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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M137 of 1982

BETWEEN	GEM McKENZIE	PLAINTIFF
A N D	EGBERT PALMER HERBERT RILEY	DEFENDANTS

Bruce Rattray instructed by Livingston, Alexander & Levy for the Plaintiff.

Raphael Codlin instructed by R. Codlin & Company for the Defendants.

Heard on: 13th and 14th June, 1982

J U D G M E N T

BINGHAM J:

On Christmas Day, in 1978 around mid-day there was a collision between a Peugot Motor Car owned and driven by the Plaintiff and a 1968 Ford Anglia Motor Car owned by the Second-named defendant and driven by the First named defendant. This collision took place along the main road leading from Runaway Bay to St. Ann's Bay at a district called Salem just as the Plaintiff was attempting to turn to her right off the main road to enter into Salem Crescent which is to the right of this main road as one proceeds towards St. Ann's Bay.

As a result of the collision both vehicles were extensively damaged to such an extent that made it uneconomical for repairs to be effected to them. They were to be considered as "write offs."

The Plaintiff,herself, suffered what may be considered at the time of the collision as serious injuries for which she received medical attention both at the St. Ann's Bay Public Hospital and subsequently at the Oxford Medical Centre in Kingston. She was laid up as a result of these injuries for two months. Although she is now to a large extent fully recovered from

these injuries, she has continued to suffer some degree of discomfort which bears some relationship to the injuries which she received. The Medical Report tendered in evidence in support of her injuries (Exhibit 1) reveal that her permanent partial disability has been assessed at 15%.

The Plaintiff's claim is therefore launched in negligence under two main heads:

1. Damages as a result of Personal Injuries.
2. Damages for loss incurred in relation to her Motor Vehicle.

The Defendants on the other hand deny that they were negligent and the Defendants counter-claim in negligence and allege in part in paragraph 5 of the Defence and Counter-Claim that "if which is not admitted the Plaintiff suffered the injuries set out in the particulars of injury set out in the Statement of Claim, the Defendant will say that these injuries were neither caused or contributed to by any wrongful act on the part of the first defendant."

In the reply, the Plaintiff joins issue with the Defendants on all matters denied in the Defence and further go on to deny all allegations made in the Counter-Claim. Despite the state of the pleadings and the issues raised by them, at the hearing of this matter there was no contest as to the amounts claimed for the estimated cost of repair to both vehicles. That sum was agreed as claimed in the claim and the Counter-Claim, at $6,400 and $5,540 respectively.

The issues remaining for determination were as to:-

1. Liability and dependent on the determination of this central issue
2. The question of Damages in so far as it relates to:-

(a) the Claim

(b) the Counter Claim

The Plaintiff's Case

According to the Plaintiff, Mrs. Gem McKenzie, on the day in question she was proceeding along the Runaway Bay main road to her home which was situated at that time on Salem Crescent. It was around mid-day, and as she journeyed on her way home, the road was, as one would expect it being Christmas Day, almost deserted. There was no traffic then approaching from the St. Ann's Bay direction and when she put on her indicator at a distance which she estimated of about 300 yards from Salem Crescent, there was then no vehicle in sight approaching from the Runaway Bay direction. At about 200 yards from Salem Crescent and on looking into her rear view mirror she then noticed for the first time an approaching car coming into view from the Runaway Bay direction travelling at what she estimated to be a fast rate of speed. She reduced her speed from thirty miles per hour to twenty miles per hour and when she got down to about ten miles per hour she was then about thirty yards from Salem Crescent. She then started to cross over to the right of the road. As she commenced to make her right turn there was a collision between the Plaintiff's Peugot Motor Car and the Defendant's Ford Anglia car which was then in the right lane attempting to overtake the Peugot. The left front of the Ford Anglia collided into the right side of the Peugot at a section between the right front and rear doors.

