

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: H.C.A.S1907 of 2004

BETWEEN

**Rooplal Sabha**

Plaintiff

AND

**Subhas Seepersad**

Defendant

AND

**Business Development Company**

Third Party

AND

**Rajmanie Seepersad**

Claimant

\*\*\*\*\*

**Reasons**

**Before Master Patricia Sobion Awai**

**Appearances:-**

**Mr. Parsad for the Defendant**

**Mr. Garcia instructed by Ms. Nanhu for the Third Party**

## **BACKGROUND**

1. On May 16, 2003, Subhas Seepersad (the Defendant) took delivery of a log skidder that he and his brother Dev Seepersad had purchased abroad.
2. By agreement dated August 27, 2004, the Defendant agreed to sell the log skidder to Rooplal Sabha (the Plaintiff). The sale was due to be completed by September 27, 2004.
3. On or about September 15, 2004, Business Development Company Ltd. (the Third Party) wrongfully seized the log skidder.
4. Proceedings were brought by the Plaintiff against the Defendant in respect of the breach of the contract for the sale to him of the log skidder.
5. The Defendant instituted third party proceedings against the Third Party claiming, *inter alia*, a declaration of ownership of the log skidder and damages for conversion and detention of the log skidder.
6. Subsequently, interpleader proceedings were also instituted at the instance of the Third Party because of a competing claim for ownership of the log skidder by one Rajmanie Seepersad.
7. In his order dated June 23, 2009, Shah J dealt with all the various claims raised by the parties. The parts of the order relevant to this assessment are as follows:

"4. A declaration is hereby awarded that Caterpillar Log Skidder Serial No. SN 98375 SIN No. 9HJ 00735 belongs to the Defendant.

.....

6. There shall be judgment for the Defendant against the Third Party for the sum of \$13,680.00 being the interest on the sum of \$48,000.00 and for the taxed costs of the Plaintiff as against the Defendant and for damages for loss of use of the said Log Skidder to be assessed by a Master in Chambers. The Master to determine the period or periods during which these damages accrued and the measure of damages."

8. The log skidder was actually returned to the Defendant in early December 2008 after repairs were effected by the Third Party.

9. This matter came before me for assessing damages pursuant to the order of the learned judge.

**THE EVIDENCE**

10. The defendant called four witnesses including himself - Subhas Seepersad, Dev Anand Seepersad, Shivai Ramlogan and Andomida Massiah Boochoon. Their witness statements were tendered as evidence in chief and they were cross examined. The Third party called Sheldon Blugh. His witness statement filed on September 23, 2011 was put into evidence. He was not cross examined.

11. Summaries and/or excerpts of pertinent evidence are set out below:

***Subhas Seepersad***

*Excerpts from the witness statement of Subhas Seepersad filed on October 20, 2011:*

4. *Both the sawmill and the Log Skidder were purchased abroad and shipped to Trinidad. In the case of the Log Skidder this was cleared and delivered to me on the 16th May 2003.....*
  
6. *My brother and I were only able to use the Log Skidder for a short period of time before it was taken from us. In that space of time we were able to obtain several jobs pulling logs with the Log Skidder as evidenced by the removal permits hereafter annexed in a bundle and marked "S.S.1". For these jobs we earned approximately \$50,000.00.....*
  
7. *After the Log Skidder was taken from the job site in Moruga we were unable to complete the job as contracted and as a result we incurred substantial losses. I was then forced to cancel several jobs which were scheduled to be done immediately after the one in Moruga as I did not have use of the Log Skidder and was unsure as to when it would be returned to me.*
  
9. *As a result of the seizure of the Log Skidder performance of the contract referred to in the Plaintiff's Statement of Claim filed 20th October 2004 was unable to be completed. Via a written contract*

dated 27th August 2004 I agreed to sell the Plaintiff the Log Skidder at a purchase price of \$480,000.00. A down payment of \$48,000.00 was made by the Plaintiff to me following which the balance of the purchase price (\$432,000.00) was to be paid on or before 27th September 2004. Notwithstanding my readiness and willingness at that time to complete the contract it became frustrated by the seizure of the Log Skidder on 15th September 2004 by the Third Party.

