**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**
**ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS**

**CICA (Civil) Appeal No 1 of 2020**
**(Formerly G 0511 of 2009)**

**BETWEEN:-**

**WOODS FURNITURE AND DESIGN LIMITED**
**(In voluntary liquidation)**

Appellant

-and-

**GARY JAMES**

Respondent

**In Open Court**

**BEFORE:**

**The Rt Hon Sir John Goldring, President**
**The Hon Sir Richard Field, JA**
**The Rt Hon Sir Jack Beatson, JA**


**Appearances:**

**Ms Alice Carver of Nelsons & Co for the Appellant**
**Mr Clyde Allen for the Respondent**

**Heard:** **23 April 2020**

**Draft Circulated:** **6 July 2020**

**Judgment delivered:** **30 July 2020**

## JUDGMENT

**Sir Richard Field, JA**

*Introduction*

1. This is an appeal from two orders respectively made on 4 October 2019 and 15 October 2019 by Kawaley J ("the judge"), following the trial before him of a claim brought by the Respondent ("Mr James") for damages for an injury to his left arm caused by the admitted negligence of the Appellant ("WFDL"), which was Mr James' employer at the material time.

2. The issues before the judge at trial were whether Mr James had been contributorily negligent and the quantum of damages. By the first order, the judge dismissed WFDL's contributory negligence case and awarded general damages to Mr James of CI$ 27,000 for general damages,

CI$ 10,537.10 special damages, made up by CI$ 1,850 (loss of earnings), CI$ 5,609.78 (past medical expenses) and CI$ 3,077.32 (future medical expenses).

3. Under the second order, Mr James was awarded his costs: (1) of pursuing the liability issue to be taxed if not agreed: (i) on the standard basis from commencement of the action to 23 June 2010; (ii) on the indemnity basis from 23 June 2010 to 3 May 2013; and (iii) on the standard basis from 3 May 2013 to 29 August 2018; (2) in successfully contesting the contributory negligence defence on an indemnity basis; (3) in relation to quantum: (i) up to and including 29 August 2018 on the standard basis; (ii) on a 50% basis after 29 August 2018 on the standard basis; and (4) in respect of the costs application on the standard basis.

4. On appeal, WFDL challenges the finding of the judge dismissing its contributory negligence case and with the leave of the judge appeals against the award of costs on the indemnity basis in favour of Mr James in: (a) pursuing the liability issue in the period 23 June 2020 to 3 May 2013 and (b) in successfully contesting the contributory negligence defence. WFDL also contends that the judge should have recused himself after becoming aware accidentally of a payment-in by WFDL.

*The judge's accidental knowledge that WFDL had paid C$ 35,000 into court on 21 November 2018*

5. In paragraph 49 of the judgment, the judge explains that, when reviewing the file to gain an overview of the course of the litigation to assess the respective complaints of delay raised by counsel at trial, he saw that following an email from WFDL's then attorneys dated 11 December 2017 referring to a settlement counter offer of CI$ 35,000 open for seven days, that sum was paid into court on 21 November 2018.

6. In paragraphs 50 and 51 of the judgment, the judge noted that under GCR 22, r 7 the fact of a payment in must not be communicated to the Court until all questions of liability and the amount of damages have been decided. He also referred to paragraph 22/7/1 of the Supreme Court Practice 1997 that provides:

> *"It is the duty of the Judge and counsel to observe this rule, but if, by inadvertence or otherwise, it is broken, it is a matter for the trial Judge to determine what should be done. If he thinks it proper, or necessary for the due administration of justice, he may refuse to hear the action further, and direct it to be heard by another tribunal. But if he is satisfied that no injustice will be done he may allow the cause to proceed; this course if taken, in itself affords afford no ground for an appeal (Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717, CA). See also Re an Action for Negligence (1992 C No. 3063), The Times, March 5 1993, where during the course of a trial a journal revealed not only the fact of payment-in but also the amount thereof, the court held that it was open to the judge to continue the hearing if he could put such*

*knowledge to one side for the purpose of making his decision at the end of the trial.*

7. Paragraph 52 of the judgment reads:

> "*This is a case which is cost-sensitive for both parties, the Plaintiff being impecunious and the Defendant being in liquidation. The trial took place over 10 ½ years after the injury was sustained. Clear grounds of a risk of injustice would be required for me to recuse myself having reserved judgement because the fact an amount of a payment in accidentally came to my attention after I had heard submissions on quantum and further considered them having reserved judgement. Because of the way in which the quantum issues were argued and the strong provisional conclusions I had arrived at before becoming aware of the payment-in, I am satisfied that I am able to "put such knowledge on one side" for the purposes of the findings recorded in this judgement. I also consider that it would not be proportionate to invite counsel to address me on this issue which appears to me to be quintessentially a matter for my own judgement*."

8. Although WFDL's Notice of Appeal and Memorandum of Grounds of Appeal do not plead a challenge to the judge's findings on contributory negligence and quantum founded on his decision to give judgment notwithstanding his accidental knowledge of the payment-in, Ms Carver for WFDL submitted that the decision not to recuse himself in respect of the issue of damages gave rise to an objective appearance of bias. She argued that the judge ought to have considered subjectively whether knowledge of the payment-in disabled him from fairly continuing with the case and then considered objectively whether there was a real possibility of the court being seen, by a fair-minded and informed observer, to be acting unfairly. And having considered these issues, he ought to have concluded that to continue with the assessment of damages, without giving the parties an opportunity to make submissions, would indeed give the appearance of bias.

9. In my judgment, it would have been preferable for the judge to have invited short written submissions from both sides and obtained information as to whether the issue of damages could be quickly decided by another judge before reaching his decision to proceed to give judgment notwithstanding knowledge of the payment-in. Such a course would not of itself have involved undue expense or led to any significant delay and ought to be the general practice in cases of this sort. However, I do not think that the judge's failure to adopt this course is sufficient to invalidate the exercise of his discretion. A new trial before another judge could have been very prejudicial to Mr James given his impecuniosity and the long delay between the occurrence of the accident and the trial. Further, the judge's consideration of the issues in the case was well advanced and I think considerable weight should be given to the view of this very experienced judge that he could put the payment-in out of his mind when finally deciding the issues before him. I also think that the postulated fair-minded observer would not in the circumstances of this

case think that it would be unfair for the judge to proceed as he did. For these reasons, I conclude that the judge's decision to finish determining the case is not a good reason for overturning his judgment and ordering a new trial.

10. Before leaving this topic, it is convenient to deal with a related submission made by Ms Carver. Right at the beginning of the appeal, she thought it appropriate to contend that the judge had been unconsciously biased in favour of Mr James because he observed at a later hearing concerned with leave to appeal that he could not envisage that the Court of Appeal would permit a situation where Mr James walked away with nothing.

11. I have no hesitation in rejecting this submission. Ms Carver's justification for advancing it comes nowhere near justifying such a serious criticism of the judge.

