THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 071 of 2019

Claim No. CV2017-03678

BETWEEN

Caribbean Welding Supplies Limited

Appellant

AND

The Attorney General of Trinidad and Tobago

Respondent

PANEL:

N. Bereaux, J.A.

M. Mohammed, J.A.

C. Pemberton, J.A.

APPEARANCES:

Mr. G. Ramdeen, Mr. U. D. Maharaj and Ms. D. Harripaul appeared on behalf of the Appellant.

Mr. S. Jaikaran and Ms. S. Maharaj appeared on behalf of the Respondent.

DATE OF DELIVERY: September 9, 2020

I have read the judgment of Mohammed JA and I agree.

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Nolan Bereaux

Justice of Appeal

I too agree.

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Charmaine Pemberton

Justice of Appeal

JUDGMENT

Delivered by: M. Mohammed, J.A.

INTRODUCTION

1. This is an appeal against the decision of the trial judge wherein she found that the appellant, Caribbean Welding Supplies Limited, was not entitled to an award of damages for loss of use arising from the State's unlawful detention of Case 210 B Excavator Serial Number NES5H4983 (the excavator), which belonged to the appellant.

2. The appellant seeks an order for damages for loss of use of the excavator for the period of unlawful detention, from November 4, 2015 to February 21, 2018[1].

[1] See the Written Submissions filed by the appellant dated April 25, 2019 at page 15. We note that in its Notice of Appeal, the appellant sought an order for damages for loss of use for the period October 21, 2015 to February 21, 2018.

3. The question of law that is involved in this appeal is whether the judge erred in law and was plainly wrong in finding that the appellant was not entitled to an award of damages for loss of use of the excavator for the time that it was unlawfully detained by the State

BACKGROUND

4. The appellant was engaged in the business of rental of heavy equipment, including that of excavators. It had purchased the excavator in question on December 17, 2014 for the sum of US$124,527.00.

5. On October 19, 2015, the appellant entered into an agreement for sale of the excavator with Aldwin Edwards for the price of $1,328,320.00. At the direction of Aldwin Edwards, the excavator was delivered to a site on Turure Road, Sangre Grande on October 20, 2015[2].

6. On October 21, 2015, Officers of the Trinidad and Tobago Police Service together with Officials of the Ministry of Energy, entered upon the site where the excavator was kept and seized it. The excavator was transported to the Cumuto Army Base.

7. The appellant's case was that at the time of the seizure of the excavator, it was being used by the appellant in work which it was lawfully contracted to perform. The daily rental rate for the excavator was between $3500.00 and $4000.00[3].

8. The appellant instituted proceedings against the respondent in the High Court and sought, inter alia, the following relief:

    (i) A declaration that the appellant was entitled to possession of the excavator.

[2] See the letter dated July 17, 2017 addressed to the Attorney General of Trinidad and Tobago which was annexed to the affidavit of Nigel Bennett [page 33 of the Appellant's Bundle of Documents].
[3] See the affidavit of Nigel Bennett dated April 5, 2018 at paragraph 18 [page 10 of the Appellant's Bundle of Documents].

(ii) An order that the excavator be delivered by the respondent onto the appellant.

(iii) Damages for the detention and/or conversion of the excavator and all consequential losses suffered as a result thereof.

(iv) Special damages in the sum of $3,500.00 per day for the period of detention of the excavator.

(v) Special damages for the depreciation in the value of the excavator in the sum of $1,328,320.00.

9. After the respondent filed its defence, an application was made by the appellant to have it struck out. On March 22, 2018, the application was heard and was granted by the judge. Judgment was entered for the appellant. It is apparent from paragraph 15 of the judge's decision on damages for detinue that the appellant had the excavator returned to it following the judgment[4].

10. On the issue of damages, the judge ordered that:

(i) The respondent pay to the appellant the sum of $1,328,320.00 as special damages for detinue of the excavator. Interest thereon was to be calculated at the rate of 2.5% from October 21, 2016 to June 1, 2018.

(ii) The respondent pay to the appellant the sum of $150,000.00 as an award for aggravated damages. Interest thereon was to be calculated at the rate of 2.5% from October, 21 2016 to June 1, 2018.

(iii) The respondent pay the appellant's prescribed costs based on the value of the claim being $1,328,320.00.

[4] See paragraph 15 of the Judge's decision.

