

IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 590 of 2008

ANNA CRAWFORD

CLAIMANT

BETWEEN AND

ARTHUR BELISLE

DEFENDANT

Hearings

2009

20th July

25th September

30th September

16th October

Mr. Anthony Sylvestre for the Claimant

Mr. Ernest L. Staine for the Defendant

LEGALL J.

JUDGMENT

Point in limine

1. At the commencement of the hearing in this case, learned counsel for the defendant made a point in limine. The point was that this claim or action was brought after the expiration of six years from the date on

which the cause of action arose; and therefore not maintainable because of section 4 of the Limitation Act, Chapter 170 of the Laws of Belize. Section 4 states: -

“The following actions shall not be brought after the expiration of six years from the date or on which the cause of action accrued --

(a) actions founded on simple contract or on tort ...”

2. The action in this matter is founded on the tort of negligence. The alleged negligence is stated in the claim to have occurred on the 30th August, 2002. The claim was filed on 1st September, 2008. The submission was therefore made that the claim was filed one day over the six years limitation period stated in section 4 of the Limitation Act.
3. Learned counsel for the claimant, in his reply to the submission, relied on section 55(b) of the Interpretation Act, Chapter 1 of the Laws of Belize, which states as follows:

“55 “In computing time for the purposes of any Act –

(b) if the last day of the period is a Saturday, Sunday or public holiday the period shall include the next

following day, not being a public holiday.”

4. It was therefore submitted that the last day of the six year period – August 30th 2008 – was a Saturday, and the matter was filed on the next following working day – Monday 1st September, 2008 – and therefore the claim was not filed after the expiration of six years from the date on which the cause of action accrued, when both section 4 of the Limitation Act and section 55(b) of the Interpretation Act are considered.

5. I agreed with the submission of learned counsel for the claimant and overruled the point in limine. When both of the said sections are considered, and when both parties’ agreement to the fact that August 30th 2008 was a Saturday is also considered, then the point in limine lacks merit. It was further submitted that the word “period” in section 55(b) above meant period of days, and that the section did not apply in a case like this where a period of years had expired. Counsel has referred to section 55(a) of the said Act where the phrase, “period of days” is used and asked the court to interpret section 55(b) as meaning period of days. I do not agree. If Parliament so intended, it would have used the phrase period of days in section 55(b) as it used it in section 55(a).

The Injury:

6. I now go to the substantive issues between the parties. In October,

1999, the claimant entered into a contract of tenancy with the defendant. I accept the evidence of the claimant that the tenancy was with respect to premises situate at 202 East Collet Canal, Belize City, Belize. The agreed monthly rental was two hundred and fifty dollars; and the rented premises was the upper flat of a two flat building in which was located a wooden verandah which formed part of the rented premises. In accordance with the contract of tenancy, the claimant paid the rent and moved in and took possession of the said upper flat of the building.

7. On 30th August, 2002 at about 9:00 p.m., while the claimant was on the wooden verandah of the upper flat, the verandah collapsed and she fell some distance to the ground and suffered serious physical injuries, including, according to her, a severely broken leg in which the bone was protruding the flesh, and the broken leg was wrapped around a post of the collapsed verandah. She was in excruciating pain. An ambulance came and she was taken to the Karl Heusner Memorial Hospital in Belize City.

8. On the 31st August, 2002, the claimant underwent surgery done by Dr. John Waight at the hospital and remained there as a patient until 5th December, 2002 when, on the recommendations of her doctors, because the healing of her injuries was not progressing satisfactorily, she went to Cuba for further treatment. On arrival in Cuba, she was admitted as a patient at the Frank Pais International Scientific Orthopaedic Complex, where she remained until 6th May, 2003 when she returned to Belize. At that time, because of the injuries to her leg,

she could not walk. She remained in Belize until 6th May, 2004, when, on the further recommendations of her doctors, she returned to Cuba as a patient at the same Complex, where she remained until 11th August, 2004. The medical treatment she received in Cuba assisted her to walk, but she could do so only on crutches.

9. The claimant, a married woman, was born on the 10th August, 1967. At the time of the injury, she was employed as an office assistant at the Ministry of Housing at a salary of \$150.00 each week. On 1st September, 2008, the claimant brought an action against the defendant and alleged that the incident was caused by the negligence and breach of statutory duty by the defendant; and claimed against the defendant damages for personal injury, interest and costs. No specific claim was made in the action for special damages.