*The contributory negligence issue*

12. At all material times, Mr James who came from Jamaica, was employed by WFDL to assist in installing floors. In the course of his employment he used WFDL's forklift truck to carry materials from the warehouse to be loaded onto the company's truck to be driven to the installation site. On 14 November 2008 Mr James loaded material onto the forklift truck and, whilst he was driving, it stopped moving. When he pushed down the power pedal to try to get the vehicle moving, he heard a sparking sound and on looking under the truck he saw an exposed wire. He then walked into the warehouse where he asked another employee, Mr Leroy Rolando (known as Troy), to assist him. Mr James' account in his signed witness statement dated 12 March 2012 of what happened thereafter is as follows.

> "*I was talking to Leroy Rowland [sic] as we walked back to the forklift truck as he was behind me and talking to me. When I got to the forklift truck I bent down to point out the loose wire. The forklift truck was pointing towards the warehouse so we approached the front of it. He was behind me looking and listening to what I was saying as we approached the front of the forklift truck. When I was looking underneath the forklift truck he was still positioned directly behind me and so if one looks at the forklift truck and observes how we were positioned I consider it was clear that he could see exactly what I was doing and see my arm. I remember he was leaning on the forklift truck looking at what I was doing and had his hand on the forklift truck. I was explaining to him what I could see. I did not see what he did because I was facing forwards during looking underneath the truck and pointing out the loose wire. However, the next thing I recall was that the machine fork dropped down and crushed my arm.... I was kneeling on the left side where the foot pedal was situated and he was standing behind me. I later learned that he opened the engine situated on the front of the forklift truck and released a valve in the engine which caused the forklift truck to come down and crush my arm.*"

13. Mr James' pleaded account of the accident was in accordance with his witness statement which constituted the principal part of his evidence in chief. He was the only witness called at the trial.

14. Ten days after the incident, a signed "Report of an injury or dangerous occurrence" was made by Mr Brian Stacey on behalf of WFDL ("the Incident Report"). The report reads:

> *"Gary James was operating a stockpicker forklift on the leading on the loading bay at Woods Furniture. The lift became unoperable and suspended 1-2 feet in the air. Troy Roland and Mr James pointed out a malfunction with the foot pedal. Mr James bent down and placed his left forearm underneath the foot pedal to demonstrate the problem. Unknown to Mr James at this time Mr Roland had moved to the front of the stockpicker and opened the front of the machine. Mr Roland was unaware Mr James had placed his arm under the machine and used the manual lowering valve. The lift lowered onto Mr James arm and trapped it."*

15. WFDL's pleaded case of contributory negligence was set out in paragraph 9 of its Defence as follows:

> *"Further, if which is denied, the Plaintiff is found to have sustained the alleged or any injury, loss or damage as a result of the accident occurring on the 14th of November 2008, the same was caused or contributed to by the Plaintiff's own negligence in that:*
>
> *(a) He asked for assistance from Leroy Rolando in order to fix the forklift truck.*
>
> *(b) Leroy Rolando attempted to start the forklift truck by standing on the platform and restarting it.*
>
> *(c) When this proved unsuccessful, Leroy Rolando moved to the front of the machine and opened the cage at the front of the machine where the automatic release valve was positioned.*
>
> *(d) At the time that Leroy Rolando went to the front of the machine, the Plaintiff was standing on top of the platform.*
>
> *(e) The Plaintiff was or should have been aware that Leroy Rolando was going to release the automatic release valve.*
>
> *(f) Without warning and negligently the Plaintiff stepped off the machine and placed his hand underneath the platform.*
>
> *(g) Leroy Rolando with due care and attention slowly lowered the platform. The Plaintiff with full sight of the platform lowering and knowledge of the actions of the Defendant left his arm in a position whereby injury was to be caused.*
>
> (h) *The Plaintiff failed to alert the Defendant, his servants or agents to his actions, which would have averted the accident."*

16. In giving his reasons for dismissing WFDL's contributory negligence case the judge said that the best available documentary evidence of what occurred on the day of the accident was WFDL's own report of how the injury occurred. The judge then went on to observe that Mr James' evidence in his witness statement was broadly consistent with the incident report and his pleaded case and that in these circumstances he found Mr James' evidence to be credible and reliable and not to any material extent discredited "despite a careful and probing cross-examination". He continued:

> "*The Defendant's starkly different pleaded alternative version of events, according to which the Plaintiff should have been aware that Mr Rolando could or might release the automatic valve, was not only not supported by any positive evidence, it was inconsistent with admissions contained in its own Incident Report compiled 10 days after the accident. If the Defendant's initial investigations suggested, even inconclusively, that the Plaintiff had contributed to his injuries to a material extent, such a conclusion (even if only preliminary or tentative) ought to have been recorded in the employer's official record of the incident.*"

17. The judge noted that WFDL had advanced, seemingly for the first time, two unpleaded allegations of contributory negligence, namely, the suggestion that it was inherently risky for Mr Woods to place his arm underneath the raised platform when it was carrying a load and that it was contrary to recognised safety standards to park the forklift truck with the loaded platform raised, as the Plaintiff clearly had done. The judge then said:

> "*As regards to the first point, the Plaintiff appeared to me to acknowledge that his actions were in an abstract sense risky, but insisted that when he bent down to point out what he believed to be the problem to Mr Rolando, his colleague was standing next to him and he did not see him moving in front of the forklift to where the valve was located. As regards the second point, the Plaintiff accepted in general terms that it was dangerous to park the loaded forklift with the forks raised. He also admitted receiving some initial training but did not admit that he had contravened any relevant operating rules laid down by the Defendant. No evidence was adduced of any safety rules in force at the time of the accident by the Defendant. The evidence clearly supported a finding that if the Plaintiff had lowered the forks before seeking assistance in relation to the truck which had suddenly stopped the accident would not have occurred in the way which it did. The critical question was whether or not he was negligent in all the circumstances including in particular (a) the involuntary stopping of the vehicle, as opposed to a voluntary parking of it, and (b) the Plaintiff's uncontradicted evidence that he did not expect Mr Rolando to release the load while the plaintiff was pointing to what he believed to be the mechanical problem.*"

18. In paragraph 22 of the judgment, the judge held that the pleaded case on contributory negligence must be decisively rejected because it was not supported by any positive evidence and was convincingly contradicted by the incident report.

19. In paragraph 23, the judge records that Ms Carver advanced the unpleaded argument in closing submissions that Mr James had been contributorily negligent by failing to lower the load when the forklift truck came to a halt and he left it to get help, Mr James having accepted that this would have been the safest course to follow. The judge then dealt with this submission by setting out in paragraph 24 section 8 of the ***Torts (Reform) Law (1966 Revision)*** and considered WFDL's reliance on *Brian Smith v James Strang Limited* [2012] CSOH 173 and *Walker v Chruszcz and another* [2006] All ER (D) 224 in paragraphs 25 and the first part of paragraph 26, and then continued as follows in paragraphs 26 – 28 of the judgment.