At the time of the collision it is common ground and not in dispute that the Peugot was travelling at a slow rate of speed - about ten miles per hour. Despite this, however, the force of the impact caused the Peugot to

be extensively damaged to such an extent as to "written off" as being uneconomical to be repaired according to the assessors report on this vehicle tendered in evidence in this matter. The Plaintiff, herself also suffered serious crush injuries to the right side of her face and body. The Plaintiff's car was carried by the force of the impact across the main road ending up in a ditch some distance into an open lot which borders the right side of the main road leading to St. Ann's Bay.

The Plaintiff under cross-examination admitted, however, that at the moment in time when she commenced to make her right turn to cross over the main road into Salem Crescent she had not taken the necessary precaution of checking in her rear view mirror to ascertain the movement and position of the approaching car which she had earlier seen when at a distance of about two hundred yards from her turn off point. She gave as her reason for not checking the fact that her right direction indicator was switched on from her vehicle had reached a distance of about three hundred yards from Salem Crescent.

The Defendant's Account

The Defendant's version as to how the collision took place as related by the first named defendant, Egbert Palmer and one Delroy Walker was somewhat varied and conflicting as to the circumstances leading up to the collision. There is no inconsistency, however, as to how the collision occurred. This version is that on the day in question, according to Egbert Palmer, while he was driving the Ford Anglia Motor Car from Brown's Town to Saint Ann's Bay in search of motor vehicle parts, on reaching along the main road at Salem District he came upon a Peugot Motor Car which was proceeding at a slow rate of speed in front of his car. The driver of the

Peugot then reduced her speed and went to the extreme left of the road and just as he was about to overtake the Peugot, having indicated this intention by tooting the horn and going to the right side of the road, the Peugot without any warning or signal turned suddenly to its right across the path the Anglia was then pursuing causing a collision between the two vehicles.

The factual situation posed for determination is therefore one in which it is abundantly clear that if the account of the first-named defendant, and or his witness is to be believed then there ought to be a total finding of negligence on the part of the Plaintiff as in the circumstances as outlined by the first-named defendant and his witness as to how the collision occurred, there was nothing that the Defendant's driver, Palmer, could have done to avoid the collision which took place, as the plaintiff is supposed to have turned suddenly across his path without giving any prior signal of her intention to do so.

If on the other hand the Plaintiff's account is preferred, then based on her own testimony, there must be a finding of at least contributory negligence as the Plaintiff has admitted that at the moment in time when she commenced to make her right turn into Salem Crescent she did not ascertain whether the road was clear of traffic from the Runaway Bay direction, and more importantly, that the manouvre she was attempting to make could be completed with safety. Her failure to take such precaution before attempting to cross over the road would have been in clear breach of Section 51(1) of the Road Traffic Act which enjoins a motorist inter alia that:-

> "A motor vehicle shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic."

The failure on the plaintiff's part to observe the driving rules for mulated in Section 51 of the Act, in the absence of any reasonable explanation, is clear evidence of negligence on her part. Negligence here being the ommission to do that which the reasonable and prudent driver which the Legislature contemplates, by the Section, would have done in like circumstances as that with which the Plaintiff was confronted.

The question would still remain for resolution, however, as to what extent this failure on the plaintiff's part caused or contributed to the collision vis a vis the manner of driving of the first Defendant.

On an assessment and evaluation of the evidence, there are a number of questions which fall to be determined before one can get to the core of this matter. These are:-

1. Was the Plaintiff's right indicator on at the time of the collision? This finding would be most critical to the Plaintiff's case as if answered in the affirmative it would mean that the Defendant's driver would have been alerted to the fact that the Plaintiff had indicated an intention to make a right turn which would take her vehicle across the main road and across the path he was pursuing and he had the option therefore of either:-

(a) Waiting until the Peugot had completed its manouvre.

(b) Overtaking the Plaintiff's vehicle on its near side, that is, to its left, assuming that there was space to the left of the Plaintiff's vehicle which permitted such a manouvre to be attempted with safety.