The Question of Negligence

10. The evidence of the claimant, that she brought to the attention of the defendant that the verandah needed to be repaired, was admitted by the defendant. It was also admitted by the defendant, that in June, 2002, he commenced repairs to the verandah. The defendant testified that the repairs were not completed, because of interference by the claimant. He claimed that he could not continue with the repairs because the claimant kept throwing water on the workmen.
11. The claimant gave evidence that she knew of repairs to the verandah. The claimant stated that because she was not at home when the repairs were done, she believed that the verandah was completely repaired,

- including the beams. The claimant stated that the defendant repaired the wooden flooring of the verandah, and she thought that he had also repaired or changed the wooden beams of the verandah as well.
12. I have seen both the claimant and the defendant give evidence in this matter and I have observed their demeanour. The defendant said in evidence and in his defence that he warned the claimant not to use the verandah until he repaired it. I do not believe him. I believe the claimant when she said that the repairs were done to the flooring of the verandah, and she believed that the beams of the verandah were also repaired. I believe the verandah collapsed because the beams of the verandah were not repaired. The claimant assumed that because the wooden flooring of the verandah was repaired, that the beams of the verandah were also repaired; and that was the reason for her going thereon.
 13. Assuming that the defendant did tell the claimant not to use the verandah, he had, in my view, a further duty to fence or cordon off the verandah until the verandah was completely repaired; and to tell the claimant, as he is an experienced builder of houses, that the verandah was liable to collapse if she went thereon. There is no evidence that he did these things.
 14. The defendant, on the facts of this case, had a duty to exercise reasonable care to avoid acts or omissions which could be reasonably foreseen, to be likely to cause physical injury to the claimant. He ought to have foreseen, that failure to cordon off or fence the

verandah and failure to explain to the claimant that the verandah could collapse; and failure to tell her not to use it may result in the claimant going on the verandah and suffering injury. Where there is duty to exercise care, reasonable care must be taken to avoid acts which can be reasonably foreseen to be likely to cause physical injury to persons: see *Glasgow Corporation v. Muir* 1943 A.C. 448, at page 457; *Donoghue v. Stevenson* 1932 AC 562 at p580, and *Fardon v. Harcourt – Rivington* 1932 AER 81. Was the defendant negligent? Before answering this question, I must bear in mind the burden of proof. In *Henderson v. Henry E. Jenkins* 1969 3AER 756 at page 766, Lord Pearson, with much clarity, explained the well known evidential burden of proof in an action for negligence as follows:

“In the action for negligence, the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails.”

15. In *AC Billing & Sons Ltd. v. Riden 1958 AC 240*, an elderly woman of 75 years of age was injured when she used a route, involving some danger, made by the defendants, after visiting friends. While using the route, she sustained considerable injuries, by falling into an unfenced sunk area after her visit. Even though there was evidence that the elderly woman was aware of the danger, Lord Reid, in the House of Lords, held that the defendants were under a duty to all persons who might be lawfully expected to visit the house; and that duty was the ordinary duty to take such care as, in all the circumstances of the case, was reasonable to ensure that persons were not exposed to danger by the actions of the defendants. Lord Cohen agreed. His Lordship, agreeing with Lord Denning in the Court of Appeal, said at page 258 as follows:

“A contractor doing work on premises is under a duty to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his works.”

16. It is clear to me that a contractor is under a duty of care in respect of premises on which he was working. The defendant was doing work on the verandah which a contractor would do; and therefore was under a duty to use reasonable care to prevent injury or damage to the claimant.

17. In relation to the defence that the injured woman was aware of the danger, the court in *Billing* held as follows:

“Where, as here, the respondent (the injured woman) was aware of the danger but, in all the circumstances, a reasonable person would have risked incurring it, the contractees (Defendants) were not absolved from liability either by giving a warning or by reliance on the respondents knowledge.”

18. The court in considering what a reasonable person, who is injured would realize or do or risk in a particular set of circumstances, must have regard to human nature as is known by the court. If it is believed, that in a particular set of circumstances, the great majority of people would have behaved in one way, it would not be right for the court to say that a reasonable man would or should have behaved in a difference way. We must not forget the maxim that a reasonable man does not mean a paragon of circumspection: see *AC Billing above at p 255*.
19. Returning to the facts of the case before me, the claimant stated that it appeared that the defendant had repaired the wooden flooring of the verandah. She saw the wooden flooring was repaired and assumed that the wooden beams were also repaired. The beams were not repaired. She went on the verandah and it collapsed with her causing her injuries. As I said, I do not believe the defendant gave any warning to the

claimant not to use the verandah. Moreover, I do not accept the submission that the claimant accepted the risk of injury and therefore waived her claim in respect of it. There is no evidence, accepted by the court, to support this submission. The defendant, who I believe rented the above mentioned premises to the claimant, had a duty to take further steps such as fencing off or cordoning off the area of the verandah; and he should have explained to the claimant that the verandah could collapse. There is no evidence that he did these things. I therefore hold that the defendant was negligent and breached the duty of care he owed to the claimant.

