

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 431 OF 1997

BETWEEN

GERARD MOOTOO

PLAINTIFF

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Before The Honourable Mr. Justice Stollmeyer

Appearances:

Mr. G. Benjamin for the Plaintiff

Mr. N. Byam for the Defendant

JUDGMENT

These proceedings concern what is commonly called a "wrecker" or perhaps more properly "tow-truck", according to Mr. Oliver Rosemin, an expert witness for the Plaintiff.

The Plaintiff claims in conversion and detinue. In or about May 1981 he imported from the United States of America a 1981 Chevrolet hydraulic wrecker, chassis No. 1 GBHC 34M7BV 106710, with engine No. Z 1104 UHW.

The necessary documentation for clearance of the vehicle into Trinidad and Tobago was presented to a customs officer to whom the Plaintiff had previously

been introduced. It appears that this documentation was prepared on the Plaintiff's behalf by a customs broker suggested to him by the customs officer. Together with the documentation, the Plaintiff paid in cash direct to the customs officer duties amounting to \$17, 810.00 but did not receive the customary "machine receipt".

He was told that he needed to obtain insurance coverage to be able to take the vehicle away from the port to be licensed for use on the roads of this country. He obtained this insurance, presented it to the customs officer and took delivery of the vehicle. He then took the vehicle to the Licensing Office on 15th May 1981 so that it could be registered and licensed.

While at the Licensing Authority, three customs officers (not two as had been pleaded) approached him. He was asked to go with them and take the vehicle to "Customs House" on Abercromby Street, Port of Spain, which he did, driving it there himself. After several interviews and discussions with various customs officers, the vehicle was seized. He returned to Customs on several occasions in an effort to retrieve the vehicle, but had no success. His then solicitor wrote to the Comptroller of Customs on 2nd July 1981 demanding the return of the vehicle. The Comptroller replied on 6th July saying that investigations were taking place into the circumstances surrounding the importation of the vehicle, and that he was not in a position to say when it would be returned. The written demand for its return was repeated by the Plaintiff's solicitor by a letter of 28th September 1981, to which there was no response.

The Plaintiff saw the vehicle at some time subsequently, perhaps in 1988, but says nothing of its condition at that time. He also obtained approval to import another wrecker at around that time, but proceeded no further saying that he was not in the right frame of mind to do so.

The vehicle was returned to the Plaintiff on 20th July 1996. On inspection it was found to be missing several parts and that others were broken. In addition, on a subsequent inspection carried out by Mr. Oliver Rosemin, it was discovered that the engine pistons were "frozen", as were the clutch assembly and wheel bearings. The tyres were rotten and the vehicle's body was corroded in places.

The Plaintiff's claim in conversion is for the cost of replacing the broken and missing parts, as well as the repairs. The vehicle itself having been returned it is clear that no claim in conversion for it can be sustained. He claims in detinue for loss of use, and, so it would appear, for depreciation.

The Defendant raises two defences. First, that the action is statute-barred since more than 4 years elapsed after the demand was made for the return of the vehicle and prior to the action being filed. Second, that the seizure and detention of the vehicle were lawful, since this took place in the reasonable belief that it represented the fruit of a serious crime and/or that it afforded material evidence of the commission of a serious offence, namely one under Section 9 (1) of the Forgery Act Chap. 11:30 i.e. uttering a forged document.

The Law

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 to 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.

Loss 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). Where the item is usually let out on hire by a plaintiff and is used by the defendant, the plaintiff is entitled to a reasonable sum for the hire of the chattel (see *Clerk & Lindsell* at para. 21-105). The present case, however, is distinguishable from *Strand Electric and Engineering Co. v. Brisford Entertainments* [1952] 1All ER 796, where the item in question was an asset of the plaintiff's existing business usually let out on hire thus producing revenue. The defendant, having detained it, proceeded to let it out on hire and retain the proceeds of doing so for itself.