On the evidence in the case whether or not the second option was available to the first Defendant is doubtful as although the Plaintiff has testified that there was sufficient space on her left at the point in time

when she commenced to make her right turn she is unable to estimate how much space there was left for the Defendant's driver to be able to execute that manouvre with safety. On the basis that the first Defendant saw the Plaintiff's vehicle indicating to turn right and continued to overtake on the very side of the road on which this manouvre would take the Plaintiff's vehicle, contrary to avoiding or preventing a collision would be substantially contributing to the very collision which he is under duty to take all reasonable care to avoid. Section 51(2) of the Road Traffic Act, apart from the injunctions laid down under Section 51(1) states that:-

> "Notwithstanding anything contained in this Section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident; and the breach by a driver of any motor vehicle of any of the provisions of this Section shall not exonerate the driver of any other motor vehicle from the duty inposed on him by this subsection."

The driver of each motor vehicle is therefore under a duty to exercise such care while he is driving so as to avoid an accident.

It must further not be forgotten that both Section 51(1) which laid down prescriptions for good driving is intended to be read together with Section 51 (2).

If therefore the Defendant's driver was in breach of either Section 51(1) or 51(2) of the Act referred to it then follows that he would have been guilty of negligence and the only question remaining for resolution would be what was the degree of fault attributable, having regard to the manner of driving of both motorists on the day in question.

In determining this critical question therefore as to whether the Plaintiff's indicator was on at the material time, I am of the view that it

was on as the Plaintiff has testified. It is of critical importance in making this finding to bear in mind the very frank admission on the Plaintiff's part, made very much against her own interest, that the reason why she did not look in the rear view mirror at the time of turning, was because she had on her indicator from she was three hundred yards from Salem Crescent. Although Mr. Codlin has quite rightly observed that the evidence given by the Plaintiff that she switched on her right direction indicator from that distance was not evidence that it was functioning, this fact may be inferred from the evidence of the Plaintiff supported by the evidence of the Defendant's own witness, Delroy Walker, that following the collision, he saw the right indicator of the Peugot on.

Having regard to the fact that the Plaintiff was seriously injured in the collision, it is inconceivable that in her moment of agony she would have had the hindsight to switch on the indicator following the collision. Had it not been functioning one would certainly have expected her to wait until she had ensured that the road was clear before attempting to cross or at least given some kind of hand signal of her intention to turn before attempting to turn to her right. The probabilities therefore, weigh heavily in favour of the fact that she did have on her indicator. I was rather impressed by her demeanour and she did not strike me as that sort of individual who in her moment of agony would be seeking to advance her cause by resorting to such low and baseless practices. Moreover it is common ground that her manner of driving certainly up to the time that she commenced to make her manouvre to her right in her attempt to cross the road, was of such a nature as to suggest extreme care to such an extent as tended to border on her being

over cautious. That she faltered in not taking the precautionary measure of ascertaining that the road was clear of vehicular traffic before turning, she has frankly admitted that ommission on her part.

Having determined this primary question therefore, it can be contended that on a careful review of the evidence in this matter, there is no evidence that the Defendant's driver took any precautionary steps to avoid the collision. In support of this contention there is no evidence that he checked his speed prior to the collision. The damage to both vehicles and in particular to the Peugot when added to the fact that the force of the impact caused the Peugot to be pushed to the opposite side of the road ending up in a ditch, clearly indicates that the Defendant's driver was travelling at what must have been an excessive speed. The damage incurred by both vehicles cannot be explained on any other rational basis than the fact that such damage was the result of the conbined speed of both vehicles at the time of the collision. As the evidence is that the Peugot was travelling slowly at the time of the collision and was pushed by the force of the impact across the road eventually ending up in a ditch on a open lot situated to the right of the main road as one proceeds towards St. Ann's Bay, such circumstances can only be explained by the fact that the Anglia, a smaller and lighter vehicle than the Peugot 504 was being driven at a fast rate of speed; certainly at a speed in excess of fifty miles per hour. On this straight but narrow highway, at the point where the collision took place, the situation which confronted the Defendant's driver was one in which he having come upon a slow moving vehicle some distance ahead of him which was indicating an intention to turn to its right, such a situation called for

caution on his part. He elected, however, to press on regardless of the situation ahead of him totally unmindful of possible and attendant danger ahead of him, if at the material time of his act of overtaking the driver of the vehicle ahead should elect to make the right turn across the road and into his path. This attitude of mind as displayed by the Defendant's driver appears to me at any rate to be so typical of many of the present-day drivers which may be summed up by the word "selfishness." This attitude completely ignores the codes of good driving conduct laid down by the Road Code and the overriding duty of care prescribed by Section 51 of the Road Traffic Act.

