THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-00349

IN THE MATTER OF THE JUDICIAL REVIEW ACT CHP NO. 60 OF 2000

AND

IN THE MATTER OF THE DECISION OF THE COMPTROLLER OF CUSTOMS TO SEIZE AND/OR DETAIN GOODS OF THE CLAIMANT PURSUANT TO SECTION 213(E) OF THE CUSTOMS ACT CHP 78:01

BETWEEN

JILLAN AIMABLE

Trading as 'Shoeaholic'

Claimant

AND

THE COMPTROLLER OF CUSTOMS AND EXCISE

Defendant

Before **Master Pierre**

Appearances:

Claimant: Mr. Jagdeo Singh instructed by Mr. Kiel Tacklalsingh

Defendant: Ms. Kendra Mark instructed by Ms. Ronnelle Hinds

Date: 6th February, 2020

JUDGMENT

INTRODUCTION

1. The Claimant brought judicial review proceedings against the defendant who seized and detained several thousand pairs of shoes she had imported into the country for sale. Aboud J heard the application and ordered that 'the consignment of goods forming the subject matter of the proceedings shall be returned to the claimant within 14 days hereof save and except for a small portion thereof which shall be retained as samples to complete [the defendant's] investigations'. The court reserved the issue of damages to await the claimant's inspection[1] of the returned goods and adjourned the application.

2. On the adjourned date, while the claimant confirmed that the goods had been returned, she advised that she had not completed inspection of the goods. The defendant asserted, however, that the question of damages had become moot, given that the claimant had signed that she had received the goods in good order upon their return to her. At the next hearing of the matter, the parties agreed that the outstanding issue of damages be assessed before a Master. The state of the goods was never formally recorded. The issue of the state of the goods therefore remained a live issue at the assessment of damages before this Court.

EVIDENCE

3. The trial on quantum proceeded in the usual way[2]. The claimant gave evidence and relied on several hearsay notices as well as two significant

[1] Examination

[2] Fordham's Judicial Review Handbook, 6th ed., under the rubric, '*Adjourning damages for separate hearing*', quoted Richards J in R (Kurdistan Workers Party) v Secretary of State for the Home Department [2002] EWHC 644, 'In practice, where there is a claim for damages as part of an otherwise appropriate claim for judicial review, the claim for damages would normally be left over to be dealt with as a discrete issue, if still relevant, after the main issues of public law had been determined. Even if still dealt with under CPR 54, rather than transferred out

pieces of documentary evidence, namely, an invoice as to the cost and value of the shoes in the sum of $13,167.00 and a retail price list, which she had prepared.[3] She sought to establish that the entire consignment of shoes had been returned to her in an 'unsaleable' condition and had been destroyed. She was therefore entitled to damages for conversion and loss of profits for the entire consignment in the aggregate sum of $10,299,150.00.

4. The defendant called two witnesses, Laurel McKell, Customs and Excise Officer II (Ag.) and Esdel Francois Customs and Excise Officer III. The defendant submitted that the claimant was not entitled to damages for conversion because the defendant had properly seized and detained the goods pursuant to sections 213 (e) and (220)(I) of the Customs Act, Chapter 78:01. Alternatively, if the claimant were entitled to damages for detinue, she must be restricted to nominal damages within a range of $20,000.00 and $30,000.00 because she had failed to prove the quantum of her loss.

ISSUES

5. There were two main issues for determination. First, whether the claimant had established the fact of her loss, that is, that the entire consignment of shoes had been destroyed by reason of the defendant's wrong and, second, whether she had established the quantum of her loss, to the value of $10,299,150.00.

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of the Administrative Court, it would still generally be subject to directions bringing it broadly into line with a damages claim commenced in the normal way'.