Limitation

The Defendant submits that the four year limitation period under Section 5 of the Limitation of Personal Actions Ordinance Ch. 5 No. 6 began at the latest when the second demand for the vehicle was made on 28th September 1981 or a reasonable time thereafter, allowing time for its delivery. The writ in this action was filed on

7th February 1997, some 15 years after that. The Defendant relies on the judgments in *Carlton Rattansingh v. The Attorney General and Ors.* in the High Court (Jamadar J.) HCA 1922 of 1998; the Court of Appeal Cv. App 105 of 2000; and the Privy Council [2004] UKPC 15

The Plaintiff submits that the detention was lawful and continued to be so, presumably up to the time of delivery in 1996. Consequently, these proceedings were instituted well within the limitation period. *Rattansingh*, it is submitted, was decided on a materially different factual basis and is not applicable to those in the present case.

Rattansingh, it is submitted, differs from the present case because there the charges laid were ultimately dismissed. The demand for the return of the tyres which had been seized by the Comptroller of Customs was made after these charges were dismissed and when it was clear that the tyres could no longer be lawfully detained. I do not see, however, how these submissions assist the Plaintiff in the present case.

There was no evidence before me of any charges being dismissed, although in examination in chief the Plaintiff said that at some time after the Comptroller's letter of 6th July 1981 he went to a police station where he was arrested and charged with certain offences. He went no further, however, his attorney being of the view (on my enquiry as to what issue this evidence went) that the events were in fact not relevant to any of the issues I was to determine. I found that a little strange for two reasons. First, given para. 3 of the Plaintiff's Reply (obviously in response to para. 4 of the defence that the detention was lawful under the provisions of Section 3 of the Custom Act in relation to an offence under the provisions of Section 9 (1) of the Forgery Act), that the Defendant could not have had a reasonable belief that any offence had been committed under the Forgery Act, particularly after June 12th 1985. The Plaintiff, however, gave no evidence as to the events of this day. Second, the Plaintiff subpoenaed the Clerk of the

Peace, Magistracy St. George's West, to produce the notes of evidence in complaint No. 7339 Corporal Moses Lewis v. Gerald Mootoo which was determined on 12th June 1987. Again, no evidence was led as to this.

If it is accepted that the charges I have referred to were in fact laid, then it is only reasonable to infer that they were determined, and in the Plaintiff's favour at that, given his pleading and the proposed witness. That would also establish a date when the detention ceased to be lawful, but even if all this was in fact what happened, and the Plaintiff was relying on a lawful detention having come to an end on either of those dates, he would be unable to show a subsequent demand for the return of the vehicle. Without such a demand the limitation period would not begin to run. It is not, however, necessary for me to decide this.

In the event, the evidence before me is that the vehicle was detained pending investigations. It is well settled that any such detention cannot be for an indefinite period. Those investigating have a reasonable period of time to make their enquiries and decide whether to lay charges. If they do not, then they can no longer lawfully detain the item in question. If they do lay charges, then they may continue the detention either e.g. as evidence, if the item is required for proof of the offence having been committed, or as representing the fruit of the crime, if one had in fact been committed.

Those investigations should have been completed by 27th September 1981. Three and a half months is in my view a reasonable time within which to complete them, in the absence of any evidence to the contrary. A reasonable time to return the vehicle after the demand of this date could be no more than two months. In my view, time began to run no later than 30th November 1981 and the Plaintiff's claims are consequently statute-barred.

The Defendant raised the statutory bar and the Plaintiff has not succeeded in overcoming the problem it posed as he is required to do. I do not agree with Mr.

Benjamin's submission that the Defendant's plea of limitation is negated by the subsequent plea of the detention being lawful. Consequently, the claims in both conversion and detinue must fail.

There is then no need to decide any of the other issues. In deference to the positions advanced on behalf of the parties as to other issues, however, I make the following observations.