It is of some significance, moreover, that in an attempt to mislead the Court as to the speed at which he was proceeding and his overall manner of driving, the Defendant's driver sought to place his vehicle a car's length behind the Peugot from he got into Runaway Bay. This was so even though the account of the Plaintiff is that when she first saw the Anglia approaching it was some ten chains away and coming at what appeared to her to be a fast rate of speed. This account was, however, contradicted by the Defendant's witness, Delroy Walker, who testified that it was after passing through Runaway Bay that they came upon the Peugot Motor Car, when they were in the vicinity of the gas station. He denied that the Anglia ever caught up with the Peugot before the collision and puts the distance behind the Peugot when he first saw it as a couple of chains.

FINDINGS OF FACT

When the evidence is carefully examined therefore, it is more probable than not that:-

(i) The Plaintiff switched on her right indicator when her car was at

a distance of about three hundred yards from her turn off point at the junction of Salem Crescent

(ii) That at that distance of two hundred yards from Salem Crescent the Plaintiff observed the Defendant's Anglia Motor Car approaching from the Runaway Bay direction, and coming at a fast rate of speed.

(iii) That the Plaintiff slackened her speed on reaching about thirty yards from Salem Crescent and started to manouvre her car closer to the middle of the road.

(iv) That the Defendant's driver had positioned the Anglia car to the extreme right of the road in a manner bent on overtaking the Peugot regardless of the circumstances.

(v) The Defendant's driver was either unmindful of the fact that the Peugot was indicating to turn to her right into Salem Crescent or if he was aware of this fact he did not appreciate or heed the Plaintiff's signal to turn right.

(vi) That the Plaintiff at the moment of attempting to cross the main road into Salem Crescent took no proper precautionary steps to ascertain whether the road was clear of oncoming vehicular traffic and that the manouvre which she was attempting could be completed with safety.

(vii) That the Defendant's driver was travelling at an excessive speed and that he made no attempt to check his speed up to the time of the collision. He was travelling much too fast for safety.

Turning now to the question of causation. I am of the view that the collision was caused by:-

(i) The Plaintiff manouvering her vheicle to the right of the main road in an attempt to cross the road without first ascertaining whether it was safe to do so.

(ii) The Defendant's driver attempting to overtake a vehicle which was ahead of him, and which was carrying out an intention indicated by a signal given by its driver to turn to its right, at a fast rate of speed.

I hold accordingly that the driver of both vehicles were negligent.

On the question of apportionment I have been guided in coming to a conclusion to no small degree by the dictum of White J.A. in Peter Thompson vs Samuel O'Connor, Suprene Court Civil Appeal 15/78 (unreported), a majority judgment of the Court of Appeal of Jamaica delivered on 5th June, 1981. In this case the driver of a Mercedes Benz Motor Car was held to be solely to be blamed for a collision which took place while he was attempting to overtake the lead car in a line of cars and in doing so he collided with a Cortina Motor Car which was ahead of the Mercedes Benz and which was attempting to turn to its right into an off road at a junction.

In dismissing the Appeal after having summarised the facts the learned Judge made the following observation at page 6:-

> "The fact of the matter is that the evidence summarised above raised two essential issues for her decision. Firstly did the respondent who was at the head of the line of traffic, suddenly turn without first indicating to the traffic behind him that he was going to do so with the intention of crossing into the road leading to McCook's Pen? Secondly did the appellant engage in the act of overtaking without regard for other traffic on that stretch of road; albeit that when he formed the intention to, and did attempt to overtake, the respondent's motor car was on the left side of the road? The answer to

"these questions must be given in the awareness of the provisions of Section 51 and 57 of the Road Traffic Act."

