilst personally driving a private car not belonging to him". In an action for negligence SM recovered against W only. The record did not disclose why judgment was not recovered as against F. W did not satisfy the judgment as against him. SM then brought proceedings against EA Co. and MG Co. relying on section 16(1). EA and MG each sought to deny liability to pay based on the double indemnity provision under the respective policies. The trial judge found both EA and MG rateably liable. EA Co appealed. On appeal MG sought to show that once it was established that W was driving F's car then a presumption arose that he was doing so as the servant or agent of F and accordingly F's vicarious liability would attract the indemnity under the EA policy so that EA became liable to satisfy the judgment in favour of SM.

The court held that: SM could not invoke the provisions of section 16(1) of that Act so as to recover from the EA Co. the amount of the judgment he had obtained against F because he was unable to show an essential prerequisite of that subsection, namely, a judgment in his favour "against a person insured" by the EA policy, thus, he acquired no rights against EA; as against MG however, SM was entitled to have his judgment against W satisfied since W was at the material time, "a person insured by the MG policy" and had become legally liable to pay SM the amount of that judgment.

The distinguishing feature of the McDermott case

[11] At first blush, McDermott's case appears to be on all fours with the facts of the instant case and supportive of the proposition being advanced by Mr. Theodore to the effect that unless it can be established that Mr. Noel has become legally liable upon the judgment then Mr. Bicar will have failed to establish an essential prerequisite of section 9(1) namely a judgment in his favour against "a person insured" by the Insurer. It is only on a review of the entirety of the judgments of the justices of appeal that it becomes apparent that McDermott does not lay down

any general proposition of law but was a case decided on its own peculiar facts. Graham-Perkins J.A. had this to say:

> "It is equally clear, and I so hold, that no obligation attaches to the EA Co. to indemnify W in respect of any sums he became legally liable to pay to [SM] for the simple, but perfectly valid, reason that W was an authorised driver who, at the material time, was "entitled to indemnity" under another policy, namely, the MG policy."[9]

Later, Graham–Perkins J.A. went on to say as follows:

> "In the circumstances as I have so far described them it appears to be beyond debate that [SM] is not entitled to call in aid the provisions of s 16 (1) of the Motor Vehicles Insurance (Third-Party Risks) Law…in respect of either [F] or [W], as far as the EA Company is concerned. This is so because SM is unable to show an essential prerequisite of that subsection, namely, a judgment in his favour "against any person insured by the policy". He can show neither a judgment against [F] nor that [W] was a person insured by the policy."[10]

[12] The distinguishing feature of McDermott's case is clearly the existence of the indemnity insurance held by W with the MG Company which in essence disqualified him as 'an insured' under the provisions of the EA policy. This distinguishing feature becomes more readily apparent from the succinct statements made by Edun J.A. to this effect:

> "By the terms of an insurance policy with [EA] and [F], EA was, in the first instance, liable to indemnify [F] in respect of any liability at law for compensation, costs and expenses which might occur in respect of bodily injury to any third party arising out of his driving of the insured vehicle. If, however, [F] authorised any person to drive the insured vehicle and a third party was injured [EA] would extend its liability only if the authorised driver was not entitled to indemnity under another policy."[11]

[13] The conclusion which I draw from those statements is that the driver "W' was not "an insured person" under the EA policy since the extension of coverage to him came into play only in the event that he was not covered by another policy in respect of the same liability. Being so covered under the MG policy, W was in essence disqualified "as an insured" under the EA policy.

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[9] At p. 454-455
[10] At p. 455-456
[11] At p. 456, my emphasis

[14] The case at bar is decidedly different. There is no qualifying restriction such as another policy covering Mr. Monrose. No other qualifying factors which would restrict the extension of cover to include Mr. Monrose have been advanced. Accordingly there is no basis on the facts of the instant case on which Mr. Monrose would fall outside the class of persons "insured under the policy".

[15] Whilst the trial judge grounds his reason for concluding that the Insurer is liable to pay by reason of the fact that Mr. Monrose is entitled to be indemnified by the Insurer under section 4(7) of the Act, that section simply establishes the connecting factor on which the liability of the Insurer in respect of an injured third party is grounded under section 9(1) of the Act. Section 4(7) states:

> "Despite anything in any enactment or rule of law, a person who issues a policy of insurance ….is liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

This subsection, in my view, simply provides the statutory basis of entitlement of an indemnity for those persons or classes of persons other than the policyholder who may be authorised drivers and who would normally be barred under the rules relating to privity of contract from seeking an indemnity from the Insurer. Mr. Monrose being a permitted driver fell within the class of persons specified in the policy in respect of which the Insurer became liable to indemnify under the policy. This right of indemnity then operates in much the same way as the indemnity afforded to the policyholder were he the one who incurred the liability. What this shows is that even though the liability may arise under the same policy, it is recognised that the liability of the policyholder/motor vehicle owner, may arise as a separate and distinct liability to that of the authorised driver and thus the Insurer's liability to indemnify the policyholder is also a separate and distinct obligation to that of the indemnity obligation arising in respect of an authorised driver. Section 4(7) created the statutory exception to the normal rules of privity and the like so as to take account of a liability arising in respect of a person who was permitted or authorised to drive other than the policyholder. In short, section 4(7) simply

ensures that an authorised driver is in the same position as the policyholder in respect of the right to indemnity from the Insurer.

[16] It follows from what I have said above that the grounding of liability of the Insurer to pay a judgment debt in respect of which the authorised driver has become legally liable to pay is not dependant on a finding of liability on the part of the policyholder by employing the principles of vicarious liability. The obligations may arise, though connected, quite separately and independently of the other once it can be shown that the driver falls within the category of persons specified under the particular policy as being covered thereunder.

[17] Given the statement contained in the certificate of insurance it is clear that Mr. Monrose, being a permitted driver, fell within the class of persons specified under the policy as being a "person insured by the policy". Accordingly, as noted at paragraph 15 above, Mr. Monrose would be entitled to be indemnified by the Insurer in respect of the liability arising as against him in favour of Mr. Bicar in respect of the judgment debt pursuant to section 4(7). The matter does not end there however. Were it to end there, this would defeat the very purposes for which sections 4(7) and 9(1) were designed, namely, (a) the plight of an authorised driver who would ordinarily have no recourse against the policyholder's insurer where the authorised driver became liable to pay a judgment debt in favour of a third party; and (b) most importantly, the plight and hardship which may be visited upon a third party who would ordinarily have no recourse against the Insurer where the policyholder or an authorised driver of the policyholder failed to pay a judgment in respect of which the policyholder or the authorised driver (independently of a finding a vicarious liability on the part of the policy holder) became liable to pay.

[18] Indeed, in my view, it is the right of the third party to recover from the Insurer in respect of a legal liability covered under the policy arising whether from the acts of the policyholder or from the policyholder's authorised driver which is at the heart of

section 9(1) of the Act and why the language employed in the drafting of that subsection speaks to a judgment "…obtained against any person who is insured by the policy." If it was intended to be referable only to the policyholder then words to that effect could have been easily used. It was clearly intended to cover not only the policyholder but "those persons or classes of persons" as may be specified under a policy of insurance issued under the Act. Accordingly, I would hold that Mr. Bicar is entitled to invoke section 9(1) of the Act in seeking to recover the judgment in his favour as against Mr. Monrose from the Insurer by reason of the fact that Mr. Monrose being a permitted driver was a "person insured by the policy of insurance" issued by the Insurer to Mr. Noel at the relevant time.

[19] I do not consider it necessary to refer to any of the authorities submitted by Mr. Maragh, counsel for Mr. Bicar, as they are not directly on point in respect of the issue raised on this appeal save for citing a short passage from Lord Scott of Foscote, a Privy Council decision in the case of Matadeen v Caribbean Insurance Co Ltd[12], where he opined as to the requirements of section 10(1) being the similar provision to section 9(1) in the Trinidad and Tobago law. At paragraph 9 he stated thus:

> "So, in short, section 10(1) of the Act, makes the insurer liable to meet any judgment obtained by an injured party "in respect of any such liability as is required to be covered by a policy under section 4(1)(b)"…The only condition precedent to the right of the injured party to claim under section 10(1), apart from the obtaining of the judgment, is that the requisite certificate of insurance has been delivered to the insured."

These prerequisites were all satisfied in this case.

[12] [2002] UKPC 69 (Trinidad and Tobago); [2003] 1 WLR 670

Conclusion

[20] Based on the foregoing, I would dismiss this appeal. I would allow the counter-appeal by affirming the decision of the trial judge though not for the reason given by him but for the reasons advanced herein. I would also order the Insurer to bear the costs of this appeal fixed at two thirds of the sum awarded below in accordance with CPR 65.13.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.

Paul Webster, QC
Justice of Appeal [Ag.]