10. On 28th March 2003 my brother Dev Anand Seepersad successful bid on the Log Skidder for a price of \$16,500.00 US plus 1% handling which amounted to \$16,665.00 as stated in the Statement of Claim filed 29th December 2006 on the Interpleader issue. Our sister Lisa Seepersad loaned Dev and I \$4,000.00 US to cover the shipping expenses of the Log Skidder to Trinidad. Therefore in total the Log Skidder cost \$20,665.00 US. Using an exchange rate of \$6.15 this would have amounted to \$127,089.75 TT.
11. If I were in possession of the Log Skidder I would have made a profit of \$352,910.25 from the contract referred to above with the Plaintiff. The money from this sale would have aided my brother and I in the setting up of our sawmill. As a result of the seizure we were forced to find alternative funds to obtain the sawmill in 2006.

**Dev Anand Seepersad**

*The statements contained in the witness statement of Dev Anand Seepersad filed on October 20, 2011 corroborated the evidence set out in the witness statement of Subhas Seepersad set out above.*

*Excerpt from the supplemental witness statement of Dev Anand Seepersad filed on December 18, 2012:*

- 3. Prior to the log skidder being seized we earned about \$60,000.00 a month after expenses. The monies earned were deposited in joint Bank Accounts at Royal Bank of Trinidad and Tobago Limited, Cross Crossing (now RBC of Trinidad and Tobago, La Romain) in the names of my brother Subhas, my sisters Lisa and Rajmanie and myself and Scotiabank Trinidad and Tobago, Marabella in the names of Subhas and myself.....*

**Shivani Ramlogan**

*Shivani Ramlogan of Scotia Bank gave evidence as to a joint account operated by Subhas Seepersad and Dev Anand Seepersad.*

**Andomida Massiah Boochoon**

*Andomida Massiah Boochoon of RBC Bank gave evidence as to a joint account operated by Subhas Seepersad, Dev Anand Seepersad, Lisa Seepersad and Rajmani Seepersad.*

**Sheldon Blugh**

*In his witness statement filed on September 23, 2011, Sheldon Blugh set out in detail the circumstances which led to the seizure of the log skidder, the ensuing court proceedings, the competing claim for ownership of the log skidder and its eventual return to the Defendant after repairs were carried out by the Third Party at a cost of \$166,784.17.*

*Excerpts from his witness statement:*

7. *The Third Party's position has always been that it was misled by the lessee, Mr. Singh, in this regard. The Third Party had no intention to deliberately deprive the rightful owner of the logskidder of his or her property, and was totally unaware at the date of the seizure that the logskidder was anything other than its own property which it was lawfully entitled to seized.*

48. *The logskidder fully repaired and restored to the Defendants satisfaction was delivered to the Defendants (sic) on the 4th December 2008 and the Defendants acknowledged receipt on the said date.....*

**THE LAW**

12. The normal measure of damages in detinue includes damages for detention of the goods along with their value: Clerk and Lindsell on Torts 15th ed. at para 21-90. In this case, the log skidder having been returned, the court has to determine what damages should be awarded for the unlawful detention.

13. In conversion cases, claims for loss of profits on contracts with third parties are allowable where such loss could have been anticipated by the defendant. This view was expressed by the authors of *Mc Gregor on Damages* 19<sup>th</sup> ed. at para 36-069 as follows:

*"By contrast, the plaintiff's loss of profits on contracts made with third parties has tended to form too remote an item of damage. That such a loss may be recoverable is recognised, but it has been allowed only where it could have been anticipated by the defendant.*

14. This learning is consistent with remoteness test of foreseeability laid down in The Wagon Mound [1961] AC 388 for negligence cases.

15. In Kuwait Airways v Iraqi Airways [2002] 2 AC 883, the House of Lords held that the same test of foreseeability was applicable in conversion cases where goods were not knowingly and dishonestly converted. Lord Nicholls at paragraphs 103 and 104 stated:

*"103. I have already mentioned that, as the law now stands, the tort of conversion may cause hardship for innocent persons. This suggests that foreseeability, as a more restrictive test, is appropriate for those who act in good faith. Liability remains strict, but liability for consequential loss is confined to types of damage which can be expected to arise from the wrongful conduct....."*



104. Persons who knowingly convert another's goods stand differently. Such persons are acting dishonestly. I can see no good reason why the remoteness test of "directly and naturally" applied in cases of deceit should not apply in cases of conversion where the defendant acted dishonestly."

