JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 23 OF 2002

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE. J.A. (Ag.)

BETWEEN	**MARK BOWEN**	**DEFENDANT/APPELLANT**
A N D	**ANDREW IGNATIUS HO-SHUE**	**PLAINTIFF/RESPONDENT**

Maurice Manning instructed by Nunes Scholefield for the Appellant
Maureen Smith for the Respondent

24th and 25th July,2003 and 30th July, 2004

COOKE, J.A.:

In February, 1995, the respondent, a commercial trader, owned two jet skis, a wave runner and a jet mate boat which he had purchased with a view to prospective rental of them. The appellant, who operated a jet skiing business at Turtle Beach, Ocho Rios, contacted the respondent and on 6th February, 1995, went to the latter's house in St. Andrew where he viewed the jet skis and wave runner. He viewed the boat at another address. The parties then held discussions with a view to the appellant renting the equipment from the respondent. On the following day, the appellant took custody of the items which, to date, have not been

returned to the respondent. On the 7th May, 1998, in the presence of a police officer, the respondent demanded the return of his equipment. Thereafter, legal action ensued in which the respondent sought:-

(i) Damages for breach of contract

(ii) Special damages in respect of the unreturned equipment

(iii) Interest

(iv) Costs

This action was successful and the learned trial judge made the following awards:

(a) $3,400,000 for breach of contract

(b) $666,000 for special damages

(c) $200,000 for general damages

(d) Interest at 6% per annum

(e) Costs.

In making the award the learned trial judge determined that the business discussions between the parties on the 6th of February, 1995 culminated in a contractual agreement whereby the appellant would rent the respondent's water sports equipment for $20,000 per week. He therefore accepted the account of the respondent and rejected the stance of the appellant that he had taken the equipment to determine the suitability for use in his business. This is how the learned judge expressed himself:

> "On the basic issues both sides agreed. There really was no dispute that the plaintiff, a

businessman, commercial trader and entrepreneur was in possession of water sports equipment for his ventures.

That on or about February, 1985 the defendant who then operated a jet skiing business at Turtle Beach in Ocho Rios, took possession of four pieces of water sports equipment owned by the plaintiff. The defendant took them to Ocho Rios. He did not purchase them. He paid no rental for them. He never returned them.

There are areas of the evidence, which are in dispute. These included the condition of the equipment at the time the defendant took them. Whether or not they were started in the presence of the defendant. If there was a rental agreement between the parties and if the defendant told the plaintiff to come to pick up his equipment in Ocho Rios.

The defendant himself said the equipment appeared to be in good condition. I did not accept his evidence that he took them from St. Andrew to Ocho Rios at his own expense to find out their condition. His mechanic's evidence does not support this either. If he had done so and found they were not in good condition he should and would have returned same immediately.

This court accepted the evidence of the plaintiff and his witness that the equipment was in good condition and was started in defendant's presence and or by the defendant. That there was a rental agreement between the parties before the equipment was released to the defendant".

The first ground of appeal was that:

> "The judgment is unreasonable having regard to the weight of the evidence adduced by the Defendant and his witnesses."

The appellant complained that the learned trial judge was in error when he said that the evidence of his mechanic did not support the assertion by him that he took the equipment from St. Andrew to Ocho Rios to find out their condition. This criticism is unfounded. The mechanic, Winston Steele, spoke to examining four Jet Skis in 1994. The equipment the subject of this action was taken from the respondent in February, 1998 and included two Jet Skis. The appellant's contention that he took the equipment for inspection is without credibility for as the learned trial judge poignantly observed:

> "If he had done so (inspected) and found they were not in good condition he should and would have returned same immediately".

It was further argued that if there was an agreement then such was void for uncertainty as there was no expiry date for the determination of the lease. This is without merit as in contracts such as this, in which there is no stipulated time for determination, such contracts may be terminated by either party giving the other reasonable notice – see ***Staffordshire Area Health Authority v South Staffordshire Waterworks Co.*** [1978] 3 All E.R. 769.

In deciding whether or not a contract came into being between the parties, the issue of credibility was paramount. That depended on

the learned trial judge's assessment of the truthfulness of the contending parties. There were no objective factors which were to be considered. The learned trial judge had the opportunity (which is denied to this court) of observing the demeanour of the witnesses as they gave evidence. It cannot be said that the reasons given by the learned trial judge are unsatisfactory either because there was a fundamental non-appreciation of the evidence or neglect to take into account any probative matter. In this case whether or not there was an agreement was entirely an issue of fact. The learned trial judge so found and there is no reason to disturb that finding. See ***Watt (or Thomas) vs. Thomas*** [1947] 1 All E.R, 587; ***Algie Moore v Mervin L. Davis Rahman*** [1993] 38 JLR 410. This first ground fails.