> "*26.... Here, there was no evidence that the Plaintiff had been supplied with any manual and ignored its warnings about parking a loaded forklift truck with the forks raised. He had not parked the truck; it broke down and stopped. More importantly still, the Plaintiff's injury did not occur through his operating the machine in a prohibited or dangerous manner. It occurred when the plaintiff was seeking to identify why the vehicle had broken down and because a fellow employee unexpectedly lowered the forks. The causal connection between leaving the loaded forks raised and the injury which was sustained is far from obvious. Nor is reasonable foreseeability of loss clear. Ought the Plaintiff reasonably to have foreseen, when he left the forklift truck after it had unexpectedly broken to summon a colleague to fix it, that the colleague might release the forks while he was showing him a broken wire in a completely different part of the machine from where the release valve was?*
>
> *27. Having admitted in the November 24, 2008 Incident Report that what Mr Rolando did was unexpected, it is impossible to see how the Defendant can be said to have proved without adducing any evidence, that the Plaintiff's injury was partly caused by his own negligence. Modern civil litigation does not permit trial by ambush. The suggestion that leaving the forks raised constituted contributory negligence was not foreshadowed in the Incident Report, was unpleaded and was first raised orally in cross-examination over 10 years after the accident occurred. In these circumstances, the oral admission by the Plaintiff that it was in general terms dangerous to park the forklift truck when loaded with the forks raised falls well short of establishing that his injury was partly caused by his own negligence in all the circumstances of the present case.*
>
> *28. The predominant cause of the injury was the admittedly negligent actions of the Defendant's employee which the Incident Report admitted were unexpected. The Defendant's contributory negligence claim is dismissed.*"

20. Ms Carver argued that the judge interpreted paragraph 9 of the Defence too restrictively. In her submission, sub-paragraphs (f), (h) and (i) of paragraph 9 covered WFDL's contributory negligence case based on certain answers given by Mr James in cross-examination, namely: (a) he put his arm under the forks to show Mr Rolando what the problem was because Mr Rolando was not listening and not looking; (b) he did not tell Mr Rolando in advance that he was going to point out the wire with his arm under the forks "but he [Mr Rolando] was there looking at

me"; and (c) when the forklift truck was parked, its forks were lowered to avoid the danger of the platform lowering unexpectedly.

21. As Lord Hoffmann said in *Biogen Inc v Medeava plc* [1997] RPC 1 at p. 45:

> *"Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."*

22. In my opinion, assuming Ms Carver's contributory negligence case fell within sub-paragraphs (f), (h) and (i), it was nonetheless clearly within "the generous ambit within which a reasonable disagreement is possible"[1] for the judge to hold on the evidence that Mr James was not contributorily negligent because Mr Rolando ought not, unexpectedly and without warning, to have lowered the platform in circumstances where Mr James was entitled to assume that Mr Rolando clearly understood that Mr James was placing his arm under the platform to point out the wire.

23. In her skeleton argument, Ms Carver stated that she did not advance the submission in closing that the judge records she made in paragraph 23 of the judgment. If this is so, what the judge said in paragraphs 24-28 is of no relevance to this appeal. On the other hand, if the judge reasonably understood that she was advancing the submission, I can see no error in the reasons the judge gave for rejecting it.

24. For these reasons I have no hesitation in concluding that the appeal against the dismissal of the contributory negligence case should be dismissed.

*The quantum of damages*

Pain and suffering and loss of amenity

25. The medical evidence of the injuries suffered by Mr James was unchallenged. He sustained fractures of the radius and ulnar bones and a crush injury to the left forearm requiring the insertion of two plates and 21 stitches. There was tenderness at the site of the implant, severe tenderness with a positive tinel test at the wrist and mild tenderness with a positive tinel test at the elbow. Sensation was mildly impaired to the ulna and there was mild carpal tunnel syndrome, entrapment/compression neuropathy of the left median nerve at the wrist and a non-localizable ulna neuropathy (axonal features only). By 24 April 2009, the bones had healed satisfactorily with excellent alignment and there were two scars of 11 cm and 9 cm respectively. At trial, Mr James was still suffering from carpal tunnel syndrome with mild discomfort which

[1] See Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ. 1642 at [16].

could be addressed when the plates were removed which should be undertaken as soon as possible.

26. Counsel for Mr James, Mr Clyde Allen, submitted to the judge that the injury fell within category 6(F)(c) of the Judicial Studies Board Guidelines ("the JSB Guidelines") so that the appropriate award was the CI$ equivalent of £25,000, namely, CI$ 33,751.50. He contended that a helpfully analogous case was *Kirkpatrick v Todd* the facts of which he summarised as follows. The plaintiff was a male aged 49 at the time of the accident and 53 at the date of trial in 1997. His occupation was that of a bricklayer. He sustained a compound fracture of his left non-dominant radius and ulna with both protruding through the skin, extensive muscular degloving injuries to left forearm and compromised vascularity. Amputation was considered. The arm from the elbow down to the fingers felt numb as if being stood upon, with some paraesthesia. He was for all and intents and purposes a one-armed man. He was awarded general damages of £45,000 (including £5000 for the extensive cosmetic defects).

27. Citing paragraph 8 of the JSB Guidelines, Mr Allen invited the judge to award the CI$ equivalent of £11,000, namely CI$ 14,850.66 for the one disfiguring scar. Because Mr James was a resident of Jamaica where the cost of living is materially less than in the Cayman Islands, Mr Allen did not seek the uplift to which a Caymanian resident would have been entitled because of the higher cost of living in the Cayman Islands than in the UK.[2]

28. Mr Allen pointed out to us that the JSB Guidelines at 6(F) (c) for less severe injury, giving a range of £12,600 to £25,750, which were referred to in his written submissions on quantum dated 30 May 2011, should be updated to £15,510 to £31,625.

29. On behalf of WFDL, Ms Carver submitted to the judge that the injury fell within category F(d) of the JSB Guidelines with a range of £5,810 - £16,830 (CI$ 5,393.85 –CI$ 17,192) and that the appropriate award for the scars was CI$ 2,500. She cited *A (A Child) v South Tyneside MBC* a decision of a District Judge reported in *Kemp and Kemp* at G5-013, which the judge said he found to be the most pertinent case. There an eight-year-old boy was injured whilst rollerblading in an area maintained by the defendant council. He suffered a fracture of the radius and ulna of his right forearm and was taken to hospital where he underwent surgery to insert metal plating of the radius and ulna. The wound had to be left open for two days and further surgery was required to close the wound and then a skin graft had to be applied to the forearm. A third operation took place to remove the plates and the boy made a good orthopaedic recovery with no long-term problems expected. He retained full function of his elbow but had a

[2] See eg *Archer v UBS (Cayman Islands) Ltd* (2009) CILR 531 at para 52 and *Chin v Yates* (above) at para 19.

permanent scar measuring 10 cm in length and 4 cm in diameter which was expected to become increasingly pale. The updated value of the sum awarded in this case was £14,915 and she invited the judge to award somewhat less.

30. The judge distinguished *Kirkpatrick v Todd* on the ground that there the injuries were clearly more severe with evidence that the claimant would suffer permanent impairment to his dominant arm. In the judge's view, Mr James' injury potentially straddled the top of the JSB "Simple Fractures of the Forearm" range within category F(d) and the bottom of the "*Less severe injury*" range within category F(c), but he thought that the latter category was inappropriate because it contemplates at some point significant disabilities and this was not the situation before him. On the other hand, pain and suffering had been aggravated by Mr James having had plates in his arm for over 10 years. Noting that Mr James would end up having two operations and had suffered mild discomfort and/or impairment for over 10 years and would possibly require decompression in addition to plate removal, the judge concluded that, putting the scar on one side, the award for pain and suffering and loss of amenity should be the equivalent of £15,000.

