IN THE COURT OF APPEAL OF BELIZE AD 2019

CIVIL APPEAL NO 1 OF 2016

DELIA ANDREWS HYDE Appellant

v

RF&G INSURANCE COMPANY LIMITED Respondent

———

BEFORE

The Hon Mr Justice Sir Manuel Sosa President
The Hon Madam Justice Minnet Hafiz Bertram Justice of Appeal
The Hon Mr Justice Christopher Blackman Justice of Appeal

H Elrington for the appellant.
J Ysaguirre for the respondent.

———

15 June 2017 and 14 August 2019.

SIR MANUEL SOSA P

[1] I am of the opinion that this appeal should be allowed. I concur in the reasons for judgment given and the orders proposed in the judgment of my learned Sister, Hafiz Bertram JA, which judgment I have had the advantage of reading in draft.

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SIR MANUEL SOSA P

HAFIZ BERTRAM JA

Introduction

[2] This is an appeal against the decision of Griffith J, delivered on the 27 November 2015, in which she ordered that Delia Andrews Hyde ("the appellant") was liable for an accident which occurred on 29 November 2013. The learned trial judge further ordered that the appellant has to pay RF&G Insurance Co. Ltd., the respondent, ("the Insurance Co.") $16,805.00 in damages, costs and interest. This Court heard brief oral arguments for the appeal on 15 June 2017. The parties relied mostly on their written submissions.

Brief background

[3] On 12 November 2014, the Insurance Co. claimed against the appellant for the sum of $17,980.00 which represents the remaining balance owing of the sum that was paid to its insured as a result of an accident that occurred on 29 November 2013, and which they claimed was caused by the negligence of the appellant whilst driving a motor vehicle.

[4] By a contract of insurance made around 26 November 2009, the Insurance Co., insured Roselia Vallecillo ("the Insured") against loss or damage to her Pick-up truck ("the truck") for up to $40,000.00 in consideration of premiums paid by the Insured.

[5] It was a term of the policy that the Insurance Co., in consideration for indemnifying the Insured, be entitled to all rights of the Insured and to prosecute in the name of the Insurance Co. for its own benefit any claim for indemnity or damages or otherwise.

[6] On 29 November 2013, the Insured was driving his truck on the Southern Highway, and upon reaching the vicinity of Mile 12, near Sittee River junction, the appellant drove her Toyota car from behind a parked bus causing the pick-up truck of the Insured to collide with her car. The Insurance Co. claimed that the collision was caused by the negligence of the appellant.

[7] As a result of the collision, the Insured Pick-up truck was extensively damaged and the Insurance Co. had to indemnify the Insured for the damage to his truck. In accordance with the terms of the Insurance policy, the Insurance Co. paid the sum of $40,500.00, to the Insured, in full settlement of his claim under the policy.

[8] The Insurance Co. collected from Home Protector Insurance Co., who is the Insurer of the appellant, the sum of $20,000.00, which represents the statutory limit payable by the Insurer of the negligent third party (the appellant in the instant matter). The Insurance Co. claimed the remaining balance from the appellant in the claim before Griffith J. That balance being BZ$17,980.00. The damaged vehicle was sold and the Insurance Co. received $4,000.00 for that sale.

[9] The appellant in her defence denied that she was negligent. She claimed that the Truck driver caused the accident.

[10] The appellant stated in her defence that the Insurance Co. freely assumed the risk that its insured could be involved in an accident and if the risk did not materialize, it would have made a profit. Further, if the Insurance Co. was not obliged to pay the excess damages, then it ought not to have paid it. That the Insurance Co. did not make the payment at the request of the appellant, or under compulsion of law, but voluntary and therefore, it cannot compel the appellant to repay the sum claimed.

[11] The parties were ordered by the trial judge to file a memorandum of issues to be determined by the court. The memorandum filed on 19 May 2015 showed two issues to be tried, namely (i) Whether or not the appellant was negligent in driving the Toyota Car on 29 November 2013, thereby causing the accident and (ii) Whether the appellant is liable to repay the claimant the balance remaining from the sums that the Insurance Co. has paid to its Insured.

The decision of the trial judge

[12] The trial judge considered the evidence and submissions of the parties and made the following findings on the two issues:

> (i) The appellant was found liable for the accident which caused damage to the pick-up truck which was insured by the Insurance Co.
>
> (ii) The Insurance Co. has proved its loss and was awarded damages in the sum of $16,805.00, prescribed costs and interest.

The doctrine of subrogation raised at trial

[13] Learned senior counsel, Mr. Elrington, at the trial below, briefly raised (as stated by the trial judge in her judgment) an issue to challenge the legality of the Insurance Co. recovering beyond the payment received by the appellant's third party Insurer. The trial judge at paragraph 16 of her judgment stated that Mr. Elrington was given an opportunity by the court to make written submissions in support of his argument but, the judge never received those submissions. As a result the trial judge said that the court would address the issue "*to the limited extent that it was raised."* The trial judge addressed the issue in the following manner:

> "16. ……. In the first place, the argument briefly raised by learned senior counsel is addressed by the existence of the doctrine of subrogation as it provides for the right of an insurer to recover payments made out to its insured from the 3rd party responsible for the loss. This right is generally regarded with reference to the early decision of **Mason v Sainsbury (1782) 3 Doug. 61** in which the argument that the insurer had already recovered its premiums and had suffered no act by the defendant (the 3rd party) was rejected. **The qualification that the insurer can sue only in the name of the insured unless the right was assigned was met in this case by the policy submitted by the Claimant containing a clause as evidence of such assignment.** (emphasis mine)

17. With respect to the fact that the insured had already received payment from the Defendant's Insurers, the Court refers to **section 23(1) of the Motor Vehicle Insurance (Third Party Risk) Act, Cap 231** which preserves the jurisdiction of the Court to hear and determine any claim for liability for damages for injury or to property notwithstanding any provision under the Act. Section 23(2) further provides that in awarding any compensation for bodily injury or damage to property the Court shall take into account any payment already received by the Claimant under the Act, which has been done by discounting the $20,000.00 received from the Defendant's Insurer. In light of these provisions, the Court finds that the receipt of compensation from the Defendant's insurer did not preclude the Claimant to sue the Defendant for loss not covered by the payment of the Defendant's insurer."

The grounds of appeal

[14] There are two grounds of appeal. In summary the grounds are as follows:

(i) The trial judge was wrong in law when she found that the Insurance Co. had suffered financial damage as a result of the accident which she found as a fact, was caused by the appellant;

(ii) The trial judge by her finding of facts, placed the burden of proof upon the appellant and the judge erred in law in so doing.

[15] The relief sought by the appellant is as follows:

(i) The decision of the trial judge that the Insurance Co. had suffered financial loss in the sum of $16,805.00 be set aside. That a finding of fact that the Insurance Co. had suffered no financial loss either directly or indirectly be substituted thereof;

(ii) That the prescribed costs order of $3,361.00 be set aside and that an order be substituted that the Insurance Co. pay the appellant such prescribed costs in the same amount.

Issue of *locus standi* raised as ground of appeal

[16] The issue of standing of the Insurance Co. was not specifically raised by Mr. Elrington SC at the trial below. But, the trial judge in addressing the doctrine of subrogation which was raised by Mr. Elrington, held that, "*The qualification that the insurer can sue only in the name of the insured unless the right was assigned* ***was met in this case by the policy*** *submitted by the Claimant containing a clause as evidence of such assignment."*

[17] Despite this ruling that there was a valid assignment to the Insurance Co. by its Insured, Mr. Elrington did not appeal on this ground. It seems that counsel was awakened by a subsequent judgment, **RF&G Insurance Co. Ltd. v Jody Reneau and Dinsdale Thompson,** Claim No. 587 of 2014, (Judgment dated 27 January 2016), by the same trial judge, in which she found that the very clause was not a valid assignment. Hence, at the hearing before this Court, the issue of standing was raised in written and oral submissions.

[18] It would be prudent to determine this issue of standing first, since it could very well dispose of the entire appeal.