[3] See exhibit attached as 'J.A.5.' to the claimant's witness statement

I. Was the entire consignment destroyed?

6. The court asked itself five questions in order to determine this factual issue:
    i. How many shoes were seized and placed in the defendant's possession?
    ii. What was the condition of the shoes at the time of seizure?
    iii. What was the manner in which the goods were seized?
    iv. What were the conditions of storage?
    v. What was the state of repair of the shoes on return?

How many shoes were seized and placed in the possession of the defendant?

7. The court was of the view that the evidence cumulatively established that the entire consignment had *not* been seized and placed in the defendant's possession. Esdel Francois gave evidence that the claimant advised that she had located four cartons of boxes belonging to the subject shipment which remained on her premises and that his tally was 219 pairs of shoes short. He gave evidence that he seized 15,297 pairs of shoes and four cartons remained in the claimant's possession which should have also been the subject of seizure.

8. The claimant gave evidence that she was contacted by Mr. Francois one week after the physical seizure and she advised that 15 boxes were missing.[4] Under cross-examination, the claimant testified that the total number of shoes was 862 boxes of 18 pair cases. That is 15,516 pairs of shoes. The claimant did not deny that she had contacted the defendant's

[4] Para 20 of the claimant's witness statement

agents and advised that four boxes, which were part of the consignment, had been left behind. Nowhere did the claimant nor any other witness say that those four boxes were given into the defendant's possession subsequently.

9. I was therefore satisfied that the entire consignment was not taken into the defendant's possession and so in the event, the claimant would not be entitled to loss in respect of the entire consignment. The unchallenged evidence was that at least four boxes (carrying 18 pairs each) and not more than 15 boxes from the original consignment remained in the claimant's possession and were never taken into actual possession by the defendant. I accepted that the defendant had seized 15,297 pairs of shoes.[5]

What was the condition of the shoes at the time of seizure?

10. The evidence established that some of the shoes were damaged prior to being placed in the defendant's possession and were in a damaged state at the time of seizure.

11. Esdel Francois gave the following evidence:

    i. the shoes which had been constructively seized were stored in the following conditions, '…*in the garage in the front of her house, an annex and another area in the back of the house where goods were stored. The garage and annex were covered, however the area behind the house was only covered by a tent*.'

[5] Para 14 of witness statement of Esdel Francois

ii. He inspected some of the shoes and noticed, '…*certain goods in garbage bags and in zip lock bags, however I did not make any enquiries regarding those shoes at that time*.'

iii. That in his exercise of taking the shoes into actual possession, he counted each pair of shoes and stated the following, '…*several pairs of shoes were presented in large plastic bags and the excuse given was that the boxes were rain soaked and were destroyed. Because of these inconsistencies, I and my team of officers had to check every single pair of shoes on the premises; an exercise which took us two days.'*

iv. He further gave evidence that, '…*I observed that some shoes were in boxes, others in zip lock bags and yet others in garbage bags. I noticed that several shoes had mildew and were damaged. I enquired of the claimant as to why these shoes were not in the original boxing. She told me that when the container was being unstuffed, the boxes were placed in her front yard which was uncovered. During this time rain began to fall and some of the boxes got wet. She further indicated that some of the boxes got so wet that they had to be discarded.*'

12. Under cross-examination, Mr. Francois acknowledged that while he made personal notes of the condition in which he received the shoes, he did not produce those notes for the court; he made no reference in his witness statement to the fact that he had made that contemporaneous note; he made no mention of the damage in his official note of seizure and he could not say how many shoes were damaged, though it was a small number.

13. However, while cross-examination established that witness Francois did not make any prior reference to the goods having been damaged at the time of seizure, the court accepted that some of the goods were in fact damaged by water at the time of seizure. This was so because the claimant, herself, acknowledged that some of the shoes were in fact wet at the time of seizure. Under cross-examination, the claimant acknowledged that rain fell when she was examining the container; that boxes of shoes got wet; and further that shoes had been removed from their boxes and placed in bags because they were damp or wet.[6] The court noted that this explanation belatedly supplied by the claimant, with respect to why the shoes were not in their original packaging, was consistent with Mr Francois' evidence regarding the explanation given to him by the claimant as to why some shoes were in bags.

