JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 52/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	HEADLEY BROWN JACQUELINE BROWN	PLAINTIFFS/APPELLANTS
AND	LINVIL TYREL	DEFENDANT/RESPONDENT

W. Clarke Cousins instructed by Rattray, Patterson & Rattray for the Appellants

John Vassel instructed by Dunn, Cox & Orrett for the Respondent

November 5, 6, 7 & December 18, 1990

FORTE, J.A.:

I have had the opportunity of reading in draft the judgment of Downer J.A. and agree with the conclusions therein. Consequently, I would also allow the appeal.

However, as the respondent relied solely on the dicta in the case of Liesbosch v. Edison [1933] A.C. 449, in support of the respondent's notice, I add a few words in that regard.

Mr. Vassell for the respondent contended that the Liesbosch case decided two points which are today as relevant as at the time of the decision. These he stated as follows:

> 1. Where the plaintiff's actual losses are increased because of his adverse financial position at the time of the defendant's wrong such increased losses are not recoverable because as a matter of legal causation they do not flow from the wrong but from the plaintiff's impecuniosity which is an extraneous circumstance special to the plaintiff and distinct in character from the wrong.

2. Such losses are not recoverable because on grounds of policy they are too remote.

In the instant case, the appellants on the 23rd November, 1982 approximately six weeks after the destruction of their Honda motor car and after failure of the respondent to replace it, purchased a 1981 Honda motor car, in similar condition to their own, for the sum of $74,000.00.

In order to finance the purchase, the appellants provided $24,000.00 from their own funds, and borrowed the remainder of $50,000.00 from their bankers at the rate of 16 per centum per annum repayable over a period of 2 years. As a result, they claimed the total interest of $16,000.00 on the loan, as a part of the cost of the replacement. The learned trial judge refused to award the interest as part of the damages claimed, on the basis of the inadequacy of the evidence: (a matter dealt with in the judgment of Downer J.A.) The respondent in the Respondent's Notice contends that the learned trial judge's refusal to award the interest "can be supported on the additional ground that the said sum represents a loss flowing from the appellants impecuniosity and not from the respondent's tort, and is too remote."

The **Liesbosch case** (per Lord Wright) recognizes the common law principle of restitutio in integrum i.e. that where a plaintiff's property has been destroyed by the negligent act of another then he should recover "such a sum as will replace it," 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 real question therefore is whether the appellants' payment of interest on the loan used for the replacement of their motor car was in the instant case too remote.

Mr. Vassell in his arguments relied substantially on the following dicta of Lord Wright in the **Liesbosch case** at page 460:

> "..... But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort, the impecuniosity was not traceable to the respondents acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act, it regards some subsequent matters as outside the scope of its selection because 'it were infinite for the law to judge the cause of causes.' or consequences of consequences. .....".

Also the following:

> "..... In the present case if the appellants financial embarrassment is to be regarded as a consequence of the respondents tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger. .....".

However, the impecuniosity in that case related to the inability of the owners of the **Liesbosch** to purchase a comparable dredger which would have been available for purchase in Holland in a reasonable time after the incident. For that reason recommencement of work on the contract was delayed for longer than it would be, had the owners been able to purchase a comparable dredger. In those circumstances the court would not award damages to compensate for the expenses resulting from that delay as the cause of the delay was the inpecuniosity of the plaintiffs with which the defendant's negligence had no causal connection.

The issue there, was never whether the plaintiffs would be entitled to interest on the cost of replacing the

Liesbosch, if this had been done within a reasonable time. Indeed the issue in the case was clearly defined by Lord Wright at page 462:

> "I agree with the conclusion of the Court of Appeal that the Registrar and Langton J., proceeded on a wrong basis and that the damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace the Liesbosch. On that basis it is necessary to decide between the conflicting views put forward, on the one hand by the respondents, that all that is recoverable is the market price of the dredger, together with cost of transport to Patras and interest, and on the other hand by the appellants that they are also entitled to damages in addition or loss during the period of inevitable delay before the substituted dredger could arrive and start work at Patras. ....". (emphasis mine)