Contributory Negligence

20. The claimant, before the accident, knew that the wooden flooring of the verandah was extremely rotten; and the beams needed urgent repairs. She made several requests to the defendant, over a period of about fifteen months, to repair the verandah; and told him that it was a hazard to everyone who used it. She stated that in June, 2002 the “Defendant appeared to have repaired the wooden flooring of the verandah.” But she said that she was not aware that the beams of the verandah were not also repaired.

21. The question the court must ask for the purpose of deciding whether or not contributory negligence is established is whether the facts, which were known by the claimant, would have caused a reasonable person in the position of the claimant, to realize the danger. In order to establish contributory negligence of the claimant, it is essential for the respondent to establish that the injury to the claimant was partly caused

by her omission to take that degree of care which the circumstances of the case required. In *Caswell v. Powell Duffryn Associates Collieries Ltd 1940 AC 152*, Lord Wright said that it was a question of degree of care which the circumstances required the claimant to take; and the court would have to draw a line **“where mere thoughtlessness, or inadvertence or forgetfulness ceased and where negligence began.”**

22. All that is necessary to establish contributory negligence is to prove to the satisfaction of the court that the injured party did not, in his own interest, take reasonable care of himself; and contributed, by his lack of care, to his own injury. The principle of contributory negligence is that where a person is part author of his own injury, he cannot call on the other party to compensate him in full: see *Nance v. British Columbia Electric RY Co. Ltd. 1951 AC 601, at p 611.*

23. Would a reasonable person on the facts, seeing the wooden flooring of the verandah repaired, and not told that the repairs were incomplete and not told not to go on the verandah, assume that the beams of the verandah were also repaired and therefore use the verandah? Could it be said, on the facts of this case, that the claimant in her own interest did not take reasonable care of herself? Did the claimant take that degree of care which the circumstances of the case required? It seems to me that the claimant, who knew that the beams of the verandah needed repairs, should not have assumed that because the flooring was repaired, therefore the beams were also repaired. Furthermore, it seems to me, she should have enquired from the defendant whether the verandah was completely repaired before going thereon; and she should

have also gone to the lower flat of the building and look at the beams of the verandah to determine whether they were changed or repaired. There is no evidence that the claimant did these things; and in my judgment, her failure to do so, and her aforesaid assumption amounted to contributory negligence on her part. In other words, I find, to use the words of *R.H. Luckhoo J.A. in Associated Industries Ltd. v. Kumar Ragnauth 1982 W.I.R. 249 at 251*, that “the plaintiff was negligent as regards himself.” I am of the view, on the facts of this case, that the claimant was twenty-five percent to blame for the accident.

Damages

24. I must now consider the question of damages. I must consider general damages which need not be specially pleaded. Then I have to consider special damages which must be specially pleaded. Under the heading general damages, much guidance has been given by *Wooding C.J.* in the hallmark decision of *Cornilliac v. St. Louis 1965 7 W.I.R. p. 491*. The learned judge enumerated several considerations which a judge should bear in mind when making an assessment of general damages involving personal injuries as follows:-

- “(i) The nature and extent of the injuries sustained;**
- (ii) The nature and gravity of the resulting disability;**
- (iii) the pain and suffering which had to be endured;**
- (iv) the loss of amenities suffered; and**

**(v) the extent to which consequentially,
the appellants pecuniary prospects
have been materially affected**

25. These are the items or heads which I have to consider in assessing general damages. I consider (v) above as meaning loss of earning capacity, because this loss is assessed under general damages. I must also consider, for convenience, the relevant facts under each item or head. I must, however, bear in mind that though it is convenient to itemize the different heads, in the end judgment is given for a single lump sum as damages for pain and suffering and loss of amenities.
26. But I observe in *Johnson v. Sterlings Products Ltd. 1981 30 W.I.R. 155*, George CJ itemized the heads above and gave an amount under each head. Wooding C.J. in *Cornilliac* however, adopted a different approach and did not disclose an amount under each head above, but gave a total figure under all the heads as damages for pain and suffering and loss of amenities. The reason Wooding C.J. gave one figure for all the heads was because, according to him, **“the nature and extent of the injuries inflicted cannot be disassociated from the physical disabilities which are their permanent result, nor are they unrelated to the pain and suffering which have had to be endured.”**
27. This approach of Wooding CJ is supported by Lord Denning CJ in *Fletcher v. Auto Car and Transportation Ltd 1968 2 A.E.R. 726*. Lord Denning expressed disagreement with arriving at a figure under each item and adding them up, because of the risk of overlapping, a point