16. In the House of Lords decision of Lord Citrine (Owners) v Hebridean Coast (Owners) [1961] AC 545 two different bases for quantifying loss for misappropriation of a vessel were identified. In the case of a profit earning vessel, damages was said to be based on the earnings that would have been made had the owner retained use of it, whereas in the case of a non-profit earning vessel, there was a practice of awarding damages based on interest on the value of the vessel. At page 577, Lord Reid stated as follows:

*"The task of assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit-earning ship there is no direct financial loss and one must ask what harm was done to the owner by his being deprived on the use of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that the owner is deprived of the services of his ship during the period of repair, the opinion of Lord Herschell in Steam Sand Pump Dredger No. 7 (Owners) v Greta Holme (Owners) appears to have given rise to the*

*practice of awarding damages based on interest on the value of the ship."*

## **SUBMISSIONS**

### ***Third Party Submissions***

17. The Third Party submitted that based on the evidence, the Defendant was contractually bound to sell the log skidder and therefore the Defendant was only entitled to (a) loss of profit for the period between September 15, 2004 (the date of seizure) and September 27, 2004 (the date fixed for the sale) and (b) the loss of the opportunity to sell the log skidder.
  
18. As to loss of profit, whether before or after the date of the then proposed sale, it was submitted that there was no evidence that any losses were incurred. The Defendant relied on the evidence of bank representatives relating to joint accounts held by the Defendant, which was unhelpful because (a) the accounts were personal not business accounts (b) the accounts were not solely owned by the Defendant and (c) the bank representatives could not say whether the sums deposited into the accounts were sums derived from the log skidding business.
  
19. As to the Defendant's submission that he was entitled to damages for loss of opportunity to sell the log skidder calculated as the difference between the value on the date fixed for sale and the value on the date of its return, the Third Party submitted that there was no evidence given as to the value of the log skidder on the date it was returned.

20. In summary, the Third Party submitted that the Defendant had failed to adduce proper evidence to prove his loss, if any, and was only entitled to nominal damages.

***Defendant's Submissions***

21. Firstly, the Defendant submitted that the Third Party was attempting to benefit from its own wrong by asserting that the Defendant was only entitled to damages for loss of profit up to the date for completion of the sale. In effect, damages for loss of profit should be awarded for the entire period of the unlawful detention.

22. Further, the Defendant relied on the evidence contained in the witness statements of the Defendant and Dev Seepersad that they had earned \$50,000.00 for jobs undertaken with the log skidder prior to its seizure. The Defendant also relied on the supplemental witness statement of Dev Seepersad in which it was stated that prior to its seizure, they earned about \$60,000.00 per month after expenses.

23. The Defendant sought to rely on bank records to support the earnings from the log skidder prior to its seizure. Of the monthly deposits of \$60,000 made into the two bank accounts, the Defendant's share was said to be two fifths of the total or \$24,000.00 per month.

24. The Defendant quantified his the loss of opportunity to sell the log skidder in the sum of \$352,910.25, being the difference between the price at which he purchased the log skidder and the price at which he had contracted to sell it.

25. In summary, the Defendant argued that he was entitled to either (a) loss of use for the full period of detention of 4 years, 2 months and 18 days at the rate of \$24,000.00 per month or (b) loss of use from the date of seizure to the date fixed for the sale i.e. 13 days at the rate of \$789.04 per day together with loss of profit from the sale of \$352,910.25 or (c) loss of profit from the sale only in the sum of \$352,910.25.

### **ANALYSIS**

26. Having considered the evidence and the arguments, I rejected the bases for quantifying damages put forward by both parties.

27. As to the Third Party's submissions, I found that there was no basis in law for limiting the loss of profit claim to the 12 day period between September 15, 2004 (the date of the wrongful seizure) and September 27, 2004 (the date for completing sale). Such a limitation, in my view, would be unjust because it was due to the wrongful seizure by the Third Party that the sale did not materialize and the Defendant was deprived of both the profits from the sale and possible earnings from continued possession of the log skidder. Indeed, at the time of the seizure, the Defendant enjoyed full ownership rights to the log skidder.

28. The fact that the Defendant intended to sell the log skidder was of course a relevant consideration as it might provide an alternative basis for quantifying his loss.

29. I also rejected the Third Party's submission that the Defendant was entitled to nominal damages only. In the House of Lords decision in Mediana (Owners) v Comet (Owners) [1900] AER 126 Earl of Halsbury LC distinguished nominal damages from real damages. At page 129 of the judgment he said:

*"The term "nominal damages" is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect of which a man is entitled to judgment. But the term "nominal damages" does not mean small damages.*

.....