Having dealt with the provisions of both these sections of the Act in so far as they relate to the duty placed on motorists on the highway and with that of the motorist changing direction the learned Judge then made this most pertinent observation:-

> "The arguments on his behalf depended very much on the fact that he had received the appropriate signal from the Fiat to overtake that car, assuming that he thereby and thereafter was entitled to continue straight way to overtake the Cortina which was still ahead of the Mercedes Benz. It is true that the appellant said he tooted his horn as he approached the Cortina but that did not by itself exonerate him from exercising such care as would indicate that he was conscious of the possible movements of the Cortina. This was not excluded merely because he had earlier formed the view that it was safe for him to overtake both vehicles.
>
> Even after he had passed the Fiat he was still under a duty of care to approach the Cortina so that his driving would not create an obstruction to other traffic and thus increase the risk of a collision." (underlining is mine)

So therefore the mere fact that the Defendant's driver stated that before attempting to overtake the Peugot he tooted his horn and placed the Anglia to the offside of the road, did not exonerate him from approaching the Peugot which was far ahead of his vehicle and indicating an intention to turn right, with caution. This duty of care on his part he failed totally to discharge. Despite therefore, the obvious and admitted negligence on the part of the Plaintiff in failing to keep a proper look-out for oncoming traffic from her rear at her turn off point, I would hold that on the facts that I have found the Defendant's driver was substantially to blame for the collision that took place. He clearly had more than ample opportunity to

assess the situation taking place ahead of him and must have fully appreciated the risk of overtaking a larger vehicle which had signalled its intention to turn to its right on what was a narrow albeit straight stretch of road. He elected in all the circumstances to continue to drive at a speed which prevented him from dealing with any possible emergency which may have resulted if at the time of overtaking the vehicle ahead should turn across his path as it did.

I would therefore for these reasons apportion the blame for the resulting collision at forty percent to the Plaintiff and sixty percent to the Defendant's driver. As there is no issue as to agency it follows that the second Defendant as the registered owner of the Anglia Motor Car is also vicariously liable for the negligent driving of the first Defendant.

Damages

I now turn to the question of Damages. It may be convenient at this stage to deal first with the Counter-Claim, as the Claim falls to be dealt with under two heads. In any event there is no issue as to the estimate of repairs for both vehicles. That head of the Claim was agreed on at the hearing of this matter hence there is no issue there remaining to be resolved. The issue on both the Claim and Counter-Claim centres around the question of the respective claims for loss of use.

In relation to the Counter-Claim the period in question is for six weeks at $40.00 per day. This was in respect of a car which the second-named Defendant used in his garage business to travel around to do errands such as obtaining spare parts. He testified that as a result of the collision he had to hire a replacement vehicle to carry out this task. The cost of hire was $40.00 per day.

The question to be determined is whether this amount was reasonable in the circumstances. The amount is not exhorbitant having regard to today's escalating costs. I consider the amount claimed to be a reasonable sum and the period of six weeks as not inordinately long. There will, however, be a slight adjustment made, to cover, a five day work week, resulting in period being a total of thirty days as claimed. The amount recoverable under this head will therefore be $1,200.

There will accordingly be judgment entered for the Defendants on the Counter-Claim for $6,740 with costs to be agreed or taxed less 60%, that being the extent to which I find that the first-named Defendant is blame worthy.

I next turn to the Claim. This as I have already mentioned falls to be considered under two heads:-

1. Damage to the Plaintiff's car
2. Personal Injuries

In so far as the various heads of Damages are concerned, the question of Personal Injuries may be conveniently left for the last.