31. In respect of Mr James' permanent dark scar, the judge thought that the damages should be at the bottom of the JSB's "disfiguring scar" range and awarded the equivalent of £5000. The scar was a distinctly raised strip of flesh slightly darker than the colour of Mr James' skin which was more than superficial and would be clearly visible to anyone coming into close contact with Mr James who would ordinarily wear short sleeves. On the other hand, Mr James did not claim to be particularly distressed by it.

32. Ms Carver submitted that the judge's total award for pain and suffering and loss of amenity was too high. The award for *A*, with the appropriate RPI uplift as of 31 March 2020, was £15,820.63 and given the surgery that *A* had had to undergo, Mr James ought to have been awarded a slightly lesser sum for his injuries and the scar. She argued that the award for the scar was excessive, even though, as compared with the case of *A*, Mr James' scar was not going to fade.

33. Ms Carver also submitted that the judge was wrong to take into account the length of time that Mr James had suffered discomfort and impairment since Mr James was as much if not more responsible for the delay in the case coming to trial as was WFDL.

34. In her skeleton argument Ms Carver also relied on *Re Roberts* (1993) and *Fryer v Smith* (1992) neither of which were cited to the judge. In the former, £7,500 for pain and suffering was awarded to the plaintiff aged 32 years who suffered a compound fracture of the shaft of the

right forearm and displacement of the ulna and dislocation of the radical head near the elbow. The fracture was plated and following that operation the arm was in plaster for several weeks. In the latter case, £7,500 was awarded for general damages to the plaintiff, a fireman aged 34 years who sustained a galeatzi-type fracture of the left forearm which was treated by an open reduction and internal plate and screws leaving a 12 cm scar described as a significant cosmetic defect but not the most serious aspect of the injuries.

35. I am not persuaded by any of the above submissions advanced by Ms Carver. It was said in *Eaton v Johnston* [2004-05 CILR 580] that this Court would only interfere with an award of damages by a trial judge if he or she had misapplied principles of law and or misunderstood or misapplied the evidence, resulting in a global award which was exceptionally high or low. In my judgment, the judge was entitled to conclude that the injury potentially straddled the top of the JSB "Simple Fractures of the Forearm" range within category F(d) and the bottom of the "*Less severe injury*" range within category F(c) and his award of the equivalent of £15,000 for pain and suffering and loss of amenity and £5000 for the scar fell within the permissible range on the facts before the Court.

36. I deal with Ms Carver's case that the judge adopted the wrong exchange rate in reaching the CI$ amount of the damages below.

Handicap in the employment market (a *Smith v Manchester* award)

37. The judge rejected Mr James' claim for this head of damage on the ground that the necessary medical evidence to justify such an award was wholly lacking.

38. Mr Allen argued that the judge was wrong to have refused to award Mr James *Smith v Manchester* damages. He was allowed to present this argument even though no cross-appeal had been served. In my judgment, this submission must be rejected. There is simply no basis for overturning the judge's finding that there was no medical evidence to justify such an award.

Loss of earnings

39. Mr James claimed damages for loss of earnings from 1 May 2009 after he had been made redundant and had been unable to find employment, having returned to Jamaica. This claim too was rejected by the judge because there was no evidence to show that it was the injury that was the cause of the post-redundancy unemployment after 1 May 2009. However, it being common ground that Mr James would have to undergo a second operation at WFDL's expense and in light of the evidence of Dr Waite, a consultant orthopaedic surgeon, that following the second operation Mr James would be unfit for work for between 1 and 3 months, the judge awarded

Mr James J$300,000 for incapacity for the 3 months, which amounted roughly to CI$ 1,850 at current exchange rates.

40. Ms Carver argued that the judge's award of CI$ 1,850 was inconsistent with his finding that there was no medical evidence to justify the claim for loss of earnings prior to the trial from 1 May 2009. I do not accept this submission. In my judgment, the sum awarded by the judge is not inconsistent with his rejection of the main loss of earnings claim. This is because it was the opinion of Dr Waite that, following the second operation, Mr James would not be fit for work for up to three months and it is not to be necessarily inferred from Mr James' general on/off approach to work post 1 May 2009 that, operation or not, he would have declined offers of work. Accordingly, I would uphold the judge's award of CI $1,850.

Medical and travel expenses

41. It was common ground that Mr James should be awarded CI$ 5,609.78 for past medical expenses and CI$ 3,077.32 for the second operation Mr James was required to undergo as soon as possible. There is also no appeal from the award of C$ 1,012.50 for the cost of his wife and three children travelling to the Cayman Islands for Christmas 2009 to give him support whilst he was obliged to stay in Grand Cayman to undergo physiotherapy. The actual travel cost was CI$ 1,350 but the judge deducted C$ 337.50 in respect of the cost Mr James would ordinarily have incurred to visit Jamaica.

The conversion date issue

42. The judge held that the applicable rate for converting the JSB Guideline sterling figures into Cayman Island dollars was 1.35, this being the rate used in *Chin v Yates* [2014 (2) CILR 196], a decision of this Court. In justification for adopting this approach, the judge said in paragraph 33, "Legal policy in this area generally favours using fixed conversion rates, reviewed from time to time, to promote settlement through increased certainty as what conversion rates apply".

43. In fact, neither the conversion date nor the rate was debated in *Chin v Yates;* instead, this Court held that the damages for pain and suffering should be £40,000 which equated to CI$ 54,000, which implies a conversion rate of 1.35.

The submissions advanced by the parties

44. Ms Carver submitted that the judge's adoption of the conversion rate used in *Chin v Yates* was not legally justified and was inconsistent with the practice of the Cayman Island courts which was to use the rate prevailing at the date of judgment. In support of the first part of this submission she contended that if a rate of exchange of general application was to be fixed, this

was not a matter for the Court but for the Legislature as evidenced by section 22 (2) of the ***Monetary Authority Law*** which provides that the value of the Cayman dollar shall be equivalent to such an amount of currency of the United States of America as the Cabinet may, in accordance with the advice of the Authority, by Order made under this section, prescribe.

45. In support of her submission as to the practice of the Cayman Islands Courts, Ms Carver referred us to paragraph 10 of Acting Justice Swift's judgment in *AX v A, B and C* [2016 (2) 150] (29/5/16) where it could be seen that the conversion rate implicit in the defendant's suggested quantum for pain, suffering and loss of amenity of £160,000 (CI$ 216,815) was 1.19, which was very close to the rate as at 16/5/2016[3] published by the XE currency platform, this being a date which would have been around the date of the trial. In addition, Ms Carver relied on the following passage in the judgment of Harre CJ in *Allen v Ebanks* [1998] CILR 190], a first instance decision where the injured plaintiff was an American tourist on holiday in the Cayman Islands:

> *"As of today, I think that the uncontested view that the award of general damages in England would be £57,000 is right. At the rate of exchange which prevailed with the US dollar at the time of trial which has not substantially changed since, the US dollar would be $94,000."*

46. Ms Carver also pointed out that the submissions on damages submitted by Mr Allen on behalf of Mr James at the trial were dated 30/5/2011 and no date prior to this, such as the date of tort, was advanced in those submissions as being the correct conversion date.