He concluded at page 467:

> "..... If the Court gives them the value of their dredger at the time and place of the loss as a profit-earning dredger, and gives them interest on that value from the time of the loss till judgment, I do not see any room for a further award of profits. .....
> .....
> It is on the true value so ascertained that the interest at 5 per cent from the date of the collision will run, as further damages, on the principles of the Court of Admiralty stated by Sir Charles Butt in The Kong Mangus [1891] P 223 that is, damages for the loss of the use or the money representing the lost vessel as from the date of the loss until payment." (emphasis mine)

In those circumstances so long as a plaintiff acts reasonably in obtaining a comparible replacement and thereby incurs interest charges which themselves are reasonable the defendant must bear those costs.

In the case before us, there is no claim for any loss incurred because of the appellants' impecuniosity. The appellant

was able through providing from his own funds one-third of the purchase price, to obtain a loan from his bankers in order to purchase a comparable motor car within a reasonable time. This method of financing is in current commercial practice the usual and normal method of purchasing a motor vehicle. Indeed, the evidence revealed that the respondent attempted to secure a bank loan in order to purchase the replacement himself.

In the case of Bacon v. Cooper Metals) Ltd [1982] 2 All E.R. 392 the extra financial charges in purchasing or replacing rotor for a fragmentiser by hire purchase was held to be recoverable from the defendants who were responsible for the destruction of the original. The defendants supplied steel to the plaintiffs who fed the steel into a fragmentiser thereby destroying the rotor, which had to be replaced by purchase of a new rotor under a hire purchase agreement with high rate of interest. It was held inter alia that it was reasonable for the plaintiff to have purchased the rotor through the hire purchase agreement and to have incurred the extra finance charges which he was not in a position to avoid. It followed that it was reasonable for the defendants to bear those costs which had fallen on the plaintiff entirely through the defendant's fault. Accordingly, the plaintiff was held to be entitled to recover the costs of the replacement rotor and the extra finance charges.

In my view, the appellants are entitled to recover the interest payments they incurred in purchasing the motor car as replacement of the one destroyed, the interest being the result of an everyday business transaction, which would have been forseeable or in contemplation at the time of the action of the respondent, whether as a tortious act or an act in breach of contract.

DOWNER, J.A.

The issue to be determined in this case was whether the appellants were entitled to succeed in claiming as special damages, interest on the principal sum they had borrowed from their bankers to purchase a motor car which the respondent Tyrell had destroyed during the course of repair. The respondent admitted liability, so this issue arose during assessment.

The facts

The crucial evidence in this case was that of Headley Brown one of the appellants who with his wife was the joint owner of a 1981 Honda Motor Car. He stated that he had observed the damage to the car at the respondent's garage on 2nd October, 1987 and initially he was provided with a car for about three to four weeks, while the respondent sought a replacement. He admitted that he was in turn offered a 1980 Honda then $55,000 which he refused. Those were the circumstances which compelled him to institute proceedings against the respondent. Parkin J., (acting) who tried the issue accepted that the proper figure for the replacement was $65,000 and he awarded that sum with interest at the rate of 3% from 2nd October, 1987 to 14th June, 1990. No issue was taken on appeal as regards that aspect of the award, but the appellant contended that he had borrowed $50,000 from his banker to pay for the replacement, a 1981 Honda Accord, and that he had to pay out $16,000 interest. Since that amount was crucial to the outcome of this appeal, it is appropriate to set out the evidence and the finding in that regard.

Cosmetic corrections have been made to make the extract of the evidence at page 13 of the record intelligible -

> " My bankers financed the acquisition of the motor car. Got loan of $50,000 for period of 2 years at 15%. Completed repayment loan November 1989. Paid total of $16,000 interest on loan."

This evidence was not challenged in cross-examination and the respondent offered no evidence. He sought to succeed below, and in this court by relying on the Liesbosch (1933) A.C. 449. Yet since the learned trial judge in a single phrase stated that interest was not proven, the appellants rightly challenged that finding in grounds 1 and 2 of their notice of appeal as well as on the basis, that the Liesbosch relied on by the respondent, supported their submissions rather than those of the respondent.

Parkin J. (acting), delivered a brief judgment and it is appropriate to set it out. It reads -

"CORAM:

Accepts Young as witness of truth and his experience in assessments.

No defect shown on Exhibit "1". No evidence either of when defect discovered and repairs effected. $5,900.00 not proved in any event.

$1,750.00 not recoverable - double benefit. New vehicle in condition old car would have been when repaired.

Interest not proven - Murphy v. Mills 14 J.L.R. 119. Evidence value car without air condition. $65,000.00.

Damages assessed for Plaintiff for $65,000.00 as follows:-

Transfer Tax	$ 500.00
Adjuster's Fee (Agreed)	$ 35.00
Replacement	$ 65,000.00

Cost to be agreed or taxed.

Interest at 3%.

Did the trial judge err in finding 'interest not proven'?

Implicit in this ruling that $10,000 interest was not proven, was a finding that funds were borrowed but that expenditure on interest did not satisfy the test laid down in Murphy v. Mills 14 J.L.R. 119. That was a case where loss of earnings was the

special damage claimed and this court recounted the matter as follows at p. 121 -

> "But I am not happy about the awards under the heads of loss of earnings and general damages. In his statement of claim the respondent pleaded 'Loss of earnings for eight months at $120.00 per month, $960.00' In examination-in-chief he said: 'I could not work for about six months. I usually earn as a mason $120.00 to $130.00 per month.' Then in cross-examination he said: 'I have no salary slips for my earnings. I work for Sharp Construction in Montego Bay. Was not working at the time.' On this evidence I fail to understand the award of six months at $120.00 per month. In the case of Bonham-Carter V. Hyde Park Hotel, Ltd. (1948) 64 T.L.R. 177; 92 Sol. Jo. 154 at p. 178 Lord Goddard, C.J. declared:
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> > 'On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

Be it noted that the witness was cross-examined and the answers were such that it detracted from his evidence in chief. In the case of loans the law presumes that if money is borrowed from a bank or drawn from one's resources, there must be a cost and it is reflected in interest payments in the first case, and loss of interest in the second. So that in either case, special damage could be claimed. Since there was no challenge, to the statement that $16,000 was paid as interest, then the proper finding ought to have been that on a balance of probabilities, the appellant had proven that issue. So considered, Mr. Cousins, counsel for the appellants was correct that the learned trial judge was in error, and that his order should be varied accordingly.

Was the authority of the Liesbosch a bar to the appellants claim for interest?

The third ground of appeal brought to the fore the rival principles of restitutio in integrum relied on by the appellants and the principle that remoteness of damages as adumbrated in the Liesbosch, disentitled the appellants to their claim for interest. This latter principle was averred, in the respondent's notice. Mr. Vassel for the respondent contended that even if the appellants had proved that they had paid out $16,000 to their bankers because they relied partly on a loan to replace their motor car, then that was due to their impecuniousity and was too remote to be a valid claim for damages. Another way of stating that submission was that the interest payments could not have been forseen by the respondent.

The Liesbosch must now be examined to determine whether it enunciates a principle which would result in so unjust a result as to deny the appellants their claim. The facts were that the Edison destroyed the Liesbosch a barge engaged in dredging the harbour at Patras. The owners could have obtained a comparable dredger in Italy shortly after the loss, but they were so short of funds that they could not afford the purchase. A necessary implication from the facts was that they were unable to secure a loan from any source except their employers.

In those circumstances, they hired a dredger, the Adria which was more expensive than the Liesbosch and so costly to lease that their employers had to rescue them by buying the dredger and then sold it to them without any mark up, and then gave them four years to pay the interest at the rate of 6%. In deciding on the measure of damages for the loss of the Liesbosch, Lord Wright said at p. 463 -

> ".....In these cases the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule."

