IN THE COURT OF APPEAL OF BELIZE, A.D. 2013
CIVIL APPEAL NO. 42 of 2010

(KENT GARBUTT
(KENIA GARBUTT b.n.f
(INESITA VARELA — APPELLANTS
(KENISHA GARBUTT b.n.f
(INESITA VARELA
(
AND
(
(RANDOLPH CARD
(ROBERT WAGNER — RESPONDENTS

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BEFORE:

The Hon. Mr. Justice Manuel Sosa — President
The Hon. Mr. Justice Douglas Mendes — Justice of Appeal
The Hon. Madam Justice Minnet Hafiz-Bertram — Justice of Appeal

Naima Barrow for the appellants
Fred Lumor, SC for the second-named respondent

_____

27th March, 2013 and 28 June, 2013

SOSA P

[1] I am in agreement with the other members of the Court that the appeal should be dismissed to the extent that it seeks the setting aside of the order of Awich J dismissing the claims against the second-named respondent,

Robert Wagner, but allowed to the extent that it seeks the setting aside of the portion of the order fixing costs awarded.

_____
SOSA P

MENDES JA

[2] I agree with the judgment about to be delivered by Hafiz-Bertram JA, which I have read in draft, and have nothing to add.

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MENDES JA

HAFIZ-BERTRAM JA

Introduction

[3] This appeal arises out of a motor vehicle accident in which the appellants were injured and the trucks of the first Appellant were damaged. The learned trial judge in the court below ordered that the claims against the second respondent, Robert Wagner ("Wagner") have not been proved and must fail. Default judgment was entered against the first respondent, Randolph Card ("Card") and the learned trial judge

assessed the damages. The appellants are not challenging the Order against Card except in relation to costs.

Factual Background

[4] On 4th September, 2001 the Appellants, brought a claim against Card who was the only defendant at the time, for damages for personal injuries, loss and damage caused by his negligent driving on 1st October, 2000 between Miles 33 and 34 on the Western Highway. The appellants obtained a default judgment against Card. The appellants thereafter obtained leave to amend the Writ of Summons and Wagner was joined as the second defendant.

[5] The Statement of Claim which was issued on 12th June, 2000 stated that the first appellant was the owner of a 1984 International Dump Truck bearing licence plate numbered A-2016 ('the dump truck") and the owner of a Mack Truck licence CZL 3134 ("the Mack truck"). In paragraphs 2 and 3 of the Claim the Appellants stated that Wagner was the owner of taxi cab licence D-0835 ("Taxi") and Card was the servant or agent of Wagner.

[6] The appellants claimed that on the 1st October, the first appellant was driving his dump truck on the Western Highway towards Belmopan and a Mr. Parham was driving the Mack truck behind the dump truck on the said highway, when upon reaching Miles 33-34, the truck collided with the taxi which was being driven by Card. The appellants claimed that the collision was caused by Card's negligence as he was driving at excessive speed, failed to observe the presence of the dump truck and the Mack truck, overtaking at a point when it was unsafe and other particulars which I need not mention. As a result of the collision, the second and third

appellants sustained personal injuries, the Mack truck was damaged and there was constructive loss of the dump truck.

[7] Card did not file a defence and default Judgment was entered against him. Wagner filed a defence in which he denied that he was the owner of the taxi and also denied that Card was his servant or agent. He said that Card was the owner and driver of the taxi. At paragraphs 5 and 6 of his defence he stated that he sold and delivered possession of the taxi to Card prior to the accident. Also, that Card failed to obtain from Wagner a formal transfer of the registration or ownership of the taxi. At paragraph 6, Wagner denied that Card was his servant or agent at the date of the accident and as such he is not vicariously liable for the actions of Card.

[8] The witness statement of the first appellant gave a clearer picture of the collision which is that the taxi collided with the dump truck. Thereafter, Mr. Parham who was driving the Mack truck behind the dump truck, swerved to avoid colliding into the dump truck and collided into the taxi.