Submissions for the appellant on locus standi

[19] In written submissions, Mr. Elrington SC addressed the ground of appeal on financial loss which I will come to later, if necessary. On the issue of *locus standi* of the Insurance Co., senior counsel relied on **RF&G Insurance Co. Ltd. v Jody Reneau and Dinsdale Thompson.** Counsel argued that the Insurance Co. had a duty to show that under the Insurance Policy with the Insured, it can sue a third party, a stranger to the contract.

[20] Senior counsel argued that in regards to the exception flowing from the principle of subrogation, there must be a legal assignment. Such assignment must be notified to

the third party before any action can be brought against that party pursuant to section 133(1) of the Law of Property Act, Chapter 190.

[21] Mr. Elrington further argued that the thing assigned must not be in the nature of a chose in action that may arise in the future but, must be in the nature of an existing and ascertainable right. He contended that the Insurance Co. did not advert to these essential requirements and did not plea or comply with them. As such, there was no *locus standi* to bring the claim.

[22] Further, senior counsel submitted that the Insurance Co. has not shown that there was a valid legal assignment or a valid equitable assignment or that notice of assignment was served on the Defendant/Appellant in order to show that the Insurance Co. had *locus standi* to bring the claim.

Submissions for the Insurance Co. in reply

[23] On the issue of standing, learned counsel, Mr. Ysaguirre, in reply, submitted that the Insurance Co. had full capacity to bring the suit in its own name, pursuant to Condition 5 of the policy of Insurance with its Insured. Counsel contended that Condition 5 authorized the Insurance Co. to bring proceedings in its own name and it is regarded as an assignment of the right to bring a suit against a negligent third party for the damages sustained. He relied on the case of **Compania Colombiana de Seguros v Pacific Steam Navigation Co.** [1964] 1 All ER 216, which is an authority for the proposition that an insurance company can bring proceedings in its own name if there is an assignment of the rights against a tortfeasor.

[24] Mr. Ysaguirre submitted that when the Insured was paid by the Insurance Co., the insured signed a 'form of acceptance' dated 3 January 2014, acknowledging payment in full and final discharge and satisfaction of the claim for loss and damages to the property insured. The form also stated that the Mazda would be the property of the Insurance Co.

[25] Counsel contended that the form of acceptance operates in tandem with the policy and its conditions. Further, since the insured agreed to the form of acceptance, this is an indication to the Insurance Co. that he has turned over all rights it would have in a matter. Also, it is an acknowledgment that the Insurance Co. has the power to bring proceedings in its own name and for its own benefit.

[26] Alternatively, Mr. Ysaguirre argued that the capacity and cause of action also passed by way of an equitable assignment. He argued that the policy, the form of acceptance and the transfer of the Madza created an equitable assignment of the cause of action, allowing the Insurance Co. to bring the claim in its own name. Also, that an equitable assignment does not have to meet the statutory requirements of the Law of Property Act of Belize, for it to be valid. Counsel relied on **Halsbury's Laws of England**, Volume 13, Fifth Edition, paragraph 25; and **William Brandt's Sons & Co. Dunlop Rubber Co**. [1904-07] All ER Rep 345.

Issue for determination on standing

[27] The issue for determination is whether Condition 5 of the Insurance policy (taken along with the form of acceptance and transfer of the Mazda) created a valid legal or equitable assignment, which entitled the Insurance Co. to bring proceedings in its own name instead of its Insured.

Condition 5 of the Insurance Policy

[28] Condition 5 of the Insurance Policy between the Insurance Co. and its insured states:

> "No admission offer promise or payment shall be made by or on behalf of the Insured without the written consent of the Company which shall be entitled **if it so desires** to take over and conduct in its name the defense or settlement of any claim or to prosecute in its name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any

proceedings and in the settlement of any claim and the Insured shall give such information and assistance as the Company may require."

Discussion

[29] Condition 5 of the Insurance policy has to be interpreted to determine whether there was a valid legal or equitable assignment of a cause of action by the Insured to the Insurance Co. to bring proceedings in its own name. Senior counsel, Mr. Elrington relied on **Reneau and Thompson** in making arguments on this point, since Condition 5 is identical in that judgment. Also, the Insurance Co. was the same claimant in that matter and the instant matter. Yet, two different interpretations of Condition 5.

[30] The date of the hearing of the instant matter was 28 October and 27 November 2015. Judgment was handed down on 27 November 2015 and the Order perfected on 21 December 2015. The judgment itself is dated 3 December 2015. In fairness to the trial judge, she did not have the benefit of submissions from counsel for the appellant who briefly raised the legality of the Insurance Co. recovering beyond the payment received by the appellant's third party Insurer. In **Reneau and Thompson**, which was heard thereafter, the issue of standing was specifically raised and fully argued.

[31] Since there are two different interpretation of Condition 5, it would be prudent to begin from the doctrine of subrogation. In **Castellain v Preston** (1883), 11 QBD 380, (which was relied upon by the trial judge in **Reneau and Thompson**), the doctrine was adequately discussed.

[32] The doctrine of subrogation applies to all contracts of non-marine insurance which are contracts of indemnity, such as motor insurance and fire insurance. In the instant matter, the policy relates to motor insurance. The doctrine is a corollary of the principle of indemnity and it prevents the insured from recovering more than a full indemnity. Brett LJ in **Castellain** at page 388 explained the doctrine this way:

> Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter (Insurer) and the assured (Insured) the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.

[33] The doctrine of subrogation is not in issue. The law is that an Insurer is able to recover from a third party (tortfeasor) monies paid to its Insured. The loss in the instant matter is the value of the Mazda less monies received from the appellant's Insurer. In an action for the recovering of such loss, it can be brought in the name of the Insured under the doctrine of subrogation for the benefit of the Insurer. However, under the exception flowing from the doctrine of subrogation, where there is an assignment of such cause of action to the Insurer (Insurance Co.), the action can be brought in the name of the Insurance Co.

[34] In the instant matter, the cause of action was brought in the name of the Insurance Co (Insurer). Therefore, it was imperative for the Insurance Co to plead and prove that there was a valid legal or equitable assignment of the cause of action to itself.

[35] The crux of the matter is whether condition 5 was a valid assignment of the rights of the Insured, whether legal or equitable. Learned counsel, Mr. Ysaguirre argued that Condition 5 forms part of a contract between the Insurance Co. and its insured and it authorized the Insurance Co. to bring proceedings in its own name.

Was there a valid legal assignment?

[36] Mr. Ysaguirre submitted that **Compania** is good authority for the proposition that an insurance company can bring proceedings in its own name if there is an assignment of the rights against a tortfeasor. There is no doubt that this is good law. However, it is my view, that **Compania** can be distinguished from the instant matter. In that case, there was a loss and payment was made by the Insurer. Thereafter, there was an assignment of the rights of the Insured to the Insurer.

[37] The language used in the two letters were clearly an assignment of the rights of the Insured after receiving payment from the Insurer. The relevant part of the first letter which was signed by the Insured states:

> "For loss and/or damage to the goods described below, consisting of [then follow the details] having received payment from the Compania Colombiana de Seguros for the foregoing, we cede and endorse to the said insurance company all rights which we have or which we may acquire in the future to claim reimbursement thereof from the third parties who may be responsible for such loss or damage."

[38] The relevant part of the second letter which was also signed by the Insured states:

> "We have received from Cia. Colombiana de Seguros the amount of 73,228.90 Pesos, amount of indemnification resulting from the loss covered by this liquidation, whereby the Cia. Colombiana de Seguros is freed from any responsibility for said purpose with the undersigned who, therefore, waives in favor of Cia. Colombiana de Seguros any rights he may have or has against others possibly responsible for the damages or losses indemnified by this payment, and we agree not to carry out any act that might in any way hinder the carrying out of such rights by the Cia. Columbiana de Seguros."

[39] These two letters read together were considered by the court as a valid assignment by the Insured to the Insurance Company. Roskill J expressed the view that the "*language of the documents of cesser and waiver of rights goes far beyond language apt*

to express the assertion of the equitable right of subrogation." He said that the language used in the letters, is the language of assignment. These letters were pleaded by the Insurer as notice under the Law of Property Act, 1925.

[40] Before the Judicature Act 1873, equity would have compelled an Insured to exercise his rights against a tortfeasor (or a contract breaker) for the benefit of the Insurer. In law, those rights can now be validly assigned by the Insured to the Insurer. Further, subject to due compliance with section 136 of the Law of Property Act 1925 (section 133(1) of the Law of Property Act of Belize), those rights can be enforced by the Insurer in its own name. See **Compania**.

[41] Further, as shown in **Castellain**, when an Insurance Co. pays a claim of its Insured for a loss, it succeeds by the doctrine of subrogation, to any rights of the insured against third parties. However, in relation to taking an action against a third party in its own name, there must be an assignment of those rights from the Insured to the Insurer. There was no assignment in the instant matter as in **Compania**. Further, the Insurer would have had to give notice to the third party, in compliance with the requirements of section 131(1) of Belize Law of Property Act, of the legal assignment and that it intends to take action in its own name. Section 133(1) provides:

> "(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, shall be effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –
>
> (a) the legal right to such debt or thing in action;
> (b) all legal remedies for the same; and
> (c) …"

[42] In the instant matter, there was no compliance with section 133 (1) of the Law of Property Act by the Insurance Co. (the Insurer). There was no express notice in writing of an assignment to the appellant of the thing in action (cause of action for the claim of damages). So, even if there was a valid legal assignment, the cause of action would have failed.

[43] Condition 5 speaks of an action which is not yet in existence, (a future chose in action), which is incapable of assignment. However, a purported assignment of a future chose in action, can be construed and given effect as a contract to assign. At the time of the contract or the purported assignment, there was no loss and no payment for any loss. As for the 'form of acceptance', which occurred after the loss and payment, this does not show an intention to assign a cause of action. It showed that the Insured accepted payment from the Insurance Co. in full and final discharge and satisfaction of the Insured claim, for loss and damage to the Mazda. At this point, the Insurance Co would have been entitled, by the doctrine of subrogation, to any benefits received by the Insurer from a third party. Mr. Ysaguirre submitted that the form also shows the Mazda would be the property of the Insurance Co. Likewise, this does not show assignment of the rights of the Insured after payment for a loss. The Insurance Co. recovered (as allowed by the doctrine of subrogation), part of the payment made to the Insured since he was fully compensated for his loss (damage to the Mazda). The Insurance Co. later sold the damaged Mazda, as shown in the evidence at trial.

[44] In my opinion, Condition 5 and the Form of acceptance taken together do not amount to a legal assignment of a right of action in tort by the Insured to the Insurance Co., to bring an action in its own name against the appellant (tortfeasor). The payment made in satisfaction of the claim by the Insured, entitled the Insurance Co. to the remedies available to the Insured. However, there was no valid legal assignment (as in the case of **Compania**) in relation to those remedies after payment for the loss. This would have given the Insurance Co. the right to sue in its own name, provided that notice was given in compliance with section 133(1) of the Law of Property Act.

Was there a valid equitable assignment of the cause of action?

[45] In the alternative, Mr. Ysaguirre contended that the policy, the form of acceptance and the transfer of the Mazda, created an equitable assignment and allowed the Insurance Co. to bring proceedings in its own name.

[46] Counsel also contended that an equitable assignment, to which I agree, does not have to meet the requirements of the Law of Property Act of Belize. He submitted that in relation to notice, there is sworn evidence from Alberto Balderamos, witness for the Insurance Co. that attempts were made by the Insurance Co. to have the appellant reimburse the sums paid under the policy but she refused to do so. He contended that these attempts at reimbursement prior to the issuance of the cause of action would effectively operate as notice of the assignment.

[47] The question that arises is whether there was an equitable assignment of the cause of action. **Halsbury's Laws of England**, Volume 13, Fifth Edition, paragraph 25, relied on by counsel, shows the modes of assignment of choses in action in equity. It states that:

> **25. Modes of assignment of choses in action in equity.** Apart from assignments in the narrower sense of express transfers, with which this title is primarily concerned, it should be observed that another person may become entitled in equity to a chose or thing in action by other means than express transfer. First, the owner of the chose in action may declare that he holds it in trust for another. Secondly, the owner may enter into a contract for valuable consideration to assign to another. Thirdly, a beneficiary under a trust may direct the trustees henceforward to hold the trust property on trust for another instead of him. (emphasis added)

[48] Counsel submitted that the insurance contract/policy and the form of acceptance taken together are contracts for valuable consideration to assign the chose in action to

the respondent for damages as a result of the accident occurring on 29 November 2013, between the Insured of the Insurance Co. and the appellant.

[49] In my view, this argument cannot be accepted for the same reasons already discussed. This is a matter of an indemnity insurance policy and Condition 5, a condition in the said policy, was obviously written before any loss occurred. Where a loss under an indemnity insurance policy has already taken place, the right of the Insurer to recover the sum payable to the Insured, is a right of action assignable either in equity or under the Law of Property Act. In the instant matter, the purported assignment in Condition 5, speaks of a future thing in action and there was no certainty that an accident would have occurred causing a loss. As such, it was impossible to assign the action or claim. Nevertheless, for sake of clarity, Condition 5 can be construed and given effect as a contract to assign. It cannot be construed and given effect as an equitable assignment of the cause of action.

[50] Mr. Ysaguirre further relied on **William Brandt's Sons & Co. v Dunlop Rubber Co**. [1904-07] All ER Rep 345. This is a case where the meaning of a letter with an attached letter, was plain although language of assignment was not used. A letter was addressed by a creditor to his debtor requesting the debtor to sign and send to a third person an attached letter in which the debtor stated that he would pay the amount of the debt to the third person. The letter was sent by the creditor to the third person who transmitted it to the debtor. The debtor signed the attached letter and returned it to the third person. The debtor paid the debt to a fourth person, by mistake. It was held by the House of Lords that there was a good equitable assignment of the debt to the third person, to whom the debtor must pay the money over again.

[51] In the Court of Appeal, the Chief Justice said that the letter does not, on the face of it, purport to be an assignment nor used the language of assignment. Lord McNaghten had this to say in relation that statement:

> **"** An equitable assignment does not always take the form of an assignment. It may be addressed to debtor. It may be couched in the language of command. It may

be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that debtor should be given to understand that the debt has been made over by the creditor to some third person. If debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by debtor."

[52] I respectfully adopt the statement that for an equitable assignment to be valid, it need not be in the language of an assignment. As stated in the above paragraph by Lord McNaghten, "*The language is immaterial if the meaning is plain."* An equitable assignment of a legal chose in action need not be in writing, nor in any particular form as shown in **Brant's Sons & Co.** In that matter, it is clear that a debt was assigned. The chose of action could have been ascertained or identified. That was an existing chose in action which was capable of immediate assignment. In the instant matter, Condition 5 speaks of a future claim that may never happen.

[53] In further arguments, Mr. Ysaguirre submitted that **Reneau and Thompson,** relied on by the appellant, is inapplicable in the instant matter, since the trial judge did not consider whether an enforceable equitable assignment was created. Further, that the judge placed reliance only on the terms of the contract of insurance, specifically condition 5. For the foregoing reasons, there was no equitable assignment of the cause of action to the Insurance Co. It is therefore, unnecessary to discuss the **Reneau** judgment.

Conclusion

[54] There was no legal or equitable assignment which allowed the Insurance Co. to bring proceedings in its own name. The appellant therefore, succeeds on this ground. Accordingly, the orders of the trial judge should be set aside. The learned trial judge erred when she found that "*The qualification that the insurer can sue only in the name of the insured unless the right was assigned was met in this case by the policy submitted by the Claimant containing a clause as evidence of such assignment."*

Order

[55] For the reasons discussed above, I would propose the following order:

1. The appeal be allowed on the ground that the Insurance Co./Respondent had no standing to bring a cause of action against the appellant;

2. The Respondent pay the costs of the appeal and in the court below. The costs order is provisional, to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application.

3. The orders of the trial judge should be set aside.

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HAFIZ-BERTRAM JA

BLACKMAN JA

[56] I have read in draft the judgment prepared by my learned sister and am in agreement with the reasons given and the orders proposed.

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BLACKMAN JA