14. That some of the goods were damaged by water at the time of seizure was therefore no longer a disputed fact. Interestingly, while the claimant acknowledged under cross-examination that some of the shoes had got wet while they were in her possession and had therefore been damaged prior to seizure, her witness statement made no mention of that fact. That fact was one which was directly relevant to the assessment, bearing in mind that the claimant's claim was that the goods had been damaged while in the defendant's possession, and one of the complaints was that the shoes were moist, showed mildew and were not in their original packaging. The claimant did not provide any explanation for her omission on a matter which was directly relevant to the assessment of damages.

[6] See pages 37 and 38 of transcript

15. It was not clear how many shoes had got wet. Under cross-examination, the claimant stated that no more than six pairs of shoes got wet and Mr. Francois said that a small number of shoes had been wet.

16. I accepted that at least six pairs of shoes were damp or wet at time of seizure but did not accept as a fact that *only* six pairs of shoes were wet or damp. The claimant claimed that 'no more than six' pairs of shoes were wet but she provided no basis for this very precise recall bearing in mind that her evidence was consistently vague about the number of shoes involved, at one time blaming her lack of precise recall on the fact that she had been pregnant and had just delivered her baby by caesarean section. Mr. Francois referred to a small number of shoes being wet. He was not pressed to hazard an amount which might represent 'a small number'. When dealing with fifteen thousand pairs of shoes, a small number may mean six but it might also mean considerably more than that.

17. n the circumstances, I accepted that prior to seizure by the defendant, a number of shoes were not in boxes, were not in original packaging, were in plastic bags, and were wet or damp. I also accepted that some were showing mildew.

What was the manner in which the goods were seized?

18. I accepted the claimant's evidence as to the manner in which the goods were seized, same which remained unchallenged. She gave evidence that during the exercise of physical seizure, '…*the defendant began to open boxes and or containers of goods and threw them indiscriminately into the*

bus.' Further, that the defendant '*…did not make any arrangement to properly secure, store or transport items which are essentially composed of various fabrics and could be damaged by water and other elements*.' There was no evidence from either side that the wet or damp shoes were separated out from the rest of the goods.

What were the conditions of storage?

19. Counsel for the defendant established that neither of the defendant's witnesses could give material evidence with respect to the conditions of storage save for the fact that the warehouse where the goods were stored was not air-conditioned.[7] I was therefore satisfied that there was no evidence establishing that the goods were stored in such conditions that would exclude the possibility of any damage as claimed by the claimant.

What were the conditions of the goods on return?

20. There was no convincing evidence from the defendants that they had returned the goods to the claimant in a good state of repair:
    i. The defendant's witness, Laurel Mckell, could not affirmatively give evidence that the goods were returned in a good state of repair because she conducted no examination of the goods at time of restoration. While she gave evidence that she did not observe that any of the shoes were damaged while being loaded, she acknowledged that the purpose of the exercise in which she was engaged was to load the trucks and not to conduct an examination. She gave further evidence that, with respect to the pairs of shoes

[7] See evidence of Laurel McKell

shown to her by the claimant, she observed no flaking or breaking away.

21. On the other hand, the claimant gave evidence that during and following the restoration exercise, she made the following observations:
    i. 'several' of the boxes were damaged in that they were ripped open or had gaping holes;[8]
    ii. there was discoloration of the packages from what appeared to be severe moisture damage;
    iii. 'several' pairs of shoes were covered in what appeared to be mould or fungus;
    iv. 'there were a lot' of damaged items;[9]
    v. there were missing shoe boxes;
    vi. 'some' pairs were missing a side;
    vii. 'a lot of' shoes had what appeared to be moisture damage;
    viii. 'most' of the black shoes were not returned;
    ix. both live and dead rats were in some of the boxes;
    x. 'several' of the boxes were littered with rodent faeces; and
    xi. the heels of some of the shoes showed dry rot.