First, I accept Mr. Byam's submission that conversion has not been proved. This claim related to the missing and broken parts, and he submitted that they could not be the subject of a claim separate from the vehicle itself based on the principle that the greater includes the lesser. These broken and missing parts, he submits, were a part of the whole wrecker. I agree. They cannot be treated separately. In value they can only represent a very minor part of the whole, the value or replacement cost of which was not proved in any event. Alternatively, five lights, a wheel jack, a pair of wheel chocks, a set of dolly wheels and rear towing apparatus can hardly be said to comprise more than a minor part of the entire wrecker.

In any event, their loss or breakage would properly fall to be considered in assessing the diminution or fall in value of the wrecker on its return or at the date of judgment.

Second, the evidence as to damages by and/or behalf of the Plaintiff fell far short of what is required. It was, quite frankly, highly unsatisfactory.

No evidence was given as to the replacement cost of the missing or broken parts, or certainly no evidence that was of any evidential value, save for a document of 25th September 1996 issued by Grand Prize Motors Inc. It is not addressed to the Plaintiff; it is not an invoice as is alleged, only a quotation; it does not come close to listing (identifiably at least) more than two or three of the missing or broken

parts. Further, the Plaintiff's evidence (to which I will come) was clear - he spent no money on replacing missing or broken parts.

Even if the claim in conversion had succeeded, therefore, there would have been no award in damages.

Third, the documents put forward by the Plaintiff in support of his claim contained a bill for a battery bought in August 1996, but the Plaintiff's evidence is quite clearly that he never drove the vehicle after it was returned. This bill must have been put forward in error - if I may employ a euphemism. He could not do so, if as he says the tyres were "dry rotted". I note that no claim is made for their replacement cost.

Fourth, the Plaintiff put forward a request of 23rd August 1996 for a pro forma invoice made of Broward Truck and Equipment Co. Inc. for a variety of parts. There is nothing, however, to link these parts to the vehicle in question, no pro forma invoice is produced, and all of this took place in pursuance of the Plaintiff's objective or intention at that time to establish a wrecking service using a new wrecker.

Fifth, the Plaintiff admitted in examination in chief (not in cross-examination) that he never spent any money either on repairs or replacement parts for the vehicle.

Sixth, he admits – again in examination in chief – and much to his attorney's surprise, that he sold the vehicle for \$80,000.00 about three to four months after he got it back in July 1996. This, of course, was well before the writ was issued in this action.

There are several other aspects of his evidence which did no good for his credibility. I do not need to go into them. It is sufficient to say that I found his credibility to be very poor and his evidence inherently unreliable, even after

taking into account the passage of time. After all is said and done, these proceedings were instituted in 1997 and I can think of no good reason why his recollections now should be materially different from those at the time he instructed his attorney to issue these proceedings. This flows not so much from a failure of recollections on the part of those giving evidence as it does from a failure to prepare his case properly.

All of this inevitably affects his evidence as to loss of use, to which I will return.

The evidence as to depreciation was equally unsatisfactory. Mr. Rosemin, who gave evidence as to this, made it clear that he was speaking from his admittedly unclear recollections and on the basis of his written opinion of 10th January 1997 (which was admitted into evidence in the agreed bundle and from which he was given leave to refresh his memory) after inspecting the vehicle, his file on the matter having been lost or destroyed. His opinion as to the cost of such a vehicle fully outfitted as a wrecker was based on no more than his recollection of 1981 prices F.O.B Miami. Further, and having put the fully outfitted cost at some US \$22,000.00, he then put the cost "on the road" in this country, including duties and all other fees, at TT \$150,000.00 using a rate of exchange of TT \$4.25–US \$1.00. This he recalled as being the rate of exchange in 1981. Based on this, he estimated that the depreciation to be TT \$24,600.00 in 1997, the vehicle having been immobile for some 16 years. The fact is, however, that the rate of exchange in 1981 was TT \$2.40–US \$1.00 as can be seen from the various declarations "...of Change in the Par Value of Dollar Orders" made under the provisions of the Central Bank Act Chap. 79:02 - and more particularly Legal Notice 194 of 1985.

