THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO

Claim No. CV 2016 - 03528

PHILLIP CASTOR

Claimant

AND

THE COMPTROLLER OF CUSTOMS

Defendant

Before the Honourable Madam Justice Eleanor Donaldson-Honeywell

Appearances:
Anand Ramlogan SC, Jayanti Lutchmedial and Douglas Bayley, Attorneys at Law for the Claimant
Tinuke Gibbons- Glenn and Svetlana Dass, Attorneys at Law for the Defendant

Date of Delivery: September 26. 2017

Judgment

I. Introduction and Decision

1. Fifty-five (55) televisions shipped in by businessman Castor Phillip ["The Claimant "] were seized by Customs officers some five years ago. More than three months after the seizure and subsequent to the Claimant's inquiries, the Comptroller of Customs ["the Defendant"] issued a Notice to him stating that the seizure was on grounds of breach of **Section 213(e) of the Customs Act Chap 78.01** ["the Act"]. There was no explanation of the breach but the section referred to concerns "fraudulent evasion" of any import or export duties or attempt of same. Although no particulars were given then, it is apparent from the case for the Defence that the Claimant was suspected of having caused customs officers to assess his television sets at an under value, so as to pay less import duties.

2. Since the seizure the Claimant has made strenuous efforts, by hiring many teams of Attorneys, sending copious correspondence, commencing more than one legal action and even seeking his due recourse to intervention by his Excellency the President, to find out why this happened and get back the goods. These efforts have been to no avail even though the Claimant went so far as to indicate through one of his Attorneys that he would pay whatever customs duty is assessed in order to recover the goods and have closure in the matter.

3. The gist of the Defence put forward, in the face of all these recovery efforts by the Claimant, is that the reason it has taken so long to address the Claim for return of the goods is that Customs officers were unable to arrange an interview with the Claimant because he did not make himself available. Counsel for the Defendant admits however, in submissions that the Claimant was never asked to come in for an interview.

4. This Defence is referred to by Counsel for the Claimant in submissions as "laughable". However, in my view the delay that the Defence fails to properly justify is so inexcusable as to be tragic. This is so in that it represents the failure to honour, respect and protect the rights of the Claimant under the Constitution of Trinidad and Tobago. It is un-contradicted that he suffered anxiety, illness, lost profits and inconvenience as a result.

5. The Claimant currently seeks judicial review of the Defendant's delay in concluding its investigation within a reasonable time in relation to the seizure of the Claimant's goods on 19 October, 2012. By fixed date claim form filed 14 December, 2016, the Claimant seeks inter alia, the following relief:
   - A declaration that there has been unreasonable delay on behalf of the Respondent/Defendant in conducting and/or concluding its investigation.
   - A declaration that it is an abuse of process and/or would be unfair for the Respondent/Defendant to continue with this investigation and/or prosecute this matter nay further;
   - Alternatively, an order of mandamus directing the Respondent/Defendant to conclude and determine this investigation within seven (7) days;
   - Damages; and
   - Costs.

6. The grounds upon which the relief is sought are listed as follows in accordance with **S.5 Judicial Review Act, Chap 7:08:**
   - Failure to satisfy or observe the conditions of procedures required by law;
   - Breach of the principles of natural justice;
   - Unreasonable, irregular or improper exercise of discretion;
   - Conflict with the policy of the Customs Act, the Judicial Review Act and the Interpretation Act;
   - Breach of or omission to perform a duty;
   - Unreasonable delay;
   - Unauthorized or contrary to law;
   - Deprivation of a legitimate expectation that an investigation would be conducted and concluded within a reasonable time and the Claimant's goods returned in accordance with the Act; and
   - Abuse of power and/or the exercise of power in a manner that was so unreasonable that no public authority would have so exercised the power.

7. The Claimant has, in my view, fully supported his case by compelling and cogent evidence that has not been discredited or disproven in the Affidavits filed by the Defendant. Furthermore, the Defence put forward in the Defendant's submissions in no way presents any justification for the lax treatment of the Claim for return of these goods. Accordingly, the decision herein upholds the Claim in all respects as further explained hereafter.