22. I turn first to the allegations relating to moisture damage and packaging. My earlier finding regarding the condition in which the goods were seized is apposite. The claimant's complaints as to the condition in which the shoes were returned were not inconsistent with the condition in which they were received in so far as it related to the following:

[8] Para 29 of the claimant's witness statement
[9] Para 32 of the claimant's witness statement

i. discoloration of the packages from what appeared to be severe moisture damage;
ii. several pairs of shoes that were covered in what appeared to be mould or fungus;
iii. missing shoe boxes;
iv. shoes with no boxes; and
v. what appeared to be moisture damage on 'a lot of' shoes.

23. The claimant did not adduce any evidence from which the court could distinguish moisture damage resulting from the goods being wet in the rain prior to seizure and moisture damage that may have resulted during the period of detention.

24. The claimant adduced no cogent evidence from which the court could be satisfied that on restoration, the missing shoe boxes were in respect of shoes over and above those which were in plastic packaging at the time of seizure. The claimant's very evidence was that at time of seizure some goods were not contained in boxes.

25. With respect to the complaint concerning the black shoes, the court accepted the claimant's evidence that most of the black shoes were missing. However, there was no evidence put before the court as to what percentage of the consignment comprised black shoes. I did not see why the claimant could not have undertaken an inventory exercise to identify the number of black shoes which were not returned and adduce that into evidence.

26. The evidence with respect to the presence of rodents and faeces, missing sides of shoes and heels showing dry rot was accepted.

27. In the circumstances, I accepted that some of the goods which were returned to the claimant were not in a good state of repair, however, I did not accept that the entire consignment was returned to the claimant in a state of disrepair.

28. With respect to the number of goods which had been affected, for the most part the claimant avoided the use of absolute terms. In two instances, she referred to 'a lot' of shoes being damaged but in most instances the claimant referred to 'several' shoes or packages being damaged. When asked under cross-examination, for example, on average how many shoes were covered with mould or fungus, she did not give a direct response but said that she had just undergone a caesarean section and so she was 'in and out'.

II. Did the claimant establish the quantum of her loss, to the value of $10,299,150.00?

29. The claimant claimed that she was entitled to recover the profit which she would have obtained had she been able to sell the goods. At one point, the claimant gave evidence that 'most' of the shoes could not be sold but then adjusted that to 'none' of the shoes could be sold. That inconsistency was not reconciled.

30. The claimant's claim of over ten million dollars was hinged solely on the document attached as 'J.A.5' and titled 'price list'. 'J.A.5' was a price list showing a retail price of between $650.00 and $675.00 a pair. The claimant also relied on two receipts which she said were in respect of the sale of shoes of similar style. She did not provide any other financial information nor indicate what her profit margin or 'mark-up' was.

31. Under cross-examination, the claimant stated that a shoe cost her approximately $300.00 to produce, which would mean, using simple mathematics, that based on the retail price of $650.00, her profit on one sale would be approximately $350.00. The claimant also claimed that she designed the shoes herself[10] but provided no other evidence such as her drawings or correspondence between herself as designer and the manufacturer to support that claim.

32. The claimant also gave evidence that she 'lost ground competitively' but failed to break this down into terms that were more concrete. She provided no accounting evidence, business records nor other data to support this claim.

33. It was also the claimant's evidence that generally when shoes which remained on her hand were out of style, she would donate them to various charities. It was a fair assumption therefore that the claimant would not always experience 100% sales in respect of shoes offered for sale.

[10] Para 41 of the claimant's witness statement

34. It was necessary for the claimant to put the best evidence available to her before the court to assist the court in its determination of the matter and to award fair and reasonable compensation to her. It is incumbent on a claimant to prove her losses. In the above circumstances, the claimant did not establish the quantum of her loss.

What was the appropriate measure of damages?