In dealing with the head of Special Damages, the amount of $6,400 as the value of the Peugot after deducting the amount of $2,000 for salvage was agreed. There has been no challenge to the amount of $20.00 paid for assessor's fee, or the sum of $140.00 paid for wrecker's fee. The two items being questioned by the Defendants are:-

1. The amount of $2,557.51 claimed as loss of earnings
2. The sum of $2,950 claimed for loss of use

The Plaintiff gave evidence that she was at the time of the collision a Life Underwriter with Mutual Life Assurance Company. She would

therefore of necessity require a motor vehicle to assist her in promoting business in that field as travelling both to service existing policies as well as promoting new business is essential to survival in the Life Insurance field. She was laid up at home for two months as a result of the injuries which she received in the collision. Having regard to the nature of these injuries the period claimed is reasonable. Her earnings she estimated as being between $1,500 - $2,000 per month. That figure was not challenged and appears reasonable. Accepting the lower sum and making allowance for a reduction by way of one-third for income tax purposes which she would have had to pay at source, this will result in the amount awarded under this head being $1,705.01.

Turning to the question of the claim for loss of use, I am of the view that this sum claimed is far too exorbitant. It must be remembered that the Plaintiff was laid up during the two months following the collision, Apart from her evidence that she in fact hired a car there is no supporting evidence that this was in fact so. One cannot, however, gainsay the fact that she would not have been inconvenienced without the use of her car. I would be minded, taking all the circumstances into consideration, to allow her claim for loss of use for a period of six weeks at a lower figure of $40.00 per day, as in the case of the Defendant and for the same period of thirty days, resulting in an award of $1,200.

The head of Personal Injuries now falls for consideration. The injuries are of the nature as one would expect from a motor vehicle collision. The injuries which she received were concentrated mainly to the right side of the Plaintiff's body that being the area to which the force of the impact

was greatest. The Plaintiff was in considerable pain for some time following the collision. This pain lasted for about two weeks and lessened after this as her injuries commenced to heal. There would have been the resulting shock generally associated with patients who have experienced collisions of this nature. The Plaintiff in addition had also the discomfort caused from the several cuts which she suffered over her right shoulder and from fractures of two ribs. The combination of these injuries caused her to become restless. At the time of the hearing she had not fully recovered from the effects of the injuries which she received in the collision.

The Medical Report (Exhibit 1) indicates a permanent disability of 15%. As the Plaintiff is not working at the present time her present earning capacity cannot be determined. There is the additional problem that there is no evidence that she has ceased working because of the injuries which she received in the collision or out of a mere matter of choice or due to other circumstances. Certainly there is no evidence contained in the Medical Report that as a result of her condition she is no longer able to be gainfully employed. There was no evidence given as to her age but her age could be assessed as being around forty years.

There is no factual basis therefore on the evidence available on which an assessment could be made based upon her earning capacity in order to arrive at a multiplier for the purpose of fixing general damages for the injuries which the Plaintiff received. Resort must therefore be had to an assessment of damages under this head based on the Plaintiff's evidence as to the injuries which she received, the period which she was laid up following the collision and based on the Medical Report (Exhibit 1). In assessing

damages under this head regard must also be had to the fact that the award of an amount for loss of earning during the period of two months that the Plaintiff was recuperating at home ought to be taken into consideration in arriving at the final figure to be awarded to the Plaintiff in order to make the sum granted a fair and reasonable one. The award for loss of earning has the effect of cutting down the award of general damages. A failure to do so would result in the Plaintiff benefitting twice over rather than in a case where there was no such claim for loss of earnings.

Taking into consideration therefore the injuries which the Plaintiff sustained including the pain, suffering and shock which she experienced, together with the 15% permanent disability which has resulted, it appears to me that a fair and reasonable award in the circumstances ought to be an amount in the region of $5,000.

The Plaintiff will have judgment on her claim therefore as follows:-

1.	Special Damages	$ 9,465.01
2.	General Damages	5,000.00
	Total	$14,465.01

Less 40% the degree of fault attributable to the Plaintiff.

There will therefore be a judgment on the Claim for the Plaintiff for $8,679 with costs to be agreed or taxed.

There will be a judgment on the Counter-Claim for the Defendants for $2,694 with costs to be agreed or taxed.

In relation to both Claim and Counter-Claim, interest awarded on Special Damages at 4% from 22/12/78 to 30/9/82.