47. Notwithstanding that the judge's award of damages would have to be reduced by CI$ 6,786.67 if the correct conversion date was the date of judgment, Mr Allen conceded before us at the hearing that the appropriate conversion date was the date of the judgment.

48. However, shortly after the hearing, Mr Allen sent to the Court a submission contending that pursuant to the decision of the House of Lords in *Owners of Steamship Celia v Owners of Steamship Volturno* [1921] 2 AC 544 ["*the Volturno*"], the conversion date should be the date of the tort, here 14 November 2008, at which point, according to Mr Allen, the conversion rate was 1.569 (although the XE currency converter gives the rate as 1.252).

49. Mr Allen also referred to *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 and *The Despina R* [1979] 685.

50. As is well known, in *Miliangos* the House of Lords departed from the former rule that damages had to be assessed in sterling at the rate of exchange at the date of the breach of contract, or, in

[3] As evidenced by a currency table printed off from the XE currency platform.

tort, at the date that the loss was determined, and upheld a judgment expressed in Swiss Francs in favour of a Plaintiff who claimed for the price of goods that had been expressed in Swiss Francs.

51. In *The Despina R* the eponymous vessel was involved in a collision with another Greek vessel, the *Eleftherotria,* in which the latter was damaged. She was owned by a Liberian company which had its head office in Piraeus. The principal place of business of the managing agents was in New York and the bank account used for monies received and payments made on behalf of the owners was a US dollar account in New York. An agreement was reached that the owners of the *Despina R* were to pay the owners of *The Eleftherotria* 85% of the loss flowing from the damage suffered as a result of the collision. The expenses of repair had been incurred in various currencies and the question whether the damages were to be paid in sterling or some other currency was referred to the Admiralty Judge. The first question for decision was whether judgment could be given in a currency other than sterling where, unlike in *Miliangos,* the claim was in tort. The House of Lords held that the decision in *The Voltura* should not be adhered to in the light of the *Miliangos*: the ability of an English court to give judgment in a foreign currency in which the loss was sustained produced a more just result than one which fixed the plaintiff with a sum in sterling taken at the date of the breach or of the loss. The next question was what was the appropriate currency or currencies in which to give judgment. Lord Wilberforce said that the question could be solved by applying the normal principles which govern the assessment of damages in cases of tort, namely the principles of *restitutio in integrum* and that of the reasonable foreseeability of the damage sustained. It appeared to him that a plaintiff who normally conducted his business through a particular currency and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss sustained is to be measured not by the immediate currency in which the loss first emerges but by the amount of his own currency which in the normal course of operation he uses to obtain those currencies.

52. Replying to Mr Allen's submission, Ms Carver contended that following the decision in *Miliangos*, *The Volturno* is of no assistance and should not be followed. She noted that in *The Despina R* there was an award of damages in French Francs for a tort claim and cited *Hoffmann v Sofaer* [1982] 1 WLR 1350 where a national of the USA claimed damages for negligent medical treatment which he underwent whilst on holiday in England which left him with a right arm that was 85% useless. He claimed damages for pain and suffering and special damages, inter alia, for the difference in salary in his former job and the job he was obliged to take because of the condition of his right arm, all of which were agreed in US dollars. It was also agreed that the award of £19,000 for pain and suffering should be given in the judgment in sterling. The

judge, Talbot J, remarked that it would be quite impossible for him and a good many other judges to assess such a claim in dollars. The difficult question was whether future losses should be assessed in US dollars or sterling. In light of the judgments in the House of Lords in *The Despina R,* Talbot J considered with what currency was the plaintiff's loss closely linked and concluded that all the losses for which he had awarded damages other than for pain and suffering were closely linked to the currency of the plaintiff's country, and to meet those losses the judgment would be in US dollars.

53. Ms Carver also cited the decision of the Court of Appeal of Guyana in *Bibi Shamina and Another v Sampat Dyal and Others* (1993) 50 WIR 239. Here there was a claim in Guyana dollars for loss of dependency brought by two minor children of a woman who was killed in a motor accident whilst on holiday in Guyana. At the time of her death, the deceased had a permanent place of abode in New York City, USA, where she worked as a factory hand and earned money for babysitting after work. The trial judge assessed the dependency in US dollars and directed that the judgment in Guyana dollars be calculated at the going exchange rate with the US dollar at the time of payment. On appeal, it was contended that the conversion date should have been the date of the tort. Giving the judgment of the Court, The Chancellor, the Honourable Kenneth Montague George, expressly approved the decisions in *Miliangos*, *The Despina R* and *Hoffmann v Sofaer* and went on to observe that since the claim for the loss of dependency had been made in Guyana dollars, the question was not whether there should be judgment in US dollars, but at what date the conversion of that currency into Guyana dollars should take place. He held that as far as possible there should be *restitutio in integrum* to the aggrieved party which meant that the conversion date should be the date of payment.

54. Ms Carver's primary submission was that the applicable exchange rate should be the date of judgment. By way of an alternative proposal, she submitted that the English authorities she cited could be followed in the Cayman Islands and the only way properly to do this was to assess general damages for personal injury in sterling using the JSB Guidelines and examples of English awards and to adopt as the conversion date the date of payment in Caymanian dollars of the sterling judgment debt. In the alternative, she contended that the current practice of the courts of giving judgment in Cayman dollars using the conversion rate applicable at the date of the judgment should be continued, the date of judgment being the closest date to the date of payment in any event.

55. Mr Allen responded to Ms Carver's submissions with yet a further series of points. He argued that *The Volturno* remained good law. In his submission, Mr James was exposed to an unforeseen risk of fluctuations in the value of a sterling which was an unrelated currency in that he felt no loss in sterling and did not live where the national currency was sterling. Mr Allen

also cited *Harlequin Property (SVG) Limited and Harlequin Hotels and Resorts Limited v Wilkins Kennedy (a firm)* [2016] EWHC 3233 (TCC) in support of a submission that Kawaley J was entitled to exercise his discretion as to the conversion date in the manner he did. In this English case, the trial judge (Coulson J) awarded damages in US dollars in a judgment given after trial that contemplated a further hearing dealing with consequential matters. At the further hearing the claimants applied for the damages awarded to be expressed in sterling with different conversion rates applicable to different segments of the damages to reflect the value of sterling when the claimants made payments in that currency which were part of the losses for which compensation was sought and awarded. Coulson J held that the Court had a residual discretion[4] whether to award judgment in sterling or a foreign currency having regard to all the circumstances of the case and he directed that the judgment should be in sterling at the conversion rates that had been established in the evidence.