II. <u>Background Facts</u>

8. The Claimant's evidence has been produced through affidavits filed 18 October, 2016 and 10 February, 2017. The Defendant's evidence is contained in the affidavits of Mr. Lawrence Sheppard (investigating officer/Customs Excise Officer I) and Mr. Richard Smith (Customs Excise Officer III) both filed on 30 January, 2017. An affidavit of Mr. Michael Blackman was also filed on behalf of the Defendant on 8 March, 2017.

9. The Claimant was a sole trader involved in importing goods for resale in Trinidad at the inception of the current dispute.

10. The incident in question began on 19 October, 2012 when the Claimant attended the Customs Bond at ABL (Aviation Business Ltd.) to clear his shipment of 55 television sets which he had purchased online from a Miami-based company. Upon his arrival he discovered that his packaging of goods had been opened. Making enquiries about this, he discovered that the Preventative Branch of Customs had inspected the shipment in his absence the night before. The Defendant disputes that all the packages had been opened prior to the arrival of the Claimant.

11. The Claimant inspected his goods in the presence of a supervisor. Thereafter he was interviewed by the supervisor and 5 other Customs Officers. The Claimant claims he was then informed by one of the Customs Officers that he was under caution as it was suspected that he had under-invoiced his goods to evade the appropriate customs duties. The Claimant claimed he was not informed of his right to an attorney and was not allowed to make a phone call.

12. It is not disputed that the Claimant fell ill during the interrogation, and was treated at hospital for Acute Coronary Syndrome. He claims that he remained traumatised after his discharge the next day and was eventually referred to a psychiatrist on 16 November, 2012. He was eventually diagnosed with Post-Traumatic Stress Disorder, the effects of which he continues to experience today.

13. The Claimant's attorney at the time wrote to the Defendant on 16 January, 2013 claiming the seized goods pursuant to S.220 Customs Act. On 22 January, 2013 the Claimant then received a Notice of Seizure from the Defendant in relation to the incident of 19 October, 2012. On 24 January, 2013 the Defendant responded to the Claimant's letter stating that it was receiving attention.

14. On 6 March, 2013, the Claimant wrote to the Defendant requesting reasons for seizure and detention and on 7 March, 2013 the Defendant responded stating that the seized goods formed part of an ongoing investigation.

15. The Claimant thereafter filed an application for judicial review. This was dismissed on 25 June, 2013 on the grounds that the application had not been prompt and that there was an alternate remedy in the form of recourse to the President. The Claimant therefore wrote a letter to the President pursuant to **S.223 of the Customs Act** on 4 November, 2013 requesting the return of the goods but received no response.

16. Further correspondence occurred between the Claimant and Defendant. The Claimant by letter of 27 August, 2015 to the Claimant requested the return of the goods and stated that he had not attempted to evade any taxes or breach any customs legislation. The letter further demanded that "*the said goods be properly examined and the relevant duties and taxes assessed and on payment of the duties*" the Claimant be allowed to take delivery of his goods. The Defendant responded on 19 October, 2015 stating:

    "*The circumstances surrounding the seizure of the said television sets and the decisions of charges (if any) are to be made for any breaches of the customs laws are being investigated by the Comptroller. In this regard, a communication would be forwarded to you with*

respect to your demand for the delivery of the goods upon payment of the relevant duties and taxes."

17. Finally, the Claimant wrote back to the Defendant on 15 December, 2015 attaching a copy of his affidavit filed in the judicial review proceedings and demanded that the duties be assessed and goods released to him. There was no further response from the Defendant.

18. The Defendant's main contention is that the investigation could not continue without a complete interview with the Claimant giving his version of events. The affidavit of Mr. Sheppard outlines two instances where attempts were made to inform the Claimant that he was to come in for an interview. One was a chance meeting at Valpark Shopping Plaza and the other one was a phone call answered by a relative of the Claimants who apparently dismissed the request. The Claimant denies he was ever contacted by customs officials for the purposes of completing his interview. In written submissions counsel for the Defendant candidly confirms at paragraph 22 that "*Admittedly, the various correspondence did not refer specifically to the need for the Claimant to attend to an interview*". It was however submitted that the need for an interview could be implied from the October 19, 2015 letter.