THE JUDGE'S REASONS FOR HER DECISION ON DAMAGES FOR DETINUE

Damages for loss of use

11. The Judge found that the appellant was not entitled to recover damages for loss of use for the period that the excavator was detained. At paragraphs 13 and 14 of her decision, she said:

> *"[13] Loss of use was also pleaded by the claimants. To support this head of damages, the claimant presented evidence of some history of renting the excavator and that a fair estimate for rental of excavators is between Three-Thousand Five Hundred Dollars ($3500.00) and Four-Thousand Dollars ($4000.00) per day.*
>
> *[14]* ***The claim for loss of use is inconsistent with the claimant's evidence that but for the detinue, there would have been loss of income from daily rental of the excavator. The claimant's evidence is that but for the detinue the excavator would have been sold. There is no evidence before the court to suggest that the sale of the excavator was anything else but a done deal. The excavator was already located at a place consistent with the sale to the perspective purchaser. To make an award for loss of use, in the circumstance of this case, would not amount to a compensatory award of damages but would cause the claimant to benefit from a windfall which he would not have received had the vehicle not been seized and detained by the police."*** [emphasis added]

THE APPEAL

The Grounds of Appeal

12. In support of its appeal, the appellant advanced the following four grounds:

    (a) The learned trial judge erred in law and was plainly wrong in finding that the appellant was not entitled to be awarded damages for the loss of use of the

excavator for the time that it was detained by the respondent, its servants and/or agents.

(b) The finding of the learned trial judge that an award for the loss of use, in the circumstances of this case, would not amount to a compensatory award of damages but would cause the appellant to benefit from a windfall which he would not have received had the vehicle not been seized and detained by the police, was totally against the weight of the evidence. (sic)

(c) The learned trial judge erred in law and was plainly wrong in finding that the title to the excavator passed from the appellant upon the execution of the sale agreement, resulting in the appellant not being entitled to damages for loss of use of the excavator for the period of time that it was detained, that is, October 21, 2015 to February 21, 2018.

(d) The learned trial judge erred in law, was plainly wrong and adopted an erroneous approach in assessing damages payable to the appellant under the different compensatory heads of damages claimed by the appellant.

The Submissions

13. The core submission made on behalf of the appellant is that the judge was plainly wrong to deny the appellant an award of damages for loss of use on the basis that there was no evidence contrary to the fact that the sale of the excavator was anything else but a "done deal".

14. Mr. Ramdeen submitted that the manner in which the judge assessed the evidence was fundamentally flawed and that she failed to take into consideration the fact that at the material time, title in the excavator did not pass from the appellant to anyone else. He

referred to the agreement for sale of the excavator between the appellant and Aldwin Edwards where it was stated that an initial deposit followed by eleven equal instalments were required for the sale to be completed. At the time of the seizure, only the initial deposit had been made.

15. Mr. Ramdeen also submitted that the judge failed to take into consideration the pleaded case of the appellant that at the time of seizure, notwithstanding the agreement for sale, the excavator was being used by the appellant for work which it was lawfully contracted to perform at Turure Road in Sangre Grande. He submitted that the agreement for sale was referred to in the letter to the respondent for the sole reason of showing the value of the excavator at the time that it was seized. He submitted that the judge erred in placing heavy reliance on the relevant part of the letter as it did not form part of the appellant's pleaded case and was not the subject of any dispute by the respondent.

16. Mr. Ramdeen further submitted that the finding of the judge that the sale of the excavator was a "done deal", conflicted with the other awards made for special damages and aggravated damages. He submitted that the judge's finding, taken to its logical conclusion, suggested that the losses would not have been suffered by the appellant but rather, by the purchaser.

17. In response, Mr. Jaikaran submitted that the judge did not err in law and was not plainly wrong in her decision to not award damages for loss of use of the excavator based on her conclusion that, at the time of the seizure, the sale of the excavator was nothing but a "done deal". He also submitted that there was no evidence to support the appellant's claim for damages for loss of use resulting from the seizure and detention of the excavator.

The Law, Analysis and Reasoning

[A] Damages for loss of use

18. We are mindful of the circumstances in which this Court can appropriately intervene in a conclusion of primary fact arrived at by a trial judge. The decision of the Judicial Committee of the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**[5] sets out the proper approach to the review by an appellate court of the findings of a trial judge. In delivering the judgment of the Board, Lord Hodge said at paragraphs 11, 12 and 14:

> *"[11] It is important to recall the proper role of an appellate court in an appeal against findings of fact by a trial judge…*
>
> *[12] In Thomas v Thomas [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488:*
>
> > *"I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence* ***should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion****; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."*
>
> *In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in Yuill v Yuill [1945] P 15, 19:*

[5] [2014] UKPC 21.