Then at p. 498 Lord Wright sets out the facts to be taken into account in determining the measure of damages and so doing, he excludes the claimants impecuniousity as being too remote. The passage reads -

> "From these 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. On the capitalized sum so assessed, interest will run from the date of the loss."

In the Court of Appeal (1933) All E.R. at p. 151(F) Scrutton, L.J. puts it thus -

> "In the case of total loss of the ship the case seems to me quite different. The claimant has lost his ship and is entitled to be paid the value of his ship at the time of the loss, plus interest from the time of the loss, till he receives payment."

If these principles relating to interest when there is the total loss of a chattel are applied in the instant case, then it was legitimate to include the interest payment of $16,000 and it may be that the interest on the $24,000 found from the appellants resources could also have been claimed and proved.

The development of the law since the Liesbosch has also been in the appellants favour. Their claim for interest was based on negligence and/or breach of contract by the repairer, so that authorities on damages in negligence and breach of contract are appropriate. As a general rule, the law on remoteness is the same in both instances. To reiterate, interest payments as special damages are not necessarily too remote. Take the case Wadsworth v.

Lydall (1981) 2 All E.R. 401 a case in contract. Here is how Brightman L.J. as he then was, expressed the principle at p. 404 - 405 -

> " The second question on the appeal is a little more difficult. It is whether the plaintiff is entitled to recover as special damages the loss which he has suffered as a result of the defendant's failure to pay his debt under the contract on the due date. To put the matter shortly, the plaintiff incurred under his contract with Mr. Gascoyne an interest charge of £335 as a result of the delayed completion, the interest being calculated for the period from the date fixed for completion until actual completion on 18th October 1976. He also incurred an expenditure of £16.20 legal costs of the second mortgage for the sum of £2,000 (odd) balance due on completion. Neither of those charges would have been incurred if the defendant had fulfilled his part of the contract by paying £10,000 on the due date namely, 15th May 1976. The judge dismissed this claim on the ground that it was too remote. He made an award of interest on the amount recovered under the judgment.
>
> In my view the damage claimed by the plaintiff was not too remote. It is clearly to be inferred from the evidence that the defendant well knew at the time of the negotiation of the contract of January 1976 that the plaintiff would need to acquire another farm or smallholding as his home and his business and that he would be dependent on the £10,000 payable under the contract in order to finance that purchase. The defendant knew or ought to have known that if the £10,000 was not paid to him the plaintiff would need to borrow an equivalent amount or would have to pay interest to his vendor or would need to secure financial accommodation in some other way. The plaintiff's loss in my opinion is such that it may reasonably be supposed that it would have been in the contemplation of the parties as a serious possibility had their attention been directed to the consequences of a breach of contract."

As for an instance in tort Doud Properties (Kent) Ltd. and another v. Canterbury City Council and others (1980) 1 All E.R. 928 is an example where the claim was negligence and/or nuisance. The defendants were liable for structural damage done to the plaintiffs garage due to pile-driving operations the defendants

undertook while constructing a multi-storey car park. The plaintiff deferred repairs until 1970 although the damage occurred in 1960. Here is how Megaw L.J. treats 'impecunious' at p. 934 (C)-(F) -

> ".....The reasons why that deferment of repairs was reasonable from the plaintiffs' point of view included the fact, not that they were 'impecunious' (meaning poverty-stricken or unable to raise the necessary money) but that the provision of the money for repairs would have involved for them a measure of 'financial stringency.' Other reasons, consistent with commercial good sense, why the repairs should be deferred include those mentioned in evidence by a director of the plaintiff companies, whose evidence was accepted by the judge as truthful and reliable. If there had been no money problem, he said, he would still not have spent money on the building before he was sure of recovering the cost from the defendants. It would not have made commercial sense to spend this money on a property which would not produce corresponding additional income. So long as there was a dispute, either as to liability or amount of compensation, he would have done no more than to keep the building weatherproof and in working order."