In relation to the Claim, interest awarded on General Damages at 8% from date of filing of Writ that is 18/7/80 to 30/9/82.

Lord Scarman equated the principles which are applicable for a stay of proceedings with those for the grant of an injunction and in relation to the latter which was the question before the House he said:

> "I turn to consider what criteria should govern the exercise of the Court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings. The modern statement of the law is to be found in the majority speeches in The Atlantic Star (1974) A.C. 436. It had been thought that the criteria for staying (or restraining) proceedings were two fold: (1) that to allow the proceedings to continue would be oppresive or vexatious, and (2) that to stay (or restrain) them would not cause injustice to the plaintiff: see Scott L.J. in St. Pierre v. South American Stores (Gath & Shaves Ltd (1936) 1 K.B. 382, 398. In the Atlantic Star this House, while refusing to go as far as the Scottish doctrine of forum non conveniens, extended and reformulated, the criteria, treating the epithets 'vexatious' and 'oppresive' as illustrative but not confining the jurisdiction. My noble and learned friend Lord Wilberforce put it in this way. The 'critical equation' he said at page 468, was between 'any advantage to the plaintiff' and 'any disadvantage to the defendant'."

Later Lord Scarman repeated with approval what Lord Diplock said in McShannon v. Rockware Glass Ltd (1978) A.C. at 812, viz.

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> (a) the defendant must satisfy the Court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay, must not deprive the plaintiff or a legitimate personal or judicial advantage which would be available to him if he invoked the the jurisdiction of the English Court."

As to this last quoted passage, Lord Scarman had this to say:-

> "The formula is not, however, to be construed as a statute. No time should be spent in speculating as to what is meant by 'Legitimate' It, like the whole of the context, is but a guide to solving in the particular circumstances of the case the 'critical equation' between advantage to the plaintiff and disadvantage to the defendants."

If on the facts the critical equation arose for determination, one would be bound to look for some present objection on the part of Chase to the continuation of Rose Hall's action in Delaware and one would look in vain because Chase is not now attempting to interfere with Rose Hall's prosecution of its case in Delaware. That case is well on the way. The voluminous affidavits filed by Rose Hall for the purposes of this appeal are all to be effect that the Delaware Court is the proper forum for the determination of all the extant issues between the parties to the Jamaican action. If that be the stand adopted by Rose Hall, then surely it must be asked the pertinent question, why are you keeping on the files in Jamaica an action as to which you have tendered evidence sufficient to satisfy Parnell J., that "the continuance of his action in Jamaica would bring him no benefit whatever if he is successful." Rose Hall must be saying, that its action in Jamaica has spent itself by a combination of circumstances and it is now void of content, an empty, moribund symbolic thing. It must be an abuse of the process of the Court for a plaintiff to seek the Court's assistance to preserve a cause of action in which it has no practical interest and from which it hopes to derive no advantage. In my opinion the facts in the instant case do not rise to the level where one can properly consider the "critical equation". Rose Hall has chosen a forum from which it hopes to reap tenfold all the advantages that could conceivably be obtained from the Jamaican action and consequently it has an interest in prosecuting that action. Chase is content to have the matters at issue between itself and Rose Hall heard and determined in Jamaica, according to Jamaican law and where important Jamaican witnesses and Jamaican records are readily available

and compellable. Chase has had to defend the Jamaican action over a number of years and in numerous interlocutory proceedings. An indefinite postponement of the Jamaican action which may have to await not only the trial process but the relevant appeal procedures in Delaware, may have the effect that all important witnesses may die or their memories may fade before the Jamaican action comes up for trial. In that regard as well as on the question of costs Chase would be severly prejudiced by a stay of the proceedings.

It is with the greatest of respect that I differ from the conclusions of Parnell J. I find that in the instant case Rose Hall is an incompetent applicant for a stay, that on the facts Rose Hall has nothing legitimate to gain from a stay, whereas an indefinite postponement of the action would be disadvantegeous to Chase.

This appeal should be allowed with costs to the appellant. Due to the manner in which Parnell J. delivered his judgment, the appellant put in his notice of appeal before the question of costs was settled and did not specifically file a notice of appeal against the judge's order for costs. It was contended by the respondents and in my view rightly so, that there was no subsisting appeal against the orders for costs in the Court below. Those orders must therefore stand.

CAMPBELL, J.A. (AG.):

By summons in Suit E. 211 of 1976 heard by Parnell, J. the respondents sought an order from the Supreme Court in exercise of its inherent jurisdiction and or under Section 344 and Section 686 of the Judicature (Civil Procedure Code) Law that:

> (a) the date fixed for the trial of the action be vacated;
>
> (b) the case be removed from the trial and/or term lists and be only restored thereto by leave of a judge; and/or
>
> (c) all further proceedings in the action be stayed.

The learned trial judge on the 19th day of December, 1980, ordered:

> "That all further proceedings in this action be and are hereby stayed while there is pending for hearing and determination, civil action No. 79-182 in the United States District Court for the District of Delaware and brought by the first plaintiff and the second plaintiff (as an involuntary party) against Chase Manhattan Overseas Banking Corporation and Holiday Inns Inc. as defendants."

The appeal before us is against this order.

The facts providing the background to the summons have been set out fully by the learned trial judge in his written judgment delivered on February 12, 1981. It is therefore only necessary for me to summarise in outline and as succinctly as possible the minimum facts relevant for the determination of this appeal.

Rose Hall Limited the first respondent (the principal plaintiff in the suit) is a company incorporated in the Cayman Islands having its principal office in Jamaica. Prior to its dispute with Chase Merchant Bankers Jamaica Limited the first appellant (the principal defendant in the suit) hereafter called Chase Jamaica, Rose Hall Limited owned real estates in Montego Bay, St. James, Jamaica. It owned some of these real estates in its own name. Others it owned derivatively through two wholly owned subsidiary companies both incorporated in Jamaica namely Rose Hall (H.I.) Limited and Rose Hall (Development) Limited, all of whose

issued shares it owned. To complete this picture of derivative ownership it should be mentioned that Rose Hall Limited is itself a wholly owned subsidiary of Rollins (Jamaica) Limited a company incorporated in Delaware, United States of America whose shares are all owned by Mr. John Rollins, Sr., a citizen of the United States of America, resident in Delaware.

Rose Hall (H.I.) Limited owned the Holiday Inn Hotel in Montego Bay. It leased the hotel in June, 1970 to a Bahamian company named Holiday Inns of the Bahamas Limited. The latter assigned the lease to Holiday Inns (Jamaica) Limited a wholly owned subsidiary of Holiday Inns Inc. both of which are incorporated in Tennessee, United States of America. At all material times Holiday Inns Inc. guaranteed the obligations under the lease of its subsidiary and thus had a vital interest in the future of the hotel.

Subsequent to the lease transaction, Rose Hall (H.I.) Limited executed in favour of the Bank of Nova Scotia a first mortgage on the hotel, and a pledge of the proceeds of the lease as security for consolidated loans obtained for the construction of the hotel totalling $U.S.6,250,000.00. The repayment of this loan was further secured by guarantee given by the Government of Jamaica.

In May, 1974 Rose Hall Limited borrowed from Chase Jamaica the sum of U.S.$3,000,000.00 and as security for the loan gave a second mortgage on the hotel, a first mortgage on 3,000 acres of its directly owned real estate, and a pledge of all its shares in Rose Hall (H.I.) Limited.

Rose Hall Limited was soon in difficulties in respect of the agreed instalment repayments of the loan and being in arrears, commenced negotiations with the Government of Jamaica about the middle of 1975 with a view to selling to her the hotel. Before the negotiations could crystallise into a sale, Chase Jamaica took over the said negotiations and offered for sale to the Government the 3,000 acres of land which it held as mortgagee in addition to the hotel. Chase Jamaica had earlier in the year, to safeguard its security in the hotel, secured a transfer to itself