"It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". *See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92.* ***Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence****: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.***

…

[14] The Board has adopted a similar approach in this jurisdiction. See Harracksingh v Attorney General of Trinidad and Tobago [2004] UKPC 3 in which it referred (at para 10) to the formulation of Lord Sumner in SS Hontestroom (Owners) v SS Sagaporack (Owners) [1927] AC 37, 47:

"… ***not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.***

… If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone."" [emphasis added]

19. The only evidence before the court were two unchallenged affidavits filed by the appellant in support of its claim, that is, (i) the affidavit of Nigel Bennett dated April 5, 2018[6]; and (ii) the affidavit of Nicholas Mohammed dated April 13, 2018[7]. The deponents of those affidavits were not cross-examined. No evidence was adduced by the respondent to challenge the appellant's evidence.

20. In the affidavit of Nigel Bennett, exhibited as "NB 4" was a letter dated July 17, 2017 from counsel for the appellant, Mr. Ramdeen, to the respondent in which a request was made for the return of the excavator[8]. The judge, in arriving at her decision on the issue of damages for loss of use, appears to have placed heavy reliance on the second item contained in that letter which provided that:

> *"[ii]…on or about the 19th day of October 2015 [incorrectly stated as the 29th day of October 2015[9]], the Claimant entered into a sale agreement with Mr. Aldwin Edwards for the sale of the equipment at a price of $1,328,320.00. At the direction of Mr. Edwards, the equipment was delivered to a site on Turure Road, Sangre Grande on the 20th October 2015."*

21. It was contended on behalf of the appellant that the foregoing information was inserted in the letter for the limited and specific purpose of showing the value of the excavator at the time that it was seized. One of the appellant's core submissions is that the judge wrongly expanded the relevance of that statement by in effect finding that the excavator had been sold at the material time.

22. In our view, the relevance of item (ii) in the letter in question cannot reasonably be confined to the purpose which was suggested by Mr. Ramdeen. The letter and the attached agreement for sale were annexed to the affidavit of Nigel Bennett, which

[6] See the Appellant's Bundle of Documents at page 5.
[7] See the Appellant's Bundle of Documents at page 89.
[8] See the Appellant's Bundle of Documents at page 33.
[9] See the Agreement for Sale annexed at Tab A of the Respondent's Bundle of Documents.

the appellant relied upon in support of its claim. Those documents therefore formed part of the pleadings of the appellant's case and was evidence which the judge could have properly taken into consideration in arriving at her decision. When a trial judge is faced with having to decide a case without having received the benefit of the evidence being subjected to cross-examination, the first question to be considered is this – is the claimant's evidence credible and consistent which is effective in tipping the scales of probabilities in his favour so as to ensure that his claim is successful? The evidence presented must be examined against that backdrop.

23. Mr. Ramdeen avers that at the time of the seizure, the appellant was the owner of the excavator and was entitled to possession of it. He also stated that at the time, it was being used by the appellant in work that it was lawfully contracted to perform.

24. The judge would have had before her the following evidence:

    (i) The appellant entered into an agreement for sale of the excavator with Aldwin Edwards on October 19, 2015, two days before it was seized.

    (ii) Prior to the execution of the agreement for sale, Aldwin Edwards paid to the appellant the sum of $110,710.00 as a deposit towards the purchase price of the excavator. The remainder of the purchase price was to be paid in eleven equal instalments of $110,710.00, commencing November 19, 2015.

    (iii) On the direction of Aldwin Edwards, the excavator was delivered to a site on Turure Road in Sangre Grande on October 20, 2015.