which Wooding CJ clearly had in mind when he made the pronouncements above. For these reasons, I adopt the position of Wooding CJ and would give one total figure under all the heads as damages for pain and suffering and loss of amenities. But I must consider for convenience the relevant facts under each head. The facts under each head are as follows:

Nature and extent of injuries sustained

28. The claimant said she suffered severe fractures of her left foot which resulted in the bone being exposed and protruding through the skin. She was unconscious. She underwent medical treatment in Cuba on two separate occasions for a total period of about one year. She also underwent several surgeries. One surgery, according to the claimant, was performed by Dr. John Waight, who said she suffered a fracture of the bones of the left ankle.

Nature and gravity of the resulting physical disability

29. The fractures of the left foot have resulted in the claimant having to use crutches for purposes of walking. She said she cannot walk without crutches. She said the bones broken in her left foot have not yet been fused or knitted back.

Pain and suffering

30. The claimant felt excruciating pain after she fell. She underwent several surgeries and spent a total of about one year and four months in hospitals in Belize and Cuba. She testifies that she is confined to a wheel chair, though she came into court on crutches.

Loss of amenities

31. The term loss of amenities has been defined as a “loss of pleasure of life or a diminution of the injured person’s capacity to enjoy his accustomed lifestyle on account of the injuries which he has sustained”: see *George CJ in Johnson v. Sterling Products Ltd. above at page 163*. There is no evidence of what kind of sporting or recreational activities the claimant participated in prior to the accident. The evidence, however, of the claimant is that she walks with the aid of crutches. She is therefore restricted, to some extent, in taking part in sporting activities such as dancing and athletics. There is no evidence of what kind of recreational activity, if any, she could participate in.

Loss of earning capacity

32. Loss of earning capacity is an award or compensation made by the court because of the injured person disadvantage in the labour market. It is compensation for the diminution, due to the injury, of the earning capacity of the injured person. There is a difference between loss of earning capacity and loss of future earnings. In *Fairley v. John Thompson Ltd. 1973 2 Lloyd’s Report 40*, Lord Denning explains the difference –

“It is important to realize the difference between an award for loss of future earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earning is awarded for real assessable loss proved

by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.”

33. The claimant is 42 years old. She was injured on 30th August, 2002 when she was 35 years old. At the time of the accident, the claimant was married and was employed as an office assistant at the Ministry of Housing. Her salary then was one hundred and fifty dollars a week. Because of her injury, she says she has not been able to work and earn wages for herself. There is evidence that the amount of \$68,000 was spent on medical expenses; and that the Ministry of Health assisted, but the extent of assistance was not given in evidence.

34. From the evidence, the claimant has lost her job at the Ministry of Housing. She says that she is unable to find employment, but there is no evidence that this is so because of her injuries. There is sadly no evidence concerning the nature of her skills, if any; and the kind of employment she could undertake. There is also no evidence from any doctor as to the percentage of her disability, though there is evidence of her injury which signifies some disability. But there is the evidence, mentioned above, though admittedly tenuous, upon which a decision under this head could be made. I must bear in mind, though, the warning of Carey J.A. in *Gravesandy v. Moore* 1986 40 W.I.R. 222 quoting Canberry J.A. in *United Dairy Farmers Ltd v. Goulbourne* 1984 (unreported) as follows:

“Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damage, must offer some evidence, directed to that head, however tenuous it may be.”