Discussion and decision

56. In my opinion the judge's adoption of the conversion rate of 1.35 cannot stand. The reason he gave for adopting the conversion rate in *Chin v Yates* - legal policy generally favours using fixed conversion rates, reviewed from time to time, to promote settlement through increased certainty - is not legally sound. He offered no explanation why the particular conversion rate applied in *Chin v Yates* was to be preferred over any other conversion rate and in my view, it was not appropriate for him to depart from the established judicial practice of adopting the date of judgment as the conversion date. If, as seems likely, the judge post trial was concerned that Mr James would be unfairly prejudiced by reason of the deterioration in the conversion rate if the judgment date was to be the conversion date, I think with respect that he ought to have invited short written submissions from the parties as to whether it was open to the court to compensate Mr James for the loss of the value of sterling since the commencement of the proceedings. Had he done so, there is in my view a reasonable chance that he would have been persuaded to grant an uplift in the damages due to Mr James in the same way that a cost of living uplift is ordered if the claimant is resident in the Cayman Islands.

57. The need to fix a conversion date in personal injury claims in this jurisdiction arises from: (a) the understandable reliance by the courts on the JSB Guidelines and sources such as Kemp and Kemp in assessing the quantum of general damages for pain and suffering and loss of amenity; and (b) the practice that these claims are brought in Caymanian dollars with the courts giving judgment in that currency.

[4] The approach adopted by Coulson J was in accordance with the notes to the White Book at paragraph 40.2.2

58. I am not in favour of Ms Carver's alternative proposal that damages for pain and suffering in personal injury claims be expressed in sterling for conversion into Cayman dollars at the going rate at the time of payment. I say this for a number of reasons. First, the proposal would still leave the many plaintiffs who are resident in the Cayman Islands or elsewhere other than in the UK subject to a potential risk of a decline in the value of sterling since their loss in the form of pain and suffering is not closely connected with sterling but with the currency of where they live. Second, I can foresee possible difficulties in granting a cost of living uplift if the only sum before the court is expressed in sterling. Third, I think it would be unseemly and inappropriate for a Cayman Islands Court to make an award in sterling in a claim where the plaintiff sues for damages in Cayman Island dollars for injuries suffered in the Cayman Islands and he or she lives in the jurisdiction or at least does not live in the UK.

59. I also see no warrant for the conversion date in personal injury cases being the date that the cause of action accrued rather than the date of judgment. I say this because there will still be an inevitable risk that one or other of the parties may be materially disadvantaged by a significant change in the exchange rate in the period leading to judgment. It was this very risk that prompted the House of Lords in *Miliangos* to abandon the rule that judgments could only be given by the English Courts in sterling. There is also the point that unlike cases in tort for conversion where the value of the property in question is taken at the time of the tort, loss in the form of pain and suffering cannot be properly assessed at the date of the tort and the going rates for particular injuries under the JSB Guidelines and English decisions are regularly updated to take account of inflation.

60. I am satisfied that the adoption of the date of judgment as the conversion date in personal injury actions has long been the practice of the Cayman Island Courts and in my opinion this should continue to be the practice unless and until provision is made by legislation or within the GCR for a specified conversion rate subject to periodic review. I say this for three principal reasons. First, the date of the tort or the date of payment are not better options for the reasons given in paragraphs 58 and 59 above. Second, converting at the date of the judgment need not inevitably mean that the parties are at risk of an unjust outcome due to material changes in the exchange rate because, pursuant to its duty to achieve *restitutio in integrum* in fixing the level of compensation, the Court has jurisdiction to adjust an award if it can be plainly shown that it is necessary to do so to avoid injustice. As I have observed above, it is this jurisdiction which allows for the cost of living uplift where the plaintiff is resident in the Cayman Islands or some other jurisdiction where the cost of living is materially higher than in the UK. Third, the practice is long standing and to change it abruptly when there is no better option available risks injustice in regard to cases that are currently pending before the courts.

61. According to the XE currency converter platform the Sterling/Cayman dollar rate on the date when the claim was issued, 14 October 2009 was 1.2936 and thereafter on the anniversary of that date prior to judgment it was: **1.2948** (2010); **1.3871** (2011); **1.3137** (2012); **1.3119** (2013); **1.3063** (2014); **1.2662** (2015); **0.9995** (2016); **1.0894** (2017;); **1.0794** (2018). And on the date of judgment (4 October 2019) the rate was **1.009**. It is obvious from these figures that there has been a material deterioration in the exchange rate since Mr James' claim was issued which could potentially have a significant negative impact on the damages to which he is entitled. In these circumstances, in order to give full and proper effect to the principle of *restitutio in integrum* it is only fair and reasonable in my view to award Mr James an uplift on what otherwise would be his recovery for pain and suffering if the conversion rate was that prevailing at the date of judgment. Looking at the anniversary figures, one sees that the material decline in rate was underway by 14 October 2016. In these circumstances I think that the fair and just way to compensate Mr James is to adopt the average anniversary rate for the years 2010 – 2015 (i.e. 1.313) rather than the judgment date rate of 1.009. The slow progress of the claim to trial was due in part to the dilatoriness of Mr James but I do not think that this is a reason that disentitles him to the uplift I propose. To hold to the contrary would be to give WFDL an unwarranted benefit and would also be inconsistent with the finding made in paragraph 83 below that if WFDL had admitted liability in June 2013 as it should have done, the claim overall would almost certainly have been resolved by the end of 2012 at the latest.

62. In the result, Mr James is entitled to general damages for pain and suffering in the sum of CI$ 26,260, which, when added to the damages awarded of CI$ 8,687.10 for (agreed) medical expenses, CI$ 1,012.50 for travel expenses and CI$ 1,850 for loss of earnings, produces a total of CI$ 37,809.60.

*The costs appeal*

Introduction

63. At the hearing on costs below, Mr Allen, following a prompt from the judge, argued that Mr James should be awarded his costs of the proceedings on the indemnity basis in light of WFDL's unreasonable delay in admitting liability and unreasonably pursuing its contributory negligence case.

64. In paragraphs 11 to 17 of the judge's Ruling on Costs ("the Ruling") under the heading **Governing Principles**, the judge identified the principles that in his view applied to the costs issues he had to decide.

> "*Ord 62, r 4:*

*The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceedings in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"

"*Ord 62 r, 11 (2):*

*Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of that act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid to him to that other party."*

"*Ord 62 r, 4 (11):*

*The Court may make an order inter partes for costs to be taxed on the indemnity basis if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

65. The judge then referred to:

"*The overarching principle for civil litigation as a whole found in the Preamble to the Grand Court Rules, which requires the parties to assist the court to achieve the Overriding Objective. The key elements of the Overriding Objective include (paragraph 1 (1):*

*(a) ensuring that the substantive law is carried out and rendered effective;*

*(b) ensuring that the normal advancement of the proceedings is facilitated rather than delayed;*

*(c) saving expense;*

*(d) dealing with a cause or matter in a way which is proportionate:*

*(i) to the amount of money involved;*

*(ii) the importance of the case; and*

*(iii) the complexity of the issues*".