25. The contents of the agreement for sale, although not explicitly referred to by the judge, are also enlightening on this issue. Clause 4 sets out the undertakings of the purchaser. It states

that the purchaser shall, inter alia; (i) punctually pay all sums specified, (ii) keep the equipment in good and serviceable repair and condition; (iii) punctually pay all registration charges and license fees; (iii) permit the seller and any person authorized by him to enter upon the premises in which the equipment is kept for the purpose of inspecting and examining the condition of it; **(iv) keep the equipment at all times in his possession and control and not remove same from the jurisdiction without the written consent of the seller**; and (v) not sell, assign or mortgage the equipment. It is apparent from the terms of the agreement that at the time of the seizure of the excavator, it would have been in the possession and control of the prospective purchaser, Aldwin Edwards. The fact that Aldwin Edwards would have directed that the excavator be delivered to a site on Tururе Road in Sangre Grande on October 20, 2015 is entirely consistent with him having possession of and control over it.

26. In light of the cumulative effect of the evidence that was before the judge, we find it very difficult to reconcile Mr. Ramdeen's submission that at the time of the seizure, the excavator was being used by the appellant in work that it was lawfully contracted to perform.

27. Based on the foregoing, the findings of the judge and her conclusion on the issue of damages for loss of use are unassailable. The appellant has not demonstrated that she was plainly wrong in arriving at her decision and therefore appellate intervention is not warranted in these circumstances.

28. Moreover, the appellant has not presented any viable evidence in support of its claim for damages for loss of use of the excavator arising from the detinue. At paragraph 5 of his affidavit, Nigel Bennett deposed that the unlawful detention of the excavator resulted in severe hardship, financial and otherwise, to the appellant. He stated that during the time of detention, the appellant had to forego a number of contracts that were entered into for

the rental of the excavator[10]. However, no evidence was tendered to show the contracts which were foregone.

29. In addition, in their affidavits, neither Nigel Bennett nor Nicholas Mohammed referred to the circumstances in which the excavator was employed at the time of seizure. There were also no witness statements tendered to show the relevant particulars of loss of use nor any viva voce evidence in that regard.

30. In relation to the documentary proof in support of its claim for loss of use, the appellant relied on (i) the receipts for rental of the excavator before it was seized and detained by the State and (ii) quotes provided to persons after the seizure and detention of the excavator.

The receipts for rental of the excavator pre - seizure and detention

31. At paragraph 18 of his affidavit, Nigel Bennett deposed that *"many times, if not always, there would be persons on a waiting list to rent the excavator."*[11] Copies of invoices were exhibited at "NB 9". However, those invoices were in relation to the rental costs of the excavator prior to the seizure and detention and are therefore not relevant to the issue of loss of use.

The quotations post - seizure and detention

32. Also annexed to the affidavit of Nigel Bennett at "NB 9" were two quotations prepared by the appellant[12]. The first was provided to Manu Rampersad and was dated November 4, 2015. The second was provided to Balou Engineering and was dated May 23, 2016. Both quotes were submitted subsequent to the seizure and detention of the excavator. In our view however, they do not provide support for the claim of damages for loss of use as there

[10] See the Appellant's Bundle of Documents at page 7.
[11] See the Appellant's Bundle of Documents at page 7.
[12] See the Appellant's Bundle of Documents at pages 85-88.

was no evidence adduced by the appellant to show that the quotations had been accepted by either Manu Rampersad or Balou Engineering and that arrangements were made to facilitate the rentals.

Conclusion on [A] Damages for loss of use

33. We are of the view that the judge was correct in finding that the appellant was not entitled to an award of damages for loss of use of the excavator for the time that it was unlawfully detained by the respondent. It was a decision which was reasonably open to her based on the evidence in the case.

34. In addition, the appellant has not provided an iota of evidence to show the prospective rentals after the excavator was seized and detained nor the contracts which had been entered into prior to seizure, which it was unable to pursue.

[B] The Entitlement to Salvage

35. At the hearing of the appeal, the court raised the issue as to whether the appellant was entitled to have the excavator returned to it in circumstances in which it was awarded the value of the excavator as special damages.

36. On this issue, Mr. Ramdeen, in oral arguments before the court, submitted that since the judge found that the excavator had no value, it would not be beneficial to or convenient for the State to keep it in its possession. He also submitted that if the State were seeking to have the excavator returned to them, the responsibility fell on the respondent to file a cross-appeal in the matter[13].

[13] See the Transcript of the Hearing at the Court of Appeal dated June 29, 2020 at page 33, lines 13-18 and 47-49.