35. It is highly likely that if the injury had not occurred, the claimant, may have still been in employment at the Ministry of Housing earning her weekly salary. I must also bear in mind the ordinary contingencies of life, such as sickness, accident or dismissals from the job. Considering the extent of the evidence in this case, including her injuries, and doing the best I can, I reach a compensation figure of \$15,000 for loss of earning capacity. I have to make it clear, though, that I do not suggest that the figure is mathematically correct. I am assessing loss of earning capacity as part general damages not computing special damage. I am evaluating prospects, and the amount I award under this heading is a broad general estimate: see Wooding CJ in *Cornilliac* above at p 494.
36. I must now assess and consider the other items or heads above and arrive at a final award as general damages. I consider the severe fracture of her ankle, the several surgeries she underwent, the nature and gravity of her injuries, the pain and suffering, the long period of her hospitalization and her loss of amenities.
37. With respect to her injuries, the claimant tendered a medical document on which appears her signature and which is written in

- Spanish. The document was admitted in evidence with the consent of counsel for the defendant, as exhibit A.C. 2. Dr. John Waight, a registered medical practitioner in Belize who performed surgery on the claimant on 31st August, 2002, gave evidence; and said he knew a patient Anna Crawford who was under his care at Karl Heusner Memorial hospital in the latter part of 2002.
38. The doctor said he was conversant and qualified in the Spanish language. He prepared a translation of Exhibit A.C. 2 from Spanish to English and his translation was admitted in evidence, again with the consent of counsel for the defendant as exhibit J.W. 1. Dr. Waight in the translation of the exhibit A.C. 2 said that the claimant suffered a fracture of the bones of the left ankle which resulted in the joint coming out of place. The doctor said there was an open wound with the fracture which became infected. He could not say what kind of employment or sporting activities she could engage in, because he did not know the effectiveness of the treatment as he had not done a recent medical examination of the claimant.
39. In order to arrive at an amount as general damages, I should also consider the amount of general damages awarded by the courts for similar injuries in order to understand the range of awards in this type of case. But I must bear in mind the reservations expressed by the Privy Council with respect to comparing awards. *Lord Carswell in Seepersad v. Persad and Another 2004 64 W.I.R. 378 at page 385* said.

“The Board entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms.”

40. I now turn to comparable awards made in other jurisdictions:

1. In *Stevens v. Dean Shanger Oxide Works 1981* (unreported) *Kemp & Kemp Revised Edition 1982 vol 2 para 12-305*, the injury was serious to the left foot of a male person aged 48 – general damages of £18,000.

2. *Jones v. Houldar Marine Drilling July 1990 see Kemp & Kemp above para 13-014. Fracture of left ankle – general damages – £16,000.*

3. *Morgan v. London Borough of Tower Hamlets, October 1988 see Kemp above para 13-019. Fracture of left ankle – general damages £7000.*

4. In *Paterson v Rotherham Health Authority 1987. See Kemp v. Kemp above para 12-406. Serious fracture of left tibia – general damages £18,500.*
These cases were decided in England more than 20 years ago and the awards were made in British pounds.

5. In the Caribbean there is the Jamaican case of *Gravesandy v. Moore 1986* above – serious injury to his left leg – general damages \$50,000.

41. There is an element of speculation in awarding general damages in this kind of case. Canberry JA in *United Dairy Farmers Ltd v. Goldbourne* recognized the difficulty in making these awards. “In

making awards,” he said ‘the courts do their part to measure the incomprehensible or the immeasurable (e.g. pain and suffering, or loss of amenities), but there is a stage at which this ends and sheer speculation begins’: See *Gravesandy v. Moore above at p 228*.

42. I bear in mind the above awards were made in a different currency, and that the awards were made more than 20 years ago. I also consider the facts and circumstances of this case, and that I must award general damages that are fair and reasonable. Doing the best I can, bearing in mind she suffered fractures to bones in her left ankle, I arrive at a figure for general damages the amount of \$55,000. This amount includes the amount of \$15,000 awarded for loss of earning capacity. Twenty-five percent must be deducted from the amount of \$55,000, on the basis of the claimant’s contributory negligence, which I have found above, leaving a balance in the amount of \$41,250 as general damages. I therefore award to the claimant the amount of \$41,250 as general damages.

Special damages

43. In this case, there is no item in the claim for special damages. The item of special damages must be specially pleaded and proved before the court could make an award under this item. If the intention is to claim for loss of future earnings, the loss has to be specially pleaded and proved: see *Gravesandy v. Moore above at page 223 Carey J*. There being no claim for loss of future earnings or special damages, the court cannot make an award for loss of future earnings or special damages.