35. Here we were dealing with goods which were destroyed, the precise number of which was not ascertainable. Generally, the measure of damages for goods which are destroyed is the market value of the items at the date and place of destruction.[11] See British Coal Corporation v Gwent County Council[12] per Glidewell LJ and Dominion Mosaics and Tile Co. v. Trafalgar Trucking.[13] A defendant must put a claimant in the position she would have been in had the wrong not been committed, that is, *restitution in integrum.*

36. The claimant provided evidence as to the total value of the consignment but the entire consignment was not seized. Also, of the goods which were seized, some were seized in a damaged/wet condition. Further, of those which were in the defendant's possession, not all were damaged. And still further, of those which were destroyed/missing, it was unclear what quantity of goods fell into that category.

[11] Alternatively, it is the value of the goods at the time of judgment which is the measure of damages in detinue

[12] (1995) Times, 18 July, CA

[13] [1990] 2 All ER 246 CA

37. There is precedent that in circumstances such as these, where the fact of loss is shown but the value of loss is not adequately quantified, an award of nominal damages can be made. Nominal damages are not necessarily small damages.

38. The authors of McGregor on Damages[14] state:

> *'nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is also important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss'.*

39. In Gillian Thomson et anor. v. Gunbridge Enterprises Limited,[15] on 5th April, 2011, Rajkumar J, as he then was, accepted the claimants' evidence that certain of their personal goods were damaged, some were stolen and some were detained. The court found that it was difficult to arrive at a value for each such category of items and in the absence of evidence as to the value of those items, awarded nominal damages.

40. In Mano Sakal v. Dinesh Kelvin,[16] on 22nd March, 2016, Donaldson-Honeywell J awarded $30,000.00 in nominal damages where the claimant established loss but the value was not adequately quantified.

[14] 13th ed. at para 295
[15] CV2009-02823
[16] CV2015-00748

41. In K.G.C. Company Limited v Gangacharan Persad,[17] on 6th February, 2014, Ventour J awarded $18,000.00 (US)(or its T&T equivalent) in nominal damages stating:

> *'44. I agree and accept the dictum of Lord Halsbury in the Mediana case [1900] AC 113 at page 116 to the effect that nominal damages "does not mean small damages." Each case ought to be decided based upon its own particular set of facts.'*

42. In Neil Persad et anor. v Trinidad and Tobago Electricity Commission,[18] on 11th October, 2017, Boodoosingh J, awarded $120,000.00 in nominal damages stating the following:

> *'I have accepted certain expenses as being both plausible and reasonable.*
>
> *However, I am unable to overlook the failings in respect of all items. The best the court can do is to make an award for nominal damages taking into account the various losses which I found... A substantial amount was claimed for these and it is clear that there was substantial loss. I found there were losses and significant losses were expected. However, ultimately Claimants must prove their losses. A nominal damages award in the sum of $120,000.00 is the best the Court could do in this regard.'*

[17] CV2008-01083
[18] CV2014-00752 at paras 66 and 67

43. In Martin John and anor. v Albert McNeil and anor,[19] on 11th July, 2019, Donaldson-Honeywell J awarded $120,000.00 in nominal damages being satisfied that the claimants suffered loss of profits as a result of the seizure of property, but did not provide sufficient documentary evidence of their monthly income.

44. In Pan Trinbago v. Keith Simpson et. ors.,[20] the Court of Appeal discussed what were appropriate circumstances for an award of nominal damages to be made as well as the appropriate range:

> *'On behalf of the appellant it was submitted that the award of nominal damages was inappropriate because there was no claim for nominal damages. It was submitted in the alternative that even if the judge's award of nominal damages was appropriate, the judge ought to have (i) invited the parties to make submissions on the amount of such an award and (ii) established a conventional figure/standard for the award. Reliance was placed on the learning of Professor S.M. Waddams in* ***The Law of Damages****.[21] After noting that the court has awarded different figures in the past for nominal damages Professor Waddams said:*
>
> > *"It is submitted that there is good reason for the courts to re-establish a conventional figure. This is particularly important where the defendant wishes to make a payment into court. If the defendant knows that the figure for nominal damages is,*

