[2020] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 114/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**THE TRANSPORT AUTHORITY**	**APPELLANT**
AND	**AMY HYACINTH BOGLE**	**RESPONDENT**

Leslie Campbell instructed by Campbell McDermott for the appellant

Dr Garth Lyttle instructed by Garth E Lyttle & Co for the respondent

26 July 2019 and 28 February 2020

PHILLIPS JA

[1] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing to add.

STRAW JA

[2] This appeal arises from the trial of two claims which were consolidated. The first claim was for damages for negligence arising from a motor vehicle collision which took place on 15 February 2011 involving the motor vehicles owned by both parties. The second claim was for damages for detinue and/or conversion as a result of the seizure of the respondent's motor vehicle.

[3] In his detailed judgment, K Anderson J found in favour of the respondent in respect of negligence and conversion. The claim for damages for detinue was dismissed. The matter on appeal is essentially confined to the learned judge's finding in relation to the claim for conversion and the award made in damages relevant to that tort.

Grounds of appeal

[4] The notice of appeal filed 20 November 2015 originally contained nine grounds of appeal. However, at the hearing of the appeal, counsel for the appellant stated that the nine grounds could be collapsed into three. Counsel indicated that he wished to proceed on these three grounds and permission was granted. These grounds are as follows:

> 1) That the learned trial judge failed to give due consideration to the evidence before the court which ought to have satisfied that court that the respondent had failed to prove all the elements required under the tort of conversion;
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> 2) If, which is not accepted by the appellant, this court finds that there was such proof, then the respondent had failed to prove the consequential loss flowing from such conversion; and
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> 3) That the learned judge wrongfully admitted into evidence some paper writings said to be receipts in breach of section 31E of the Evidence Act."

For the sake of expediency, the court will be dealing with grounds one, three and then two.

Factual background

[5] On 15 February 2011, a motor vehicle collision took place along Waltham Park Road in the parish of Kingston, involving the respondent's motor vehicle and a motor vehicle owned by the appellant and driven by an inspector, employed to the appellant.

After the collision, the respondent's motor vehicle was seized and placed on a wrecker by the appellant's servants/agents.

[6] At the scene of the accident, a warning notice dated 15 February 2011 was issued by Inspector Pauline Saunders to the respondent which indicated that she was warned for prosecution for the following offences, "(1) Operating without a Road Licence (2) No PPV Insurance" in contravention of the Road Traffic Act. Written across the top of the said notice were the words "Lyndhurst Road Pound". The respondent stated that she was subsequently served with two summonses on 23 February 2011 requiring her to attend court on 8 March 2011. These summonses were in respect of the use of the motor vehicle as a public passenger vehicle without a road licence in contravention of section 61(1) of the Road Traffic Act, and without a policy of insurance in accordance with section 4(1) of the Motor Vehicles Insurance (Third-Party Risks) Act.

[7] The respondent attended the Corporate Area Traffic Court in relation to the offences described at paragraph [6] on a number of occasions; 8 March 2011, 20 September 2011, 24 April 2011 and eventually, on 24 April 2012 the matter was dismissed as the Crown offered no evidence and the respondent was discharged. A letter bearing the same date was written by a deputy clerk of the courts to the appellant, advising of same and requesting that the respondent be assisted. There is nothing to indicate whether this letter was received by the appellant.

[8] It appears that an order was made for the respondent's vehicle to be released on bond on 8 March 2011, the very first date that she was before the Traffic Court. This

was the evidence of the appellant's servant, Pauline Saunders, who attended that court on that date. Further, in the notes of evidence at page 42, she described the process to be engaged when a vehicle is released on bond as follows:

> "The owner of the vehicle will go to room 2 at the Traffic Court – that is the office, with the documents for the vehicle inclusive of the title. The Judge will make the ruling that the vehicle is released to the owner on bond of 100 some or 200 some. She will also state that all fees are to be paid. After going to the office, the owner will get a letter to proceed to Transport Authority. There at the Transport Authority – 119 Maxfield Avenue the pound fee will be paid. Managers will then sign the relevant documents for the release of the vehicle. Nothing else."

[9] It is the uncontradicted evidence of the respondent, however, that for many days after the accident which occurred on 15 February 2011, she repeatedly went to 119 Maxfield Avenue (one of the offices of the appellant) and the pound at Lyndhurst Road demanding answers about her vehicle but no one could tell her where it could be found. A letter was also written by her attorney-at-law on 23 September 2011 to the appellant setting out the wrongful actions of their servants and requesting compensation for loss of use of the vehicle. That letter also alleged that the vehicle was taken by wrecker to an unknown destination and that the whereabouts of the vehicle was still unknown. A demand was made for the payment of the sum of $1,785,000 within seven days of receipt of the letter. A handwritten notation indicated that the letter was delivered to the appellant on 19 October 2011. There was no demand made for the return of the vehicle, nor any service of the order of the court on the appellant, although the court had ordered that the vehicle be returned on bond from March 2011.

[10] On 7 January 2015, the first day of the trial, the respondent gave evidence that it had been almost three years since her motor vehicle was seized and taken away from her and that she was still not able to locate it. In the notes of evidence, at page 22, it was suggested to the respondent in cross-examination that she was aware that her vehicle was at the Industrial Terrace pound. She answered that she was not and stated that she was hearing for the first time (on 8 January 2015) that her vehicle was at the said pound.

[11] For completeness, it should be noted that the appellant's servants/agents, who were named as 1st and 2nd defendants in the proceedings in the court below but not served with the claim, gave a vastly different account of the events which took place on 15 February 2011. Both Lloyd Bowen and Pauline Sanders, who were Route Inspectors employed to by the appellant, stated that they observed the respondent transporting passengers and collecting money and returning change, without the requisite public passenger licence and insurance in breach of the Road Traffic Act and Transport Authority Act. In any event, it is undisputed that the respondent did not have the said licence to be so engaged. She denied that she was taking up passengers for hire at all. Lloyd Bowen stated that it was the respondent who drove her vehicle and hit the front bumper of a motor vehicle belonging to the appellant, but he did not observe any damage to either of the vehicles. The learned trial judge did not accept this account and as mentioned earlier, he found in favour of the respondent in respect of negligence.

[12] Pauline Saunders gave evidence that about 20 minutes after the collision, a wrecker came and took the respondent's motor vehicle. When shown the warning notice,

she acknowledged that she issued it to the respondent "on the spot" and that it was her handwriting in which it was indicated that the motor vehicle was being taken to the Lyndhurst Road pound. She further stated that the motor vehicle was taken to the said pound but she was told that the pound was full and that it was taken to another pound. She gave no indication as to whether the respondent was informed of this change. At trial, in response to the question "What happened to the claimant's vehicle?" Ms Saunders said, "My knowledge is that the claimant and that claimant's lawyer did not take up the offer and it remained at the Transport Authority's pound". This statement apparently relates to evidence that emerged during the trial concerning the court-ordered bond for the release of the vehicle. It was not pleaded by either party in their statement of case.

[13] The learned judