JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 62/85

COR: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

STEPHANIE COOPER-MARLEY
DIANA COOPER-MARLEY APPELLANTS

v.

AUDLEY BETTON RESPONDENT

W.K. Chin-See, Q.C., & Michael March for appellants

Michael Vacianna for respondent

12th February & 13th March, 1987

CAREY, J.A.:

The question which fell to be considered in this appeal, was whether an award of damages for loss of use of the respondent's car, was, having regard to the evidence, excessive and ought to be reduced. We came to the conclusion that this award of McKain, J., given on 28th November, 1985 was eminently reasonable and ought not to be disturbed. We then promised to put our reasons in writing.

The relevant circumstances may be summarily stated: On 17th December, 1983, the respondent's Volvo motor car which was involved on that day in a collision with a car owned by the first appellant and driven at the time by the second appellant, was put in the hands of the repairers, and there it remained for five (5) months.

In his statement of claim, the respondent not unnaturally included a claim for loss of use for the period 22/12/83 - 17/5/84 = $31,749.52. The first week's loss of use amounted to $500.00 being charges for taxi-hireage. There was evidence that the plaintiff hired a Toyota Cressida motor car from a car-hire firm during the remainder of the time his car was out of service. The estimate of damage was prepared round about 9th January, 1984. The reason for that delay was put down to the difficulty of obtaining information regarding the price or the availability of parts of the car, and also to the ensuing festive season when the garage was semi-closed, i.e., operating only with a skeleton staff.

There was further delay as the assessor did not examine the vehicle until 24th January. As to this period, it was said not to be abnormal. The job itself was put in hand near the end of January of that year, and all the parts, but for a strut, were available in this country. An order for this part was put through by telephone to Miami in February, but was not supplied until May. If all the parts required for the repairs were available, then the job would have taken no more than four weeks.

It is clear from the award that the learned judge thought that the repairers were less than diligent in obtaining the strut from their Miami dealers for she disallowed a period of seven weeks from the respondent's claim. It was the appellant's complaint nonetheless, that the period allowed, was itself unreasonable. The respondent, it was said, must be linked both with his insurers and his repairers, and accordingly, their defaults and dilatoriness cannot be visited upon the appellants. He cited Charnock v. Liverpool Corporation & anor. [1969] 3 All E.R. 473 to show that repairers could be held liable for not completing repairs within a reasonable time. In that case the repairers were held liable for a period in excess of five (5) weeks which was the period regarded in the trade as reasonable. Martindale v. Duncan [1973] 2 All E.R. 355, also cited, was

concerned with delay in putting repairs in hand while the repairers waited for authorisation to proceed. There it was held that the delay was reasonable because the plaintiff who was claiming from the defendant's insurers could not be certain that he was in a good position vis-a-vis the insurers until the repairs had been authorised. He mentioned Wolfe v. Brisden (unreported) [1868] CA, a laconic note of which appears in Bingham's Law of Negligence (3rd ed.) page 620 which states:

> "P claimed for ten week's hiring pending repairs—repairs actually took ten days—but P was unwilling to put repairs in hand until D had inspected—Held, P had waited too long and could only claim four weeks. The proper course, per Salmon L.J. (4 C), was to get an estimate, forward it to defendants, and say that they were being given a week to decide whether they would inspect, failing any response to which the repairs would be put in hand."

What can be said of these cases, is that they illustrate that what is reasonable is a question of fact depending on all the circumstances of the particular case and they do not pretend to lay down any proposition of law. Such guidelines as may appear, are but counsels of common sense. Take the first case, that was an action against the repairers (as also the owners of the car, the negligent driving of which had caused the damage) in which the plaintiff recovered an amount of £53 as against the repairers, not the owners. The Court held that it was an implied term of the repairers' contract with the owner that the repairers would carry out the repairs within a reasonable time, namely, five weeks. The reason for the added delay was that the repairers were short of staff, and because, by agreement with a car manufacturer, they gave priority to warranty repairs on cars made by that manufacturer. The repairers did not warn the car owner of their inability to carry out

the repairs in a reasonable time because they did not wish to lose the owner's custom.

That factual situation is altogether to be distinguished from the present case where semi-closure at Christmas time is usual and therefore well-known. We are not, of course, concerned with any implied term in a repairer's contract in this appeal and accordingly the case really takes us nowhere.

So far as the second case is concerned, the delay about which complaint was made, came about because the owner wished to obtain authorisation from the insurers before putting the repairs in hand. That was a plain question of fact and the court held that the delay was not unreasonable. This case is not unhelpful, illustrating as it does, a valid reason for delay.

In the present case there was evidence that the period during which the owner and repairers waited on the assessor, was not abnormal. The judge appeared to have accepted the evidence of the respondent's auto mechanic who gave evidence in that regard. That period does not seem to me unduly protracted and it is not clear what Mr. Chin-See would have wished the respondent as owner of the damaged car to do in an endeavour to mitigate his loss. He had reported the accident to his insurers promptly. He had visited the garage on numerous occasions between 17th December and 9th January, 1984 to ascertain the progress of the repairs. For myself, I do not see how that evidence showing the period to be normal and the extent of the activity on the part of the owner, could be assailed.

Now the repairs were not completed until some time in May 1984 shortly after the strut which was ordered from Miami, arrived. It took, therefore, a further four months after authorisation to complete work. The appellants are entitled to complain that

that period of delay is unreasonable; and this is so, despite the fact that the part required was not easily obtainable from a dealer because it was not usually kept in stock and, therefore, had to be ordered from suppliers.

But the learned judge did not allow the total period claimed. She plainly did not accept as satisfactory the explanation of the respondent's mechanic that the car was only 2 years old and the part required was not in common use. She, therefore, allowed a total of eight weeks as reasonable for the procuring of this car part. In the circumstances of the case, the learned judge properly directed herself that whoever may have been responsible for that delay, the entire cost occasioned thereby should not be visited upon the appellants.

This Court can only interfere with an award of damages if it is so inordinately high or low that no reasonable judge could have made such an award. I am not persuaded that McKain, J., having disallowed a substantial part of the period claimed, can be held to have erred. In my view, she was entitled to consider -

i) that the part had to be ordered from foreign dealers;

ii) that the part was not one in common use and, therefore, not held in stock by dealers;

iii) that the foreign dealers had in turn to order from suppliers;

iv) that the part had to be imported into the island;

v) that an import licence may have been required.

She was required to deal not with some abstract concept of reasonableness, but with the practicalities of obtaining car parts not available within the Island but from foreign dealers, in this case, in Miami, Florida. No Court of Appeal would be minded to prescribe time schedules as to what is to be regarded as reasonable periods

for loss of use. It is a question of fact.

It was for these reasons that I came to the conclusion that this Court should not disturb the award of the judge.

KERR, J.A.:

I have had the benefit of reading the draft judgment of Carey, J.A. I am in agreement with his reasoning and his conclusion. There is nothing I can usefully add.

WHITE, J.A.:

I concur with the judgment of Carey, J.A.