19. There was also evidence of a potential investigation into actions of the Customs Officer by the name of Mr. Imtiaz Ali who was the supervising officer at the time of the incident. The affidavit of Michael Blackman filed by the Defendant indicated that Imtiaz Ali had not submitted a report in the matter as he had invoked his right to silence.

20. The Claimant alleges that the Defendant has breached its statutory duty under **sections 220 and 213 of the Customs Act** and **section 15 of the Judicial Review Act Chap 7:08** as well as **section 23 of the Interpretation Act**, **Chap 3:01** by its unreasonable delay in concluding its investigations.

21. The Claimant also alleges that his constitutional right to enjoyment of property has been breached since he has been deprived of same without due process.

III. Issues

22. The issues in the present case are as follows:

  i. Whether there has been unreasonable delay on behalf of the Defendant in conducting and/or concluding its investigations;
  ii. Whether there has been any breach of constitutional rights due to this delay;
  iii. Whether there would be an abuse of process or unfairness should the Defendant continue with this investigation and/or prosecute this matter nay further; and
  iv. What measure of damages is to be awarded, if any?

IV. Law and Analysis

Issues (i), (ii) and (ii)

23. **Section 15 Judicial Review Act** states:

"Where –

(a) a person has a duty to make a decision to which this Act applies;

(b) there is no law that prescribes a period within which the person is required to make that decision; and

(c) the person has failed to make that decision,

a person who is adversely affected by such failure may file an application for judicial review in respect of that failure on the ground that there has been unreasonable delay in making that decision."

24. **Section 23 of the Interpretation Act** states:

"Where a written law requires or authorizes something to be done but does not prescribe the time within which it shall or may be done, the law shall be construed as requiring or authorizing the thing to be done without unreasonable delay having regard to the circumstances and as often as due occasion arises."

25. The Claimant cites several notable decisions on the concept of delay including ***Thornhill v AG [1981] AC 61***; ***Ramnarace v PSC CV 2007-00218***; and ***CCSU v Minister of Civil Services (1985) AC 374***. He also cites the dicta of Jones J. (as she then was) in the local

High Court decision of ***Anthony Leach v PSC HCA 1002 of 2004*** as outlining a useful test for whether there has been substantial delay in instituting disciplinary charges:

> *"Were these delays in good faith? Were they lengthy? Were they entirely understandable? Did the Applicant suffer material prejudice? Are there any fair trial considerations or fundamental human rights in issue? These must, in my opinion, be the questions for the court in circumstances like these. At the end of the day what this Court is called upon to determine is whether in all the circumstances it is fair, given the delay of over four years between the institution of the disciplinary procedure and the preferring of the charges, to allow the disciplinary proceedings to continue. It is in dealing with this question of fairness that both the reasons for the delay given by the P.S.C. and the prejudice suffered by the Applicant are relevant."*

26. The learned judge held in that case that a period of three years' delay was not reasonable.

27. In relation to the notion of prejudice, the Claimant, citing ***Paula Barrimond v PSC HCA S-1301 of 2005***, submits that the prejudice suffered by the Claimant is to be presumed having regard to the inordinate length of the delay. Further, that the likelihood that the Claimant would be able to marshal witnesses or evidence favourable to him at this stage has been reduced significantly.

28. The Claimant also submits that the any attempt to initiate proceedings pursuant to this incident at this stage would be unfair and an abuse of process. Several cases were cited in support – See ***Dion Samuel v AG*** and ***Samaroo v Minister of Education HCA 536 of 1998***.

29. The Defendant's only defence regarding the length of delay is that the Claimant, himself, was responsible for the delay due to his failure to attend the Customs office for an interview. They contend that without this completed interview the investigation could not continue. They suggest, as recited in the factual background above, that over the five years since the seizure there were two attempts to notify the Claimant of this need for an

interview – one via telephone to a relative and one at a chance meeting at Valpark Shopping Centre.

30. The Claimant's argument against this contention is that in all of the written correspondence from the Defendant there was never any indication that the lack of an interview was the reason the investigation had stalled. In fact, the letters from the Defendant made it clear that their investigation was ongoing.