37. At paragraph 15 of her decision, the judge said:

> "*[15]* ***The court notes that the claimant has had the excavator returned to him – following the judgment of the court.*** *However, based on the evidence of the current condition of the excavator and the estimated cost of doing repairs, the excavator likely has either no value or a nominal value. In those circumstances it seems likely and the court so finds on a balance of probabilities, that any monies expended by the claimant, if he so chooses to undertake repairs to the excavator, would be recouped since the excavator should then be worth at least the cost of those repairs."*

38. In relation to the law of torts, the fundamental basis for determining the measure of damages is to place a claimant in the position that he would have been in had the tort not been committed or *"restitutio in integrum".*

39. The forms of judgment or remedies in an action for detinue has been considered in the decision in **General and Finance Facilities Ltd v Cooks Cars (Romford) Limited**[14]. In delivering the judgment of the court, Lord Diplock said at page 650:

> *"…in detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention; or (2) for return of the chattel or recovery of its value as assessed and damages for its detention; or (3) for return of the chattel and damages for its detention."*[15]

40. In **Halsbury's Laws of England 3rd Edition Vol. 38** at paragraph 1317 and **McGregor on Damages 13th Edition** at paragraph 1032, the learned authors stated that a claimant in proceedings for detinue is entitled to the return of the chattel **or** its value.

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[14] [1963] 1 WLR 644.

[15] This has been accepted and applied in several decisions in Trinidad and Tobago, including **Goolcharan v General Finance Corporation Ltd HCA148/1998** at paragraph 25 by Mendonca J (as he then was), **Mohammed v Mohan 798/1998** at paragraph 22 by Kangaloo J (as he then was) and **Onika Modeste v The Attorney General of Trinidad and Tobago CV2016-0951** at paragraph 65 by Harris J.

41. In the order dated March 22, 2018, the judge granted permission to the appellant to enter judgment against the respondent for the relief sought in the Claim Form and Statement of Case filed on October 20, 2017. Two of the reliefs sought were (i) a declaration that the appellant was entitled to possession of the excavator and (ii) an order that the excavator be delivered by the respondent onto the appellant. In the judge's reasons for her decision on damages for detinue, she stated that the excavator was returned to the appellant following the judgment of the court (see paragraph 37 above). The judge also stated that the measure of damages that the appellant was entitled to for the unlawful detention of the excavator was its market value at the time of seizure[16]. She awarded the appellant the sum of $1,328,320.00 for special damages for detinue of the excavator.

42. It is clear from the foregoing authorities that the appellant cannot recover both the value of the chattel and possession of it since that would be contrary to the established remedies for the cause of action in question and would result in the "double recovery" on the part of the appellant. Accordingly, we find that the judge was plainly wrong in granting the declaration that the appellant was entitled to possession of the excavator and ordering that it be delivered by the respondent onto the appellant.

43. By virtue of **section 39 (1) (a) of the Supreme Court of Judicature Act Chapter 4:01**, this court has the power to *confirm, vary, amend, or set aside the order or make any such order as the Court from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require.*

44. **Section 39(2)** provides that:

> *(2) The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any*

[16] See paragraph 20 of the Judge's decision.

particular party to the proceedings in Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

45. Insofar as the judge declared that the appellant was entitled to possession of the excavator and ordered that it be delivered by the respondent onto the appellant, this constituted a clear error in law. In our view, having regard to the circumstances of this case and the remedies obtained by the appellant, we find it just and appropriate that the excavator be returned to the State, whatever its current condition and despite (as the judge found) it having either no value or a nominal value. The consideration that the excavator is of nominal value should not enure to the benefit of the appellant.

DISPOSITION

46. The appeal is therefore dismissed. The orders of the judge which are set out at paragraph 10 above are affirmed. In exercising our jurisdiction under **section 39 of the Supreme Court of Judicature Act**, we set aside both the order of the judge with respect to the declaration that the appellant was entitled to possession of the excavator and the order that it be delivered by the respondent onto the appellant. We order that the appellant deliver onto the respondent possession of the excavator within 14 days from the date of this judgment.

COSTS

47. Costs are to follow the event. The judge ordered that the respondent pay to the appellant prescribed costs based on the value of the claim which was in the amount of $1,328,320.00. The appellant is ordered to pay the respondent's costs which are to be determined at two-thirds of the costs assessed in the court below. If however the appellant wishes to file written submissions in support of a different order as to costs, it is to do so within 7 days

from the date of this judgment. The respondent is to reply within 7 days of the date of receipt of the appellant's submissions.

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Mark Mohammed

Justice of Appeal