Since the plaintiffs succeeded in recovering the cost of repairs in 1970, there was no need to press the alternative claim for interest from 1960 on the basis that repairs could have been effected at that time. Implicit in the judgment is that interest would have been awarded on the money so spent, and what would have been in issue was the basis of calculating the rate. At p. 936 (a) Megaw L.J., puts it thus -

> " The result is that the plaintiff's alternative ground of appeal, as to the appropriate calculation of interest, does not arise, for it is a necessary part of their submission on the first issue that, damages being referable to the deferment of repairs, interest is not payable up to the date of the hearing. In the circumstances, I think it better to say nothing on that point on which the argument on either side was commendably brief."

In supporting the decision of Megaw and Browne L. JJ., Donaldson L.J., as he then was said at p. 941 -

> " The position of the plaintiffs in the present case seems to me to be quite different. They were not impecunious in the Liesbosch (1933) A.C. 449, (1933) All E.R. Rep. 144 sense of one who could not go out into the market. On the contrary, they were financially able to carry out the work of reinstatement in 1970. However, on the judge's findings, they were commercially prudent in not incurring the cash flow deficiency which would have resulted from their undertaking the work in the autumn of 1970 and waiting for reimbursement until after the hearing, particularly when the defendants were denying liability and there was a dispute as to what works could and should be done by way of reinstatement. In my judgment, the decision in the Liesbosch case has no application to such a situation, which is distinguishable."

The necessary inference from this passage was that it was permissible to go into the market for funds and had that course been followed, the presumption would be that interest payments would accrue and it would have been a legitimate head of damage.

There was a further claim for repairing the replaced vehicle but no serious attempt was made to establish this head of damage. The claim to recover the cost of the deposit paid to the respondent for repairs was abondoned. So considered the appellant has succeeded in having the order of Parkin J. (acting) varied so that the claim for special damages of $16,000 must be met by the respondent and this will also attract interest at the rate of 3% from 2nd November to 14th June, 1990. The respondent must also pay the taxed or agreed costs in this court.

MORGAN, J.A.:

I too agree that the appeal should be allowed and that interest, as claimed, should be awarded. As is stated in the judgments above, which I have read in draft, the respondents relied heavily on the case of **The Edison o/c The Liesbosch** (1933) 3 All E.R. 144. The facts of the **Liesbosch** and the excerpts already quoted in the judgments of Forte and Downer, JJ.A., are sufficient to show that it is clearly distinguishable from this case. There it can be seen that the plaintiffs claimed (1) cost of hiring a substitute dredger from the time of purchase to the time of resale (2) cost of a new vessel (3) excess cost of working the hired vessel (4) overhead charges and (5) loss of profit. All these heads of damages were calculated on the actual loss and expenditure.

The ordinary measure of damages, however, was stated as (1) cost of buying a similar vessel (2) cost of getting her to the moorings and (3) loss of profit consequent on disruption of operations between obtaining and delivery.

These were to be calculated on market values and not on actual loss and expenditure.

It was held, however, that what was payable was (1) the value of a comparable dredger with interest thereon from the time of loss till payment (2) cost to adapt it for performance (3) compensation for loss of contracts between the loss and the time at which a suitable dredger could reasonably be found. (Unfortunately when one was available they had no money to buy). This compensation included (i) overhead charges (ii) expenses of staff and (iii) equipment thrown away.

What was excluded and considered remote, was loss due to their financial position which made them unable to buy a substitute dredger at the time, thus causing delay in the work.

This is not the case here as the car was replaced within six weeks when a similar car was found. There was no delay in finding a substitute car. The appellants were unable to find the full sum to replace it so they used their own funds and also secured a bank loan on which there were charges. This is an ordinary and reasonable way of finding money and falls squarely under the heading of "compensation" - sub-head "overhead charge" as is stated in the **Liesbosch**. A claim could have been entertained on the first head for the full value of the car with interest from the time of loss.

There was no evidence of financial impecuniousity, actual or inferential. A private party, as distinct from a company, could not ordinarily be expected to find the full sum of $65,000 from their own means for such a purpose without borrowing.

It is my view that what is claimed is not remote but foreseeable and payable.