31. The Defendant submits that the affidavit of the Claimant that was sent to the Defendant is not sufficient to eliminate the need for an interview. However, there is no indication of this in any of the correspondence coming from the Defendant. The Defendant argues that their letter of 19 October, 2015 which suggested that the Claimant had to pay relevant duties and taxes, provided the basis on which it could be implied that the Claimant would have to attend the office of the Defendant for an interview. This submission is untenable in light of the fact that this obligation could have been clearly communicated in any of the Defendant's letters. It is clear from the Claimant's side that a resolution of the incident was being sought and there is no real evidence of the Defendant's intention in that regard.

32. The Defendant also suggests that the Claimant's unwillingness to attend the Customs office can be inferred from the psychiatrist's report relied upon by the Claimant as proof of his mental anguish caused by the Defendant's actions. The report stated that the Claimant's anxiety after the initial interrogation caused him to avoid contact with the Customs officials for some time. This argument by the Defendant, however, is not borne out due to the fact that it was a report made just after the seizure. Circumstances may have altered during the four-year time period thereafter. Further this does not nullify the point that the Defendant has not provided any evidence of actual notice provided to the Claimant that he was required to give further information or come in for an interview.

33. The Defence has therefore failed to show that the delay was caused by the action of the Claimant. The defence is also the same on the abuse of process and the constitutional points and therefore fails for the same reasons as well.

Issue (iv)

34. With regard to damages, the Claimant relies on Section 8(4) of the Judicial Review Act 2000 and the case of ***Permanent Secretary, Ministry of Foreign Affairs & Prime Minister Patrick Manning v Feroza Ramjohn PCA 38 of 2010; Prime Minister Patrick Manning & PSC v Ganga Persad Kissoon; PCA 57 of 2010*** for the proposition that damages can be awarded in a claim for judicial review where there is a concomitant claim at common law. The Claimant submits therefore that he has a claim for damages for detinue and conversion of his property for which he can be compensated in this claim.

35. The Claimant lists the following factors to be taken into account as aggravating factors:
    i. Monetary Compensation in order to put the Claimant back into his position prior to the seizure in the amount of $245,000.
    ii. The injury sustained as a result of the interrogation by the Defendant and resulting Acute Coronary Syndrome and Post-Traumatic Stress Disorder.
    iii. The fact that the Claimant was a law-abiding citizen with no prior convictions.
    iv. The fact that the Claimant was not informed of his right to an attorney-at-law nor allowed to make a phone call at the time of the interrogation;
    v. The Claimant's continued distress at the risk of criminal prosecution for over four years.

36. These factors have not been specifically defended by the Defendant in its submissions and no alternate figure for damages has been suggested. It is clear that a claim in detinue can be made by a person with the immediate right to the possession of the goods against the person in possession of the goods and who, in the face of a proper demand to deliver them up, has failed or refused to do so without lawful excuse - See ***Carlton Rattansingh v The Attorney General of Trinidad and Tobago and Kanahar Doopant the Comptroller of Customs and Excise, CA No. 105 of 2000***, page 7, per Warner JA.

37. In the decision of ***Peer Nasseir v The Attorney General of Trinidad and Tobago CV 2008-03812***, Master Alexander stated as follows;

"17...Where the goods were used to generate income, this loss of profit may be recoverable see Bodley v Reynolds [1846] 8 QB 779...To be noted is that, "where no specific loss of profit can be shown, he may be awarded damages for general loss of use, or in default of either of the preceding, and an award of interest may be given." See McGregor on Damages 17th edition... To be noted is the dicta of Stollmeyer J (as he then was) in Gerard Mootoo (supra) that "[L]oss of use is not generally regarded as a separate head of damage because the mere capacity for profitable use is part of the value of the item, and loss of use would represent pro tanto recovery twice over (see Clerk & Lindsell on Torts 15th Ed. para. 21-104)..."

38. The Claimant has not outlined with sufficient specifity on a balance of probabilities the profit he would have made on the television sets. Furthermore, there has not been any claim from the Claimant for the return of the television sets in the present claim. It is clear, however, that the length of time that has passed would have reduced the Claimant's ability to make a profit on sale. Further the fact that the Claimant is no longer in the business of importation and selling of television sets would greatly impact the value of the goods to him on their return.