66. It is necessary to set out in full paragraph 15 of the Ruling.

"*Costs sanctions are arguably the most important case management tools available to judges charged by the GCR Preamble with actively managing cases with a view to achieving the Overriding Objective. During the course of litigation, this Court presently lacks the resources to actively manage each civil case throughout the course of the litigation. The Court relies on the parties to assist the Court to further the Overriding Objective and if, at the end*

*of the case, it is clear that the parties have failed to discharge this important procedural obligation in one or more material respects, the court must impose the requisite costs sanctions without fear or favour. Full enjoyment of civil litigant's (sic) constitutional fair rights requires the Court not to shut its responsibilities in this regard. Assessing the reasonableness of the way litigation has been conducted when assessing costs at the end of the trial is not an exercise which is intended to rely primarily on the wisdom of hindsight, but necessarily entails taking into account the merits as determined at trial. Save in the rare cases where wasted costs orders are made against attorneys, findings that litigation has been conducted unreasonably to a material extent do not ignore the forensic reality that striking the right balance between advancing a client's partisan litigation rights and assisting the Court to further the Overriding Objective is frequently an inherently difficult task."*

67. In paragraph 18 of the Ruling, the judge set out a timeline of the principal events in the course of the proceedings. What follows is an edited version of his chronology.

- 14 October, 2009; writ filed;
- 14 November, 2009: defence filed;
- 23 June, 2010: notice of intention to proceed; plaintiff sought a split trial on liability and quantum and defendant who was told that plaintiff was impecunious and dependent on compensation to have the second operation he needed was invited to admit liability or agree to an interim payment; the defendant rejected these proposals;
- 2 November, 2010: summons seeking trial of preliminary issue filed. Affidavit sworn on behalf of Mr James exhibiting medical reports, requesting a trial of a preliminary issue and explaining that the plaintiff is impecunious and cannot have the plates removed from his arm until he recovers damages;
- 14 January, 2011: Chief Justice orders split trial and encourages parties to settle;
- 3 December, 2011: trial on liability fixed for hearing on 13 March, 2012;
- 12 March, 2012: plaintiff signed witness statement on liability and his attorney signs legal submissions on liability:
- 10 May, 2013: Sampson and McGrath formally apply for leave to come off the record as attorneys for WFDL;
- 3 May, 2013: Sampson and McGrath come off the record;
- 19 December, 2014: plaintiff issues notice to fix trial date;
- 27 October, 2016: plaintiff issues second notice to fix trial date;
- 18 November, 2016: Diamond Law Attorneys give notice of change of Attorneys replacing Sampson and McGrath on behalf of WFDL in voluntary

liquidation

- 18 September, 2017: plaintiff gives notice of intention to proceed;
- 21 March, 2018: defendant files Summons to dismiss for want of prosecution;
- 11 May, 2018: plaintiff gives notice of intention to proceed;
- 29 August, 2018: defendant having admitted liability, Williams J gives directions for the trial on quantum which contemplate the plaintiff filing a medico legal report by 21 September 2018 and a witness statement:
- 20 March, 2019: McMillan J orders that unless the plaintiff does all things necessary to progress the case to trial on May 21-22, 2019, the plaintiff's case shall be dismissed for want of prosecution;
- 23 May, 2019: the matter being listed as case management conference the trial was ordered to take place on 27 August, 2019 when it did finally proceed.

68. Paragraph 19 of the Ruling reads:

> *"This timeline suggests that the present case is emblematic of one where case management (in terms of the parties' duty to assist the Court to achieve the overriding objective) has gone missing in action and the goal of achieving substantive justice has been derailed. The Court should not shirk its duty to impose whatever costs sanctions appear to be required."*

69. In paragraph 25, the judge said:

> "... [B]*earing in mind that the Chief Justice in 2011 encouraged the parties to settle the case, the fact that the Defendant delayed admitting liability until 7 years until after that judicial encouragement was given and pursued a contrib*utory negligence defence to trial which was unsupported by any positive evidence almost cries out for costs sanctions on even a superficial analysis. The latter view is fortified by the aggravating factor that the Defendant's denial of liability postponed over many years a second operation which the Defendant's denial of liability postponed over many years a second operation which the Defendant knew the Plaintiff was required to have and could not pay for."

70. After a detailed consideration of the relevant background facts, the judge concluded that WFDL had acted unreasonably and/or improperly in its defence of the liability claim between 23 June 2010 to 10 May 2013 and for these reasons awarded Mr James indemnity costs in respect of this period of the litigation. In the judge's view, WFDL knew or ought to have known that it had no serious defence on liability given the admissions contained in the Incident Report but had instructed its lawyers to take an obstructionist approach before ceasing to instruct them at all. Further, WFDL knew or ought to have known that in delaying admitting liability and

addressing quantum Mr James was being denied access to medical treatment to remediate documented ongoing symptoms in circumstances where liability to pay an amount which would cover the second operation could not in good faith be disputed. WFDL's conduct constituted a breach of requirements (a), (b), (c) and (d) of the Overriding Objective.

71. In respect of the rest of the period from the issue of proceedings on 14 October 2009 down to the trial the judge awarded Mr James his costs to be assessed on the standard basis.

72. As to the costs of the trial, the judge held in paragraph 31 of the Ruling that WFDL should pay Mr James' costs of resisting its contributory negligence case on the indemnity basis on the ground that it had been unreasonable and improper, having regard to a civil litigant's legal obligations under the Overriding Objective, for WFDL to have pursued this case which it was incapable of proving and to have advanced positively an entirely new un-pleaded version of the claim. In paragraph 32 the judge said it was fantastical to imagine that WFDL could prove that Mr James had been negligent in a way that was unsupported by any document and inconsistent with the most reliable document (the Incident Report). WFDL could only have succeeded on its pleaded case if Mr James were persuaded to abandon almost altogether his version of how the accident occurred. In paragraph 33, the judge said that a defendant such as WFDL who elects to ignore the Court's encouragement to settle (as Williams J had done on 29 August 2018) and unreasonably disputes liability and/or pursues a hopeless defence must receive an appropriate costs sanction at the end of the trial.

The submissions advanced on behalf of WFDL

73. Citing what the judge said in paragraphs 15, 18, 25 and 31 of the Ruling[5], Ms Carver contends that in awarding indemnity costs the judge erred in law in pursuing a policy of enforcing the Overriding Objective of the GCR rather than confining himself to the requirements of GCR Ord 62, r 4 (11)[6].

74. Further and in the alternative, Ms Carver submits that: (1) the indemnity costs order in respect of WFDL's failure to admit liability should be set aside on the grounds that: (a) the start and end dates of the period specified by the judge are wholly arbitrary; (b) WFDL was not given a proper opportunity to address the judge on how the case progressed; (c) the judge had wrongly proceeded on the basis that WFDL was under a duty to drive the case forward when this was solely the obligation of the plaintiff; and (2) the judge was wrong to conclude that WFDL's

[5] See paragraphs 65, 67, 68 and 71 above.
[6] See paragraph 63 above.

contributory negligence case justified an indemnity costs order in accordance with Ord. 62, r 4 (11).