The Order of the trial judge

[9] The trial judge from paragraphs 10 to 15 ordered the following:

"10. The claims against Robert Wagner have not been proved and must fail. The claims are dismissed against Robert Wagner. The claimants shall pay the costs of the claims to Robert Wagner, to be agreed or taxed.

11. Default judgment has already been entered against the first defendant, Randolph Card. The sums that the court will award as damages must, however, be proved by evidence. I accept the replacement value of truck No. A-2016 was proved at $40,000.00.

Out of that, $2,000.00 must be deducted for the sale of the truck as a scrap. The sum awarded to Mr. Kent Garbutt for his truck No. A-2016, is $38,000.00.

12. In addition, the court awards to Mr. Garbutt the sum of $6,000.00, the costs of repairs to truck No. CZL-3134.

13. Special damages awarded to Mr. Garbutt is $1,000.00 for transporting truck No. A-2016, and $300.00 that he paid for medical treatment of his daughters.

14. The abrasions and pain suffered by Kenia Garbutt were neither serious nor long lasting. Kenisha suffered one swelling and pain in the hip. Again, they were neither long nor lasting. To each, the court awards the sum of $1,000.00.

15. Mr. Randolph Card alone will pay the claimants the costs of this claim up to when the judgment was entered against him. The costs are fixed at $2,000.00, given that he did not file a defence."

The Appeal

[10] The appellants appealed against the portion of the decision where the trial Judge stated that :

(i) the claims of the appellants against the second respondent have not been proved and therefore must fail;
(ii) the claims are dismissed against the second respondent; and
(iii) the appellants shall pay the costs of the claims to the second respondent, to be agreed or taxed and that portion of the decision set out in paragraph 7 of the order which says that the costs of this

claim up to when judgment was entered against the first respondent are fixed at $2,000.00.

[11] There are seven grounds of appeal and the relief sought by the appellants are to set aside the order made against the second respondent, Wagner and that he be found liable for the torts committed by the first respondent, Card. Also, an order to set aside the decision that the costs of the claim is fixed at $2,000.00 and that for the respondents to pay the appellants prescribed costs. I will now determine the issues raised in the grounds of appeal.

Issue 1

Whether the certificate of registration in the name of Wagner constituted *prima facie* evidence that the taxi was at the material time being driven by the servant or agent of Wagner.

[12] Learned Counsel, Ms. Naima Barrow submitted that in the case of a vehicle which is registered, the owner is the person in whose name the vehicle is registered and that Wager admitted in his defence he was the registered owner of the vehicle. She relied on the definition of owner contained in section 2(b) of the **Motor Vehicles and Road Traffic Act, Chapter 230.** Further, Learned Counsel relied on the case of **Barnard v Sully [1931] 47 TLR 557** and submitted that at the time of the accident, Card was the servant or agent of Wagner given that Wagner was the owner of the taxi. In that case, it is stated that *where a Plaintiff in an action for negligence proves that damage has been caused by the defendant's motor-car, the fact of ownership of the motor car is prima facie evidence that the motor car, at the material time, was being driven by the owner, or by his servant or agent*.

[13] Learned senior counsel, Mr. Lumor submitted that the only evidence tendered on behalf of the appellants is the admission of Wagner that the vehicle is registered in his name. Further, that the **Motor Vehicles and Road Traffic Act** presumes ownership in four circumstances under section 2. Learned Senior Counsel relied on section 2 (iii) which states:

> *(iii) in the case of a vehicle that is the subject of a hire purchase agreement, the person in possession of the vehicle under the agreement;*

[14] Learned Senior Counsel, further submitted that under the common law, property would pass to the buyer upon payment of the purchase price. He further relied on the Belize **Sale of Goods Act, Chapter 261,** at section 3(1) which provides:

> *3(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a monetary consideration, called the price.*