[19] CV2018-01115
[20] C.A. CIV. S.027/2013 at paras 58 to 62
[21] 2nd Ed. (Aurora, Ont. Canada Law Book) at c. 10.20

say, $1, the defendant can safely make a payment into court of that amount. It is in the public interest to discourage unnecessary litigation, and the rule governing payment into court is designed to further that interest. The defendant who concedes that the plaintiff's right has been infringed but asserts (as it turns out correctly) that there is no loss, should be entitled to know what amount to pay into court in anticipation of an award of nominal damages. In inflationary times some might argue that the amount should be perpetually increasing, but this argument ignores the nature of nominal damages, which is not to give compensation for anything that could be bought with money but to mark symbolically the infringement of a right. Provided that the amount is not so low as to be confused with contemptuous damages, a small and fixed conventional sum seems appropriate. It is suggested that $1, which appears to be the figure having most authoritative support in Canadian cases, should be adhered to."

The appellant submitted that the range of the award of nominal damages in the High Court over the last ten years has typically been from $100[22] to $25,000[23]. There was one instance in which $250,000 was awarded[24]. It was thus submitted that the judge ought to have first established a conventional award because no standard existed. In addition, the judge provided no reasons for the

[22] See Luthel John v Hollis Collins HCA 544 of 2002 (delivered July 21st 2010) at pg 12
[23] See Persad-Maharaj v Persad-Maharaj CV2007- 00923 at para 43
[24] See RBTT Merchant Bank Limited & Ors v Reed Monza & Ors. CV2010-03699 at paras 9 - 16

figure arrived at. The appellant contended that the judge having failed to set a standard, it was open to this Court to now do so because the sum of $5,000 awarded could not reasonably be characterized as nominal. It was submitted that a nominal sum would have been in the range of $1 to $5.

In response, the respondents submitted that the claim form did seek damages as a relief. Though it did not specify what type of damages there was no requirement in law that general or nominal damages be specifically pleaded. There is also no requirement for the parties to be heard on whether nominal damages ought to be granted and on the quantum of such damages. The quantum of nominal damages to be awarded is at the discretion of the court, having regard to the particular circumstances. The respondents submitted that it could not be said that the award was inappropriate having regard to the role of the appellant as the world governing body for steel pan. The award reflects the gravity of the denial of the respondents' right to contest elections in accordance with the Constitution.

Discussion and conclusion

The court fixes a small sum, referred to as nominal damages, in order to mark the fact that there has been a breach of contract, but not in any way to compensate the claimant, where no loss has been proven.[25] *Nominal damages are generally awarded to mark the fact that there has been a breach of contract in circumstances where*

[25] see Mappouras v Waldrons Solicitors [2002] EWCA Civ 842

there is no quantifiable loss caused by the breach. The quantum of nominal damages to be awarded is at the discretion of the court, having regard to the particular circumstances of the case.

In this case the appellant is the world governing body for steel pan and acts as the sole representative for members in all matters relative to the development, promotion and performance of steel pan and steel bands. The first and second respondents were denied their right, pursuant to the Constitution, to contest the election of the appellant's governing body. An award of the sum of $5000 representing nominal damages was not inordinately high or exorbitant. In light of the range highlighted by the appellant, it cannot be said then that a conventional award, in Trinidad and Tobago, would be in the range of $1 to $5. There is no basis upon which to interfere with the judge's discretion.'

DISPOSITION

45. Having regard to the length of time the goods were in the defendant's possession, (7 months), the nature of the goods seized, the number of items seized, and all of the above findings and observations, I made the following order: the defendant shall pay the claimant nominal damages in the sum of $100,000.00 and costs calculated on a prescribed costs basis. There shall be a stay of execution of 42 days.

Sherlanne Pierre

Master