Discussion and decision

75. I accept Ms Carver's submission that in awarding indemnity costs the judge erred in law in pursuing a policy of enforcing the Overriding Objective of the GCR rather than confining himself to the requirements of GCR Ord 62, r 4 (11). In my judgment, when deciding whether costs should be taxed on the indemnity basis the Court should have regard exclusively to whether the requirements of Ord 62, r 4 (11) have been met. With respect to the judge, it was not open to him to come up with a policy of his own devising that glossed and thereby widened the reach of this rule. Whether there should be such a policy is a matter for those responsible for amending and updating the GCR.

76. It follows that the judge's exercise of discretion in awarding indemnity costs must be set aside leaving this Court free to determine for itself whether Mr Allen's application for indemnity costs should be upheld pursuant to Ord 62, r 4 (11) and in light of Ms Carver's additional submissions challenging the indemnity costs orders.

77. Section 7.4 of *Practice Direction No. 1/2001, Guidelines Relating to the Taxation of Costs.* Section 7.4 provides:

> "*In the case of taxations on the indemnity basis, the hourly rate or scale of rates will be that agreed between the attorney and his client provided that such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on a taxation on the standard basis shall not be regarded as evidence that it is unreasonable.*"

78. In *Ahmed Hamad Algosaibi and Brothers Company v Saad Investment Company Limited and others* [2012] (2) CILR 1] Chief Justice Smellie said:

> "*9. There is guidance to be found in the case law as to the approach to be taken to an application for an award of costs on the indemnity basis in party and party litigation. In Bonotto v. Boccaletti (1), the Court of Appeal held that this court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis, but the discretion is to be exercised only in the most exceptional cases (otherwise than where the costs are to be paid under contract or out of a fund).*
>
> *10. It is nonetheless recognized that the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require.*
>
> *11. In Simms v. Law Society (6), Carnwath, L.J., in delivering the lead judgment on behalf of the English Court of Appeal, summarized the*

*principle (by reference to the English equivalent of GCR, O.62, r.4) in the following terms ([2006] 2 Costs L.R. 245, at para. 16), which I think are suitable to be adopted by this court:*

> *"The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p. 1085ff) show that costs will normally be awarded on the standard basis—*
> *'. . . unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalise a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for the award of costs on the indemnity basis ...'* (p. 1087–8)

*Similarly, in Kiam v. MGN (No. 2) [2002] 2 All E.R. 242, 246 Simon Brown, L.J., while agreeing that '... conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs ...' – added - 'to my mind, however, such conduct would need to be unreasonable to high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight . . .'*

12. *In Excelsior Comm. & Indus. Holdings Ltd. v. Salisbury Hammer Aspden & Johnson (2), Waller, L.J. had earlier expressed the view ([2002] C.P. Rep. 67, at para. 39) that the issue whether indemnity costs should be ordered depends on whether there is "something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs ..."*

79. I respectfully agree with these observations of the Chief Justice. They should be followed and applied whenever a court is asked to award costs on the indemnity basis.

80. In *Bennett v Attorney General* [2010 (1) CILR 478] Henderson J expressed the view that advancing a defence that was merely weak or unlikely to succeed would not warrant an indemnity costs order whereas the maintenance of a defence that was manifestly hopeless would. In my view, there may be cases where a defence does not fall within the category of manifestly hopeless but is one that must have been appreciated to be very weak and highly speculative which in the context of the proceedings overall could justify such an indemnity costs order.

81. WFDL's Defence was filed on 24 November 2009. It was settled by WFDL's then attorneys, Samson & McGrath. In response to paragraph 3 of the Statement of Claim that pleaded it was an implied term of the contract of employment between the plaintiff and the defendant and/or the duty of the defendant to take all reasonable precautions for the safety of the plaintiff whilst at his place of work, paragraph 3 of the Defence denied that any such implied terms of duty

existed between the parties. And in paragraph 8 of the Defence it was denied that the injuries [of the plaintiff] were caused as a result of the negligence of the Defendant, his servants or agents. These extraordinary denials were persisted in until August 2018 when counsel for WFDL informed the Court that liability was admitted. Ms Carver told us that she understood that the Incident Report had been based solely on Mr James' account of the accident who had told WFDL he would not sue for his injuries and that after an investigation Mr Rolando had given a completely different account of the accident but had then returned to Jamaica. However, we heard nothing to suggest that a signed witness statement was ever taken from Mr Rolando and we heard no credible explanation of how an officer of WFDL signed off on the Incident Report without having assured himself that the account of the accident it contained was accurate. Further, in the unlikely event that WFDL did not appreciate at all material times that Mr James was impecunious, they had express notice of this fact on 2 November 2010 when its attorneys were informed that due to his impecuniosity Mr James was dependent on compensation to have the second operation and they were invited to admit liability or agree to an interim payment. As recorded by the judge, WFDA gave that invitation short shrift standing by their denial of any responsibility whatsoever for Mr James' injuries.

82. In my judgment, WFDL's defence that no duty of care was owed to its employee Mr James and that it was not liable to any extent for the injuries Mr James suffered was hopeless from the outset in light of the contents of the Incident Report and the absence of a witness statement signed by Mr Roland containing an account of the accident that had Mr James putting his arm under the raised load when it would have been obvious to him that Mr Roland was going to lower the load without warning. I am also of the view that it was unreasonable to an even higher degree entitling Mr James to indemnity costs for WFDL to persist in its denial of all liability for the accident from 23 June 2010 down to August 2018 whilst rebuffing the proposal made on that date on behalf of Mr James that liability be admitted or an interim payment be agreed in the knowledge that Mr James was impecunious and dependent on compensation to be able to undergo the necessary second operation.

83. For these reasons I conclude that pursuant to Ord 62, r 4 (11), Mr James is entitled to recover his costs in establishing liability on the indemnity basis from 23 June 2010 down to 29 August 2018. I make it clear that in reaching this view I reject the submission that WFDL was entitled to sit back and leave it to Mr James to make the running to bring his claim to trial. I do so because I am well satisfied that if WFDL had admitted liability in June 2010 as it should have done instead of waiting until 29 August 2018 to do so, Mr James would have obtained an interim payment of sufficient size to finance the second operation and his claim overall would have been resolved almost certainly by the end of 2012 at the latest.

84. I turn to the application that Mr James' costs in resisting WFDL's contributory negligence case should be paid on the indemnity basis. Mr James did not serve a reply. It follows that for all practical purposes we are concerned with Mr James' costs at and preparing for trial in rebutting WFDL's contributory negligence case. In my judgment, the contributory negligence case at trial was hopeless. No witness was called by WFDL to support its pleaded contributory negligence case and the Incident Report, signed as it was by an official of WFDL, was extremely strong evidence against WFDL. The whole case depended on a Micawber type cross-examination hoping that something might turn up of sufficient cogency to controvert Mr James' evidence in chief and the Incident Report, an endeavour that for all practical purposes was bound to fail, as it did. For these reasons I have no hesitation in finding that the pursuit of the contributory negligence case was unreasonable to a high degree and that Mr James' costs in meeting that case should be taxed on the indemnity basis.

*Conclusion*

85. For the reasons given above, I would dismiss WFDL's appeal with costs to be taxed on the standard basis if not agreed.

**Sir Jack Beatson, JA**

I agree.

**Sir John Goldring, President**

I also agree.