39. The cost of the television sets has not been conclusively determined although the total value as assessed on the customs declaration forms was $30,000. However, based on the calculations made using the Best Buy printout produced by the Claimant, the total value would have been over $70,000. The Sales Order for the Televisions attached to the Claimants Affidavit lists the prices as US$190 to $240 per television. Using the higher cost, the 55 televisions would be valued at US$13200 or TT$ 79,000 approximately. .

40. Due to the fact that the investigation to prove allegations against the Claimant that the assessed value on the form was an under-value to achieve customs evasion was incomplete, that value could possibly have been used to determine the value of the television sets. Therefore, the Claimant would be entitled to $30,000 for the 55 television sets with an uplift for both potential profits and interest. On the other hand there is no evidence that the Claimant had any influence on the officer who assessed the goods at the lower value.

Accordingly I will use the value of $74,700 as the total buying cost, as stated in the Claim, in assessing damages.

41. The Claimant assesses his lost profits on sale of the televisions at $170, 300 as stated in the table at page 24 of his Leave Application. The Claimant has proved, by sworn affidavit, that there was some loss of profit but has failed to properly substantiate this loss as required by law - ***Grant v Motilal Moonan Limited and Rampersad Civ. App. No. 162 of 1985***. Additionally, there has never been a definitive indication as to the import duty that should have been paid which would have reduced profits. A nominal award will therefore be given with regard to loss of profit.

42. In the case of ***The Mediana [1900] AC 113, 116***, the court was of the opinion that 'nominal damages' does not mean "small damages". In the words of Lord Halsbury LC:

    "Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right, which though it gives you no right to any real damages at all, yet gives you the right to the verdict or judgment that your legal right has been infringed ...But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may also be represented as compensation for the use of something that belongs to him depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

43. This decision was applied in ***RBTT Merchant Bank Ltd and others v Reed Monza Ltd and others CV2010-03699***, and an award of $250,000 was made as nominal damages. In the decision of ***Persad v Persad-Maharaj CV2007-00923*** a nominal award of $15,000 was made in the circumstances where the value of bottling equipment taken without permission by the Defendant and not returned, could not be ascertained. In the present case the sum of $25,000.00 will be awarded as nominal damages due to the fact that a substantial loss had, in fact, been proven.

44. With regard to the aggravating factors, it must be determined whether the conduct of the Defendant is sufficiently highhanded or outrageous to justify an award of aggravated damages.

45. According to the **Halsbury's Laws of England Vol. 29 (2014)** on Aggravated Damages at [322]:

    "The defendant's motives, conduct or manner of inflicting the injury may have aggravated the claimant's damage by injuring his proper feelings of dignity and pride. In tort, the claimant can be awarded additional damages, called 'aggravated damages', to compensate for this…It should be noted that quite apart from this the claimant may be able to point to aspects of the defendant's conduct which have aggravated or increased his actual damage, or caused additional heads of damage such as inconvenience."

46. **The Law of Damages (Common Law Series) Chapter 15** supports this statement of the law:

    "Where a wrong for which damages are at large has been deliberately committed in a flagrant, outrageous or high-handed way, the normal measure of compensatory damages may be inflated to take account of the fact. Aggravated damages are compensatory. They exist to make good, albeit in a rough and ready way, the distress and humiliation that the claimant is presumed to have suffered, over and above the other more concrete effects of the wrong."

47. In ***Gerald Mootoo v The AG HCA 431 of 1997*** Stollmeyer J (as he then was) explained the distinction between conversion and detinue thus:

    "Conversion is a purely personal action for pecuniary damages resulting in judgment for a single sum, generally measured by the value of the chattel at the date of judgment together with any consequential damage flowing from the conversion which is not too remote.

    Where conversion cannot be directly proved, it may be inferred from proof of a demand for the item and the refusal to hand it over.

Detinue is more in the nature of an action in rem because the Plaintiff seeks the return of the item or payment of its value assessed at the date of judgment, together with damages for its detention. This effectively gives a defendant a choice of whether to return or pay for the item.

It is immaterial whether a defendant obtained the item by lawful means because the injurious act is the wrongful detention, not the original taking or obtaining of possession. Detinue is usually evidenced by a failure to deliver an item when demanded.

Damages for detinue are intended to compensate a plaintiff for his loss, not to punish a defendant. Consequently, the fall in value of an item subsequently recovered can be recovered only if the loss is proved. Otherwise, only nominal damages are recoverable."