Ground 2 challenged the award of $666,000.00 as special damages. This sum represented the cost incurred by the respondent in the acquisition of the rented water sports equipment. His evidence revealed the sources of his purchases and a statement of his expenditure in relation to each item. There was no evidence to support the veracity of the respondent. The complaint is that as damages had to be strictly proven and this was not so done in this case, there was no basis for this award. This requirement for an evidential foundation for a successful claim in special damages was succinctly stated in the oft-quoted statement by Lord Goddard C.J. in ***Bonham Carter v Hyde Park Hotel Ltd.*** [1948] 64 TLR 177:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it".

This court has accepted the principle that there is an onus on a plaintiff to prove his loss strictly. See ***Lawford Murphy v Luther Mills*** [1976] 14 J.L.R. 119. However, what is sufficient to amount to strict proof will be determined within the context of the particular case. For example, a casual worker could not be expected to produce documentary evidence of his earnings. The position would be the same in respect of income earned from a sidewalk vending trade. See ***Desmond Walters v Carlene Mitchell*** SCCA No. 64/91 delivered 2nd June, 1992 (unreported). The appellant submitted that in order to discharge the onus on the respondent to strictly prove his loss of $666,000.00 he should have either

(a) called the individuals from whom he purchased the equipment; or

(b) produced receipts, and neither was done. There are however, two factors to be considered. Firstly, the evidence of the respondent as to the purchase price was never challenged by the appellant who was in the water sports business. It is not an unreasonable inference that, in the absence of any such challenge, the appellant accepted the sum claimed as the purchase price as reasonable. Secondly, there is the evidence of the appellant that he paid US$3,000 for his comparable jet

Skis. The respondent claimed $110,000 for each of the rented skis. It is the evidence of the appellant that in 1992 he had purchased comparable Jet Skis for US$3,000 each. In 1994 the average exchange rate of our dollar vis-a-vis the United States dollar was $33.50 to one. So, a conversion of what the appellant paid for one ski would approximate to what the respondent said he paid for each of the rented skis. The learned judge found the respondent to be a credible witness. Certainly it cannot be said that the purchase prices he claimed were unreasonable. This ground of appeal fails.

Ground 3 was complementary to the previous one. It was that the "learned trial judge failed to appreciate that the purchase price of equipment acquired several years before is not proof of the present value of (that) equipment". The appellant's contention here was that the learned trial judge did not give any weight to the evidence of the "depreciation of the viability of Jet Skis after one year's use". This submission was based on the evidence of Steele (the appellant's mechanic) as it then appeared in the record that "an ordinary Jet Ski lasts nine months to one year maximum". At this hearing it was agreed that the record as it then existed was incomplete as Steele did go on to qualify his statement just quoted to the effect that "nine months to one year maximum" was in reference to the period of time before which such

jet ski would need repair. Further, if there was repair, a jet ski "could last up to a lifetime".

Despite this, there remains the consideration of whether with the passage of time the rented equipment would not have depreciated in value. These items were imported. The original cost, therefore, was influenced by the value of our dollar in relation to the global financial market. The value of our dollar has continued to fall quite significantly. Accordingly, while the value of the items would quite likely have depreciated if they were in the country of origin, this is not so in Jamaica. Because of this factor, the award for special damages will not be disturbed.

Ground 4 complained that "the learned judge failed to take into account the duty of the plaintiff to mitigate his loss". The first question that arises is what is the "loss" in respect of which there should have been mitigation? This can only be in respect of the equipment which was not returned. The appellant did not appreciate this, as misconceived submissions on this ground suggested that there was an onus on the respondent to have terminated the contract, recovered his equipment and then find alternative rental. The duty to mitigate does not arise during the subsistence of a contract. Perhaps, it may be said that the non-payment of the rental fees over the prolonged period could be classified as a repudiation by the appellant. The fact is that if there was

a repudiation the respondent did not accept it. Consequently, until the 7th May, 1998 when the respondent demanded the return of his equipment the contract was in existence. The appellant has not demonstrated (and the onus of proof is on him) what reasonable steps the respondent ought to have taken to mitigate the loss of the equipment. This ground fails.

Ground 5 succeeds as there was no basis for the award of $200,000.00 for general damages . As to this, there was a concession by the respondent.

In conclusion, the appeal is dismissed, but the award of damages is varied to the extent that the award of $200,000 for general damages is not allowed. The respondent shall have his costs to be agreed or taxed.

DOWNER, J.A.:

I agree.

PANTON, J.A.:

I agree.