Given the sale of the vehicle for \$80,000.00 in 1996, one is left to wonder about the rationale for any depreciation at all since the initial cost of the vehicle would not have exceeded that figure in any event.

This brings me to the issue of loss of use. It is accepted that this is to be a reasonable sum in certain circumstances (which I have already set out) but which in my view are not applicable in this case. In any event, the evidence – once again – is woefully lacking. It is based almost entirely on the Plaintiff's experience while working at "Eggie's Garage" from 1979 to 1990 and thereafter at "Gabriel's Garage" from 1990 to 1994. His functions there were to take requests for wrecking services, negotiate the fees, and write up the bills. He had nothing to do with any administration or management functions, and was therefore not in a position to give any evidence as to the cost of maintaining and/or repairing a wrecker. He claimed loss of use of \$300.00 per day in 1981 increasing over the years, by amounts which he could only describe as "...could be..." anywhere from \$100.00-\$300.00 per day, to \$2,000.00 per day in 1996. There was absolutely nothing concrete to his facts or figures, despite his very precise evidence as having paid \$17,810.00 in cash direct to the customs officer for which he never saw any official receipt.

Mr. Morley, who gave evidence on the Plaintiff's behalf as to the daily revenue to be expected of a wrecker similar to that of the Plaintiff, was no more precise despite having been in the business himself since 1975. His evidence was based solely on his own business. Ultimately, and having operated two wreckers during that time (one larger and the other smaller than the Plaintiff's) he came to say that his profit really never exceeded \$20,000.00 per month before selling his larger wrecker in 2004.

This makes a mockery, in my view, of the Plaintiff's claim to loss of use at the rate of \$2,000.00 per day, six days per week, 52 weeks per year in 1996 - a total of \$624,000.00 per annum or \$52,000.00 per month. This claim, when taken together with the other claims for special damages, none of which (save, ironically, the wrecking services!) were supported by any documentary evidence or by any evidence at all, serves only to reinforce the impression of the Plaintiff's

various claims being unsupportable and grossly exaggerated in this particular regard.

Further, all this must be taken in the context of the Plaintiff obtaining approval for the purchase of another wrecker in 1988, unsupported – yet again – by any documentary or other evidence, and seeking various quotations in 1996 for equipment to outfit a wrecker, but proceeding no further on either occasion for no apparent good reason. If these events were put forward in an effort to demonstrate that the Plaintiff fulfilled his duty to mitigate his loss (see *Halsbury's Laws of England* 3rd Ed. Vol. 38 Trover and Detinue at para. 1318) then he has failed to so demonstrate.

Again, one is left to wonder; this time as to whether the Plaintiff ever really intended to go into the wrecking business at all. In summary, I find the evidence to be bordering on the incredible if not actually incredible.

In examining the issue of damages, the decisions of the Court of Appeal in Cv. App. 43 of 1998 *Sookoo and Anor. v. Ramdath*; Cv. App. 239 of 1998 *Harrinanan v. Pariag & Ors.*; Cv. App. 2 of 1996 *Greer v. Alstons Engineering Sales and Services Ltd.*, as well as the Privy Council's decision in the latter ([2003] UK PC 46), are all of assistance (see para. 6 of the last in particular).

In my view, the only claim which I would be prepared to accept would be for the wrecking services totalling \$950.00. That apart, and given all that I have set out, I would not award more than \$15,000.00 as nominal damages. As to interest, I would have awarded it at the rate of 3% on the amount of \$950.00 from 15th September 1996 (being the approximate mid-point between the dates of the two receipts which came into evidence) to 27th September 2000 and thereafter at 6% to judgment. As to the nominal damages, I would have awarded interest at the rate of 6% from 7th February 1997 (being the date of the writ) to 27th September 2000 and thereafter at 12% to judgment. As to costs, I would have awarded the

Plaintiff half of his costs, to be taxed in default of agreement, given that his claim in conversion would have failed in any event.

In the result, however, and based on the defence of limitation, the Plaintiff's action is dismissed with costs.

21st April 2005

C.V.H. Stollmeyer
Judge