Rule 8.9 (3)

44. The defendant submitted that under Rule 8.9 (3) of the Supreme Court (Civil Procedure) Rules 2005 the claimant must attach to the claim form the report of the medical practitioner stating the personal injuries alleged in the claim. It is clear that Rule 8.9 (3) of the Rules was not complied with, in that there was no report of a medical practitioner stating the personal injuries of the claimant, attached to the claim form. This Rule does not prescribe a sanction for non-compliance. But Rule 26.9 (2) states that a failure to comply with a Rule does not invalidate any step taken in the proceedings, unless the court so orders. I therefore hold that the failure to follow Rule 8.9 (3) does not invalidate the claim of the claimant.
45. But having said that, it must be strongly mentioned that the Rules of the Supreme Court must be obeyed; and that counsel is expected in preparing pleadings to exhibit knowledge of the Rules. It must be remembered that the court has a discretion to invalidate steps in civil proceedings taken contrary to the Rules; and the court may well, in appropriate cases, do that, with accompanying orders for the payment of costs.

Trespasser

46. The defendant submitted that the claimant was a trespasser, she having held over after an expiry date mentioned in a notice to quit to the claimant. The claimant denied receiving a notice to quit. But assuming a notice to quit was served on the claimant, she did not

become a trespasser by holding over after the expiry date mentioned in the notice. She held over the premises on a tenancy at sufferance.

Counterclaim

47. The defendant filed a counterclaim against the claimant for the amount of \$9,625.00 for rent and mesne profit for the period 15th May, 2002 to 31st July, 2002 and from 1st July, 2002 to 31st July, 2005 – a period of 38 ½ months at \$250.00 per month. The counterclaim, though uses the term mesne profit, which means profit received by a tenant in wrongful possession of land, is in effect a counterclaim for rent owing of \$250.00 per month for the period of 38 ½ months.
48. The claimant gave evidence that she always paid her rent on time and never fell into arrears of rent. It was also suggested to the defendant in cross-examination, that he had told the claimant, after the accident, that she could stay at the premise rent free. This suggestion was denied by the defendant. The defendant had testified that he took the claimant to court for rent owing; but she did not appear and the magistrate did not hear the matter. I believe the claimant was in arrears of her rent; and I do not accept that she was told after the accident that she would be allowed to live rent free at the premises.
49. It was also submitted by the claimant that the counterclaim for the rent owing was barred by section 4 of the Limitation Act, Chapter 170, which states that actions founded on simple contracts shall not be brought after six years from the date on which the cause of action

accrued. The action is in effect, for an amount owing and is founded on the contract of tenancy.

50. The cause of action would seem to have accrued when the rent for May, 2002 was not paid. The counterclaim was brought on 26th January, 2009, which is about six years and eight months after the rent for May, 2002 accrued. Since the action cannot be properly brought after the expiration of six years from when the rent for May, 2002, became due, the rent and mesne profit owing for the period May, 2002 to January, 2003 is barred by section 4 above. The defendant is entitled to the rent and mesne profit owing from 1st February, 2003 to 31st July, 2005 – 30 months at \$250.00 per month making a total of \$7,500. I therefore give judgment for the defendant on the counterclaim in the amount of \$7,500.

The Balance

51. Rule 42.11 of the Supreme Court (Civil Procedure Rules) 2005 states:

42.11 (1) This Rule applies where the court gives judgment for specified amounts both for the claimant on the claim and the defendant on the counterclaim.

(2) If there is a balance in favour of one of parties, it may order the party whose judgment is for the

lesser amount to pay the balance.

- (3) In a case to which this Rule applies, the court may make against the claimant and the defendant (whether or not it makes an order under paragraph (2) –**
- (a) a separate order as to damages; and**
 - (b) a separate order as to costs.**

52. As shown above, the court has given judgment for specified amounts of \$41,250 and \$7,500 for the claimant and defendant respectively. There is a balance in favour of the claimant in the amount of \$33,750. Acting under Rule 42.11 (2) above, I order the defendant to pay to the claimant the said balance of \$33,750.

CONCLUSION

53. I therefore make the following orders:
1. Judgment for the claimant against the defendant in the sum of \$41,250. for negligence.
 2. Judgment on the counterclaim for the defendant against the claimant in the sum of \$7,500. representing rent and mesne profits owing.

3. The defendant is ordered to pay to the claimant the sum of \$33,750 being the balance remaining after the sum above awarded to the defendant is deducted from the sum above awarded to the claimant.
4. Defendant to pay to the claimant interest on the said sum of \$33,750 at the rate of 6% per annum from 1st September, 2008 until the said sum is fully paid.
5. Defendant to pay costs to the claimant in the sum of \$3,000.

Oswell Legall
JUDGE OF THE SUPREME COURT
16th October, 2009