48. Aggravated damages may be awarded for a particularly high-handed conversion – See **The Law of Damages (Common Law Series) Chapter 15**; ***Owen and Smith (t/a Nuagin Car Service) v Reo Motors (Britain) Ltd [1934] All ER Rep 734, 151 LT 274, CA***.

49. In the present case the Claimant has, in fact, succeeded in proving an inordinate delay which caused him significant distress throughout the nearly five-year period. The Defendant's defence does not stand up to the evidence of the written correspondence produced by both parties. This is further exacerbated by their failure to call an important witness, Mr. Imtiaz Ali. The conduct of the Defendant in failing to conclude the investigation or initiate proceedings against the Claimant, coupled with a weak defence on the Claimant's contribution to the delay, is sufficiently highhanded conduct which caused injury to the Claimant's dignity and wellbeing to justify an award of aggravated damages.

50. The following authorities serve as a guide in assessing the amount to be awarded as aggravated damages:
    - In ***Ambrose v AG of Trinidad and Tobago (unreported)***, the court awarded $60,000 for compensatory damages for false imprisonment for a period of 68 hours and $10,000 for aggravated damages in July 2010.

- In ***Huggins v The Attorney General of Trinidad and Tobago (HCA 1714 of 1998)***, per Mendonca J. (as he then was) on 13th December, 1999, the Claimant was awarded general damages of $60,000.00 for an unlawful arrest and detention for 54 hours. He was also awarded $10,000.00 as aggravated damages.

51. In the present case, therefore, the sum of $74,700 will be awarded as the replacement value of the television sets, with a nominal sum of $25,000 representing the loss of potential profits as a result of the Defendant's withholding of the goods. A further award of $10,000 will be made as aggravated damages in light of the distress experienced by the Claimant throughout the four-year period of delay. Interest will be awarded on each of these sums at 9% from the date of the first pre-action letter sent to the Defendant after the seizure to the date of this Judgment.

V. <u>Conclusion</u>

52. The Claimant has succeeded in proving that the Defendant's conduct of the investigation on the Claimant's goods was unreasonably delayed. The Defendant's defence that the delay was due solely to the Claimant's failure to attend an interview is not borne out by the evidence of the correspondence between them. There was no written indication that the investigation had been stalled due to the failure of the Claimant to present himself to the interview. Further, the evidence of attempts made to contact the Claimant in the affidavit of Lawrence Sheppard are insufficient to constitute a proper notice given to the Claimant of this requirement. This conduct has also been shown by the Claimant to have amounted to a breach of his constitutional right to enjoyment of his property.

53. The Claimant is therefore entitled to the declarations sought in his claim.

54. The Claimant has succeeded in proving that he suffered some loss as a result of the detention of goods and prolonged period of "investigation" by the Defendant. However, the losses of profit have not been sufficiently particularised in this claim and can therefore only be awarded as nominal damages.

55. The Claimant has succeeded in proving that there should be an uplift in damages due to the distress and mental anxiety cause by the Defendant's unjustifiable and highhanded conduct of the investigation.

VI. Orders

56. It is hereby declared as follows:
    i. That there has been unreasonable delay on behalf of the Respondent/Defendant in conducting and/or concluding its investigation.
    ii. That it is an abuse of process and would be unfair for the Respondent/Defendant to continue with this investigation and/or prosecute this matter any further;

57. Damages in the sum of $74,700 is to be paid by the Defendant to the Claimant as the replacement value of the television sets, in addition to a further nominal sum of $25,000 representing the loss of potential profits as a result of the Defendant's withholding of the goods. A further award of $10,000 as aggravated damages in light of the distress experienced by the Claimant throughout the nearly five-year period of delay is to be paid by the Defendant to the Claimant.

58. The Defendant is to pay interest on the said sums mentioned above at the rate of 9% per annum from 16th January, 2013 to the date of this judgment.

59. The Defendant is to pay the costs of the Claim to the Claimant fit for Senior and Junior Counsel in an amount to be assessed by the Registrar if not agreed.

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Eleanor Joye Donadson-Honeywell

Judge

Assisted by Christie Borely, JRC 1