[15] Section 6(4) of the **Motor Vehicles and Road Traffic Act** provides that the certificate of registration shall be given to the owner and shall be regarded as sufficient evidence that the vehicle to which it refers is registered. This section does not say that it is sufficient evidence that the person mentioned in the certificate of registration is the owner of the vehicle. Section 2 of the Act presumes ownership in four circumstances, as submitted by learned senior counsel, Mr. Lumor. In the case of a vehicle that is the subject of a hire purchase agreement, the owner is the person who is in possession of the vehicle under the agreement. In this case, there

was a hire purchase agreement between Wagner and Card and the learned trial judge found that ownership had been passed to Card. See also section 3(1) of **Sale of Goods Act, Chapter 261.**

[16] In **Barnard v Sully** and also in the case of **Harry Rambarran v Gurrucharran [1970] 1 WLR 556 ,** the fact of ownership of the vehicle was accepted and not in issue, as in the case at bar. As such, these cases did not consider whether the certificate of registration proves ownership. In this case, Wagner has denied ownership and he has proven that he sold the vehicle to Card. The facts of the **Barnard case** should be distinguished from this case. In **Barnard,** the principle is that where there is no evidence as to the **relationship** between the owner and the driver at the material time, there will be a *prima facie* presumption that the driver was the servant or agent of the owner. This presumption is rebuttable. There is evidence in the case at bar that Card at the time of the accident had purchased the taxi from Wagner, so the question as to relationship between Wagner as the owner, and Card as driver does not arise in this case. The claim by the appellants that Wagner was the owner of the taxi was based solely on the certificate of title and this was displaced by Wagner's evidence of sale.

[17] In my opinion, the Appellants had to overcome the evidence of Wagner that there was a sale. The learned trial judge did not have to make a finding that the certificate of registration in the name of Wagner constituted *prima facie* evidence that the taxi was at the material time being driven by the servant or agent of Wagner.

[18] For the sake of argument, assuming that there was a presumption of agency and the certificate of registration constituted *prima facie* evidence of ownership, I am in agreement with learned senior counsel, Mr. Lumor that

the evidence accepted by the Learned trial judge from Wagner displaced the presumption of agency and the *prima facie* evidence of ownership.

Issue 2

The learned trial judge erred in law and misdirected himself in finding that it was for the appellants to prove that there was no arrangement by which ownership of the car and permit were given by Wagner to Card.

[19] The learned trial judge at paragraph 8 of his judgment, said that the appellants needed to prove that there was no arrangement by which ownership of the car and permit were given by Wagner to Card. Learned counsel, Ms Barrow submitted that given the presumption of agency, it could not have been for the appellants to prove that Card was a servant or agent of Wagner but, rather it was for Wagner to prove that Card was not his servant or agent.

[20] Learned counsel, relying on **Barnard v Sully,** contended that while the common law allows the presumption of agency to be rebutted by proof of actual facts to the contrary, the presumption should not be easily displaced in respect of taxi cabs and the evidence must be of such a quality, that the court is left certain that the relationship of principal and agent did not exist. Learned counsel submitted that the evidence of Wagner is one of convenience and insufficient to rebut the presumption that Card was not driving as the servant or agent of Wagner.

[21] The appellants in paragraphs 2 and 3 of their claim stated that Wagner was the owner of taxi cab licence D-0835 ("Taxi") and Card was the servant or agent of Wagner. Wagner denied that he was the owner and

the judge accepted ownership of the taxi passed to Card. This destroyed any presumption of agency. The burden of rebutting that evidence that there was a sale was on the appellants. One way of doing this was to compel Card as a witness and ask him questions about ownership, and the purpose of his driving of the taxi on the day of the accident. Accordingly, the learned trial judge did not err in finding that it was for the appellants to prove that there was no arrangement by which ownership of the taxi was given by Wagner to Card. In relation to a 'permit' mentioned by the learned trial judge, this was an error and will be addressed under the fifth issue.

Issue 3

Whether the trial judge ought to have considered whether Card was the servant or agent of Wagner

[22] Learned Counsel, Ms. Barrow submitted that there is nothing in the judgment of the learned trial judge evidencing that he considered whether or not Card was driving as the servant or agent of Wagner, given that the car was registered in the name of Wagner. Learned counsel referred to paragraph 7 of the judgment of the learned judge where he stated that, '*regarding the case against him (Wagner) as the employer of the first defendant (Card)* the second defendant outlined a business arrangement between himself and Card. She also referred to paragraph 8 of the judgment where the learned judge said that, "*The evidence that the claimants relied on for proof of ownership of the taxi car, and of the second defendant being the employer of the first, was the record of registration of the car in the name of the second defendant and ownership of the taxi permit. In my view, that evidence is not sufficient proof given the testimony of the second defendant."*

[23] The learned trial judge did not address servant or agency, and it is my opinion, that he was correct in not doing so because of his finding that ownership of the taxi had passed to Card. This evidence accepted by the learned trial judge shows that Card was not driving the taxi as Wagner's servant or agent. Card was acting for his own purposes and not under the instructions of Wagner. As shown in **Salmond on Torts**, 'a servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done'. Card was not Wagner's servant.

[24] Further, Card was not the agent of Wagner. In **Morgans v Launchbury [1972] 2 All ER 606,** the decision turned on a principle of vicarious liability based on the law of agency. In that case, it is stated that if the driver is the agent of the owner acting within the scope of agency, the owner, as principal, is vicariously liable. Lord Wilberforce at page 609 said that

> *'… in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty.'*

[25] In the case at bar, Card purchased the taxi from Wagner. There was no servant or agent relationship between them. I respectfully adopt the speech of Lord Wilberforce in **Morgans v Launchbury** at page 609 where it is stated:

> *I accept entirely that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable' and that either expression reflects a judgment of value - respondeat superior is the law saying that the owner ought to pay.*

It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorized the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorized or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well.

[26] Since the evidence accepted by the learned trial judge shows that there was a sale of the taxi to Card, and there is no evidence showing that he was under the control of Wagner or driving for Wagner's business, then the learned trial judge did not err in not considering whether Card was the servant or agent of Wagner.

Issue 4

Whether the learned trial judge failed to consider that the taxi continued to be operated by Card under insurance in the name of Wagner.

[27] Learned counsel, Ms. Barrow submitted that there is nothing in the judgment which shows that the learned trial judge addressed his mind whatsoever to the fact that the taxi continued to be operated by Card under insurance in the name of Wagner. Learned senior counsel, Mr. Lumor submitted that the passing of property in goods is rarely of relevance to insurance. See **Benjamin's Sale of Goods, 3rd Edition page 177 at paragraph 276,** relied on by learned senior counsel which states:

The passing of property is rarely of relevance to insurance. A person can insure goods to their full value against any loss, on

behalf of anyone who may be entitled to an interest in the goods at the time the loss occurs, provided that it appears from the terms of policy that it was intended to cover their interest. Also, a buyer will have an insurable interest in goods if they are at his risk, whether or not the property was passed to him.

[28] There is the evidence from Wagner in relation to the Insurance of the taxi, that he had a group plan, and that he had called the insurance company to tell them that he no longer owns the taxi. The learned trial judge did not say whether he considered this evidence. However, I agree with Learned senior counsel, Mr. Lumor that the passing of property in goods is rarely of relevance to insurance. **Benjamin's Sale of Goods, 3rd Edition page 177 at paragraph 276** applied. This issue is therefore, not fatal to the finding of the learned trial judge that there was a sale of the taxi.

Issue 5

Whether the learned trial judge erred in law and misdirected himself in proceeding to deliver a judgment after the elapse of three years six months of hearing the claim.

[29] Learned counsel, Ms. Barrow submitted that it took the learned trial judge three years, six months to deliver a decision. She contended that given the length of time that elapsed between the hearing and the decision, it was no longer possible for the learned trial judge to fairly assess the evidence adduced at trial. Learned counsel relied on several authorities which show that excessive delays are quite unacceptable. See the case of **Rupert Marin v George Betson, Civil Appeal No. 26 of 2007 of Belize** where Justice Carey said that a delay in excess of two years was to be regarded as appalling and quite unacceptable.

[30] Learned counsel further challenged the judgment on the basis that the delay compromised the judge's ability to properly assess the evidence presented to him at trial. She relied on the cases of **Rex Goose v Wilson Sanford & Co. and Gerard Munoz [1998] EWCA Civ. 245** at paragraphs 112 - 113 and **Cobham v Frett [2001] 1 WLR 1775.** In **Rex Goose** there was a delay of 20 months in the delivery of the decision in a complex case and it was argued that the judge's misdirections was a miscarriage of justice and a new trial was ordered. In **Cobham,** there was a delay of 12 months which the court considered as excessive delay. However, they said that the judge's notes had been of a high quality and it was impermissible to conclude merely from the delay that he had difficulty in remembering the demeanour of the witnesses. It was also stated that if excessive delay is to be relied on in appealing a judgment, it must be shown that the judgment contains errors that are probably, or even possibly attributable to the delay.

[31] Learned counsel, Ms. Barrow in her oral submissions pointed out that there were errors in the judgment. The judge referred to a taxi permit which was never adduced at trial. Further, that the Judge did not remember which Counsel appeared in the matter before him because he stated in his judgment that it was Mrs. Chung, when in fact it was learned counsel, herself and Mr. Marshalleck.

[32] Learned senior counsel, Mr. Lumor accepted that the ground of appeal is a legitimate complaint which likewise affects Mr. Wagner, the second respondent. He relied on the case of **Arthur Hoy Jr. & anor. v. Aurora Awe & 3 ors Civil Appeal No. 2 of 2006, Belize Court of Appeal,** the judgment of Morrison JA at paragraphs 17-22 where it is stated that when the court determines that there is an excessive delay, the court has to examine the trial Judge's finding of fact and his reasons for his

conclusions in order to ensure that the delay has not caused injustice to the losing party. Also, it must be shown that errors in the judgment was probably attributable to the delay.

[33] It is without doubt that a delay of over three years in handing down a judgment is 'excessive delay'. Maybe, the learned trial judge had a good reason for the delay, as in most cases where there is excessive delay but, he made no mention of it, in his judgment.

Evidence before the trial court by Wagner

[34] The crux of the appeal is the ownership of the taxi. The relevant evidence given by Wagner at paragraphs 6 to 9 of his witness statement is:

6. *I know the first Defendant, Randolph Card. Until June/July, 2000 he used to drive the taxicab licence plate registration D-9835 for me on "work and pay" basis.*
7. *In about June/July, 2000 the first defendant, Randolph Card, completed payment due on the vehicle and I gave him the vehicle; he became the owner and had complete control and possession of the vehicle.*
8. *a). When the first defendant bought the vehicle, we agreed that he will notify Home Protector Insurance Company Limited and insure the vehicle in his own name.*

   b) We also agreed that he will go to the Traffic Department in Belize City and obtain the forms that I need to sign to enable Randolph Card to register formally the vehicle in his own name.

9. *The first defendant, at the time of the road accident, was not my servant or agent. He did not drive for me and I was not responsible for his actions since about June/July, 2000.*

[35] In cross-examination, Mr. Wagner said that he was the owner of the car which he bought from United States of America. He said that he buys cars to sell or to have people run the cars on hire purchase basis. He explained that "work and pay" basis means 'hire purchase'. He further described the arrangement, which is, if a person is working the vehicle and he gets his money or part of the money out of the car, he would sell the person the car and arrangements would be made to pay a monthly fee until final payment.

[36] In relation to the transfer of ownership, Wagner said that he would tell the driver to get the transfer and he would sign it out to them but, this is after the final payment.

[37] In further cross-examination, Wagner said that the purchase price of the taxi between himself and Card was $2,400.00 and it was paid in monthly installments of $400.00, to be paid off in six months. Since he stated that he brought the car into Belize in 1998-1999, he was asked by Learned Senior Counsel, Mr. Marshalleck, why it took Mr. Card so long to pay off for the taxi when he had six months to pay. In answer, he said, at that time Card was paying the rental on the vehicle. That is, "*He used to drive the car for me on a taxi basis. He used to pay a weekly rate."*

[38] Learned Senior Counsel asked Wagner whether Card was working for him as his employee, and he replied that Card worked for him about ten years. When asked what was the job that Card did for him, Wagner replied that**,** *He would collect from other cab, or taxi men for me. He also stated that Card was driving taxi for him.*

[39] In relation to payment for Card's services, the following exchange took place between Mr. Wagner and learned senior counsel, Mr. Marshalleck:

Q. How did you use to pay Mr. Card for his services to you?

A. He would get a cheaper rate for the vehicle.

Q. When you said that he was your employee before June, July how did you have to pay him? What was the relationship?

A. He would bring the money for the other taxi to me.

Q. Yes. What about his taxi that he was driving?

A. He would pay monthly a far lower rate.

Q. How does that work? What's the rate?

R. The rate is $800.00 a month for a normal taxi and he would pay me $400.00 because he was a good worker and he was going to own his car.

…..

Q. How did you use to pay him?

A. He got a cheaper rate for renting the vehicle or driving taxi

…..

Q So, you are saying he use to rent the car from you?

A. Yes sir.

Q. Is that a flat rate?

A. Yes sir.

Q. Do you share in the profit of what the car earned?

A. No, just a flat rate he would pay me.

Q. What's the flat rate?

A. Would be $800.00 a month.

Q. And that continue even after he had decided to buy the car?

A. No. we had a set price and we had a set time frame for him so he would own the car.

Q. What was the price and time frame again?

A. The time frame would be 6 months and the price was $2,400.00.

Q. So then the actual rate fell from $800.00 a month to $400.00 a month.

A. Yes sir.

Q. That's what you are saying. So, he wasn't your employee?

A. At that time no sir.

Q. Good. Before that time you say he was your employee?

A. Yes sir.

Q. How did you use to pay him as an employee?

A. He would get a cheaper rate for his car, or the car he is driving for me.

Q. So the work that he use to do for you was to collect from the other drivers.

A. Yes sir.

Q. And you pay him for that work by giving him a cheaper rate on his car.

A. Yes sir.

Q. So, he never use to drive the car for you?

A. On his car he would get a cheaper rate that he is driving.

Q. Yea. But, you are just renting him the car.

A. Yea. That's the same thing sir.

Q. How does that make him your employee?

A. Well, we becomes friend and he would start collecting from the other guys for me.

Q. Was he still collecting from the other guys for you when this collision happen?

A. No sir. .. I was phasing out that business. ..Prior to 2000.

[40] In re-examination, Mr. Wagner said that the arrangement for Card to buy the car was made in January of 2000.

[41] The cross-examination is helpful in clarifying the evidence in chief as stated in the witness statement, in relation to the relationship between

Wagner and Card. Wagner in his examination in chief said that Card, until June/July, 2000 used to drive his taxicab for him on a "work and pay" basis. He explained in cross examination that "work and pay" basis means 'hire purchase'. He further described the arrangement which is, if a person is working the vehicle, and he gets his money or part of the money out of the car, he would sell the person the car and arrangements would be made to pay a monthly fee, until final payment. The arrangement between himself and Card is further explained later in the cross-examination which is that Mr. Card at the beginning of the relationship was renting the taxi at $800.00 per month. Mr. Wagner's evidence showed that the 'driving of the car for him' and 'the renting of the car' amounts to the same thing. This rental relationship between the respondents changed when there was an agreement for Mr. Card to purchase the taxi for $2,400.00 with monthly instalments of $400.00. At this time, Mr. Wagner had received rental for about 10 years. The monthly instalments were $400.00 and not $800.00 as when the taxi was being rented. The evidence though confusing, shows that Wagner at the beginning, rented the taxi on a 'work and pay' basis and thereafter, the taxi was sold to him on a hire purchase arrangement which was done on a 'work and pay' basis.

[42] There was also a further relationship between Wagner and Card which Wagner described as an employment relationship. He said that Card collected money from other taxi men for him. He did not pay him by cash but, by a reduction in the monthly payments. This relationship however, ended before the accident in question. It is quite obvious that Wagner did not understand the employer/employee relationship, as he spoke of friendship with Card, who would collect from other taxi men and as such, he would give him a reduction in the rental.

[43] The learned trial judge had the advantage of seeing the witness, Wagner and he obviously found him a credible witness as he accepted his evidence that he (Wagner) and Card entered into a hire purchase agreement for the sale of the taxi in January 2000 and paid off in June 2000.

[44] A transcript of the proceedings before the trial judge was prepared but there is no date as to when it was prepared. The appearances recorded by the stenographer in the matter was, 'Mr. Hubert Elrington for the claimants and Mrs. L. Barrow Chung for the defendants'. This is the erroneous appearances that the learned trial judge used for his judgment and this is an indication that the learned judge had the transcript of the proceedings at the time of writing of his judgment. He therefore, had all the evidence in the matter before him to refresh his memory.

[45] Mr. Wagner's evidence about the sale of the taxi was not contradicted by any other evidence. The trial judge in accepting the evidence that there was a sale of the taxi, made a finding of fact, as there was no documentary evidence. He also made a finding of law in relation to the passing of ownership, which in my opinion was correct as discussed above. The evidence considered by the learned trial judge is stated at paragraph 7 and 8 of his judgment and he made a finding at paragraph 8 that, *It has been proved that in the arrangement between the first and second defendants, property would pass when the first defendant would have paid to the second the costs of the car and a little more money. Registration of transfer would be evidence confirming transfer of ownership subsequently, not the only proof of transfer.* The evidence mentioned in paragraph 7 in its entirety is:

> *Regarding the case against him as the employer of the first defendant, the second defendant outlined a business arrangement*

between himself and the first defendant. His testimony was that, he bought and owned the car No. D-0835, which he licensed to ply as a taxi cab, and he insured it. He said they agreed that the first defendant would run the taxi cab until the first defendant would have paid off the cost of the car and a little more to the second defendant; and that the first defendant was not paid wages. The second defendant further said that in June or July 2000, the first defendant paid off the sum of money agreed, and the second defendant passed ownership of the car and the business to the first defendant who was to apply to the authorities for transfer of ownership of the car and of the taxi permit. He learnt that the first defendant done neither by the time of the collision.

[46] The Learned trial judge did not say anything about the demeanour of the witness, Wagner or whether he found him to be a credible witness. It is implied however, that he found the evidence to be credible since his finding is *that it has been proved that ..., property would pass when the first defendant would have paid to the second the costs of the car and a little more money.*

[47] The cross-examination was obviously crucial in this matter, as it clarified all the arrangements between Wagner and Card. Wagner was clearly confused but, the cross-examination on a whole shows a rental arrangement and thereafter a sale which was done on a 'work and pay' basis (hire purchase) and further that Card collected from other taxi men for Wagner.

[48] The errors in the judgment in relation to appearances of Counsel is not attributable to the delay, but an error in the transcript of the proceedings. As for the taxi permit, this court cannot say how the trial judge referred to a taxi permit, as no evidence was adduced at trial in

relation to same. This however, is not fatal to the finding of the learned trial judge that it has been proven that property would pass upon payment. I cannot say that this is attributable to the delay, but, it may be a misunderstanding by the learned trial judge that there has to be a transfer of the taxi permit. What is required is a transfer of title of the vehicle.

[49] This court has not been shown any material factual errors made by the learned trial judge, and I note that this is a simple road traffic matter. The complaint is that three years six months is a long time and the learned trial judge made no mention of the credibility of Wagner. This court has not seen the learned Judge's notes and cannot say whether he recorded the impression the witness, Wagner made on him. It is likely also, that the Judge on reading the transcript and his notes recollected the impression that Wagner made on him. I am not in a position to comment on the demeanour of the witness but, having read Wagner's witness statement and his cross-examination in its entirety, cannot say that there are inconsistencies in his evidence. There is confusion, but learned senior counsel, Mr. Marshalleck vigorously cross-examined Wagner and in the process cleared up all confusions. Since no material factual errors have been indentified, I am unable to make a finding that the delay compromised the judge's ability to assess the evidence.

[50] I must add however, that this court, does not condone excessive delays in the delivery of judgments. I respectfully adopt the closing paragraph written by Justice Morrison in **Arthur Hoy**, a judgment of this court in which he stated:

> 22. *While there are good and compelling reasons for sometimes protracted delays in the delivery of reserved judgments ... I do not think anyone would challenge the suggestion that prompt delivery of such judgments is an essential*

component in the efficient and expeditious administration of justice, which the new Civil Procedure Rules are explicitly designed to promote.

Issue 6

Whether the learned trial judge erred in law and misdirected himself in ordering that the costs of this claim up to when judgment was entered against Card be fixed at $2,000.00.

[51] The learned trial judge at paragraph 15 of his judgment, ordered that only Mr. Card will pay the costs of the claim up to when judgment was entered against him. He fixed the cost at $2,000.00 given that Card did not file a defence.

[52] Learned counsel, Ms. Barrow submitted that the learned trial judge erred in law and misdirected himself in ordering $2,000.00 costs against Card, the first respondent. She contended that pursuant to **Rule 64.5** of the **Supreme Court (Civil Procedure) Rules, 2005 (CPR),** the usual order of the Supreme Court ought to be an order for prescribed costs. She also relied on the case of **David Sims et al v Audubon Holding Ltd. et al Civil Appeals No. 15 & 16** at para 63 where it is held that:

Both appellants argued that the judge was wrong to order costs to be assessed, if not agreed. The usual order is undoubtedly an order for prescribed costs and the judge gave no hint as to the reason why she made a different order. It is fundamental that a judge is obliged to give reasons for making an unusual order as to cost unless, of course, reasons are deducible from the rest of the

judgment. The consequence of failure to give such reasons when reasons are required will often be to require this court to set aside the costs order made and exercise an original discretion to determine the appropriate order to make as to costs. In this case (counsel) tried gamely to defend the order for assessed costs but did not persuade me that the order should stand.

[53] I am in agreement with Learned Counsel, Ms. Barrow that an order for prescribed cost should have been made in this case. **Rule 64.5** of the **CPR** (in so far as relevant to this claim) provides:

> *(1) The general rule is that where Rule 64.4 does not apply and a party is entitled to the costs of any proceedings, those cost must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (5) of this Rule.*
>
> *(2) In determining such costs, the "value" of the claim is to be decided -*
>
> *.....*
>
> *(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in Column 2 of Appendix B against the appropriate value.*
>
> *.....*

[54] Appendix B shows the scale of the prescribed costs, that is the full cost. Appendix C shows the percentage to be allowed at various stages of the claim. The costs awarded in this claim against Card is $2,000.00. A default judgment was entered against Card and the learned trial judge assessed damages at $47,300.00. Under Appendix B, where the value of the claim does not exceed $50,000.00, the percentage of cost is 25%.

Therefore, the full cost would be 25% of $47,300.00 = $11,825.00. In this case Card did not file a defence and default judgment was entered against him. As such, a percentage of the cost will be allowed pursuant to Appendix C. It is provided that up to default judgment, and including assessment of damages, 60% of the full cost is allowed. As such 60% of $11,825.00 = $7,095.00. I would allow the appeal under this ground in relation to the first respondent, Card and set aside the cost of $2,000.00 ordered by the learned trial judge and substitute the sum of $7,095.00 as prescribed costs.

Order

[55] For reasons stated, I would dismiss the appeal against the second respondent, Wagner. It should be ordered that the appellants pay the second-named respondent costs to be taxed, if not agreed, and that the order as to costs be provisional in the first instance, but become final and absolute on a date, seven full days after the delivery of reasons for judgment, unless application for a contrary order be filed before that date. If such application is made, it should be ordered that the issue of costs is to be decided by the court on written submissions to be filed and exchanged within 15 working days from the date of the filing of the application.

[56] I would allow the appeal in relation to costs against the first-respondent, Card. I would award prescribe costs to the appellants in the sum of $7,095.00.

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HAFIZ BERTRAM JA