*It appears to me, therefore, that what the learned Lords in The Greta Holme intended to point out - and Lord Herschell gives expression to it in plain terms - was that the unlawful keeping back of what belongs to another person is a ground for real and not nominal damages.*

30. Based on the foregoing, I was of the opinion that the Third Party "unlawfully kept back" what belonged to the Defendant for some 4 years. That, to my mind, was ground for awarding real, not nominal damages.

31. On the other hand, the Defendant argued that he was entitled to the sum of \$352,910.25 which was the difference between the purchase price of the log skidder and the selling price at the time of seizure.

32. I rejected this argument for two reasons. Firstly the Defendant failed to plead this loss as special damages. Secondly, it was not disputed that the Third Party had seized the log skidder by an honest mistake and based on the Kuwait Airways case supra. the applicable test was foreseeability. The loss of the sum of \$352,910.25 based on the contract of sale with a third party was too remote and not allowable.
33. Having rejected the loss of opportunity to sell the log skidder as a basis for assessing damages in this case, I considered what damages could have been earned by the Defendant had the log skidder remained in his possession.
34. The evidence regarding the actual earnings of the log skidder proved to be conflicting. On the one hand the Defendant and his brother Dev Anand Seepersad in their witness statements stated that the log skidder earned \$50,000.00 from May 16, 2003 to September 15, 2004, a period of one year and four months. On the other hand, Dev Anand Seepersad stated in his supplemental witness statement that the log skidder earned \$60,000 monthly.
35. By way of explanation, Dev Anand Seepersad indicated under cross examination that the statement in his original witness statement was a typographical error. But even if this were to be accepted, there was no explanation given for how he arrived at the sum of \$60,000 as earnings and no documents were provided to support his assertion.
36. The evidence relating to the bank records raised more questions than answers. In particular the deposits to the

accounts were in no way shown to be relatable to monies earned from the log skidder.

37. In all the circumstances, there was no reliable evidence relating to what the log skidder actually earned or what it was capable of earning. As a result, I was constrained to resort to another basis for quantifying the Defendant's loss.
38. In the Lord Citrine case supra. the owners had been deprived of the vessel for some eleven and a half days but no specific substitute vessel was obtained as the owners had several vessels available for use. A measure of damages based on interest on the value of the ship was found to be appropriate. The dictum of Lord Morris of Borth-Y- Guest at page 583 of the judgment is instructive:

*"On the findings of the learned registrar the respondents have not sought to argue that the damages to be awarded in respect of the loss of the use of the Lord Citrine for 11 1/2 days should only be nominal. It is therefore proper that such sum should be awarded as will fairly compensate the appellants. This sum is to be assessed having regard to the particular facts of this case. No help in the process of assessment is to be derived from seeking to describe the Lord Citrine by some form of words or by seeking to place her in some category or classification. Everything depends upon the circumstances which are special to this case. The appellants would not have hired out the Lord Citrine on a commercial basis and so have earned money from some charterer. Nor was their use*

*of the Lord Citrine in any way comparable to the use which the owners of the Ikala were able to make of her as a profit-earning ship earning specially high profits in exceptional times. Nevertheless, the wrongdoing of the respondents did have the result that for a period of 11 1/2 days the Lord Citrine was under repair whereas, had she not so been, she would have been carrying coal and playing her part in the appellants' comprehensive winter coal-carrying operations. The then capital value of the Lord Citrine was for her owners "infructuous" during the 11 1/2 days. In these circumstances, I respectfully agree with the assessment of damages....."*

39. Having regard to the circumstances in this case, including in particular the fact that the log skidder was about to be sold when it was seized and the dearth of evidence relating to its actual profit making or profit making capacity, I considered it appropriate in this case to use the same measure of damages as in the Lord Citrine case, namely interest on the value of the log skidder.
40. It was undisputed that the Defendant was deprived of the capital value of the log skidder for some 4 years.
41. As to the value of log skidder, I considered it was appropriate to use the sale price of \$480,000 as there is no indication that the contract for sale was anything other than arms length transaction that reflected the true market value of the log skidder.



42. Interest on the capital value of the log skidder was calculated at the rate of 12 percent per annum for a period of 4.2 years. The sum awarded as damages was therefore \$241,920.00

**RULING**

43. The following order was made:

(1) The Third Party shall pay the Defendant's damages for loss of use in the sum of \$241,920.00 with interest at the rate of 12% per annum from May 28, 2005 (the date of service of the Third Party Notice) to December 8, 2014.

(2) The Third Party shall pay the Defendant's costs to be taxed in default of agreement.

**Dated this 27<sup>th</sup> day of February, 2015.**

**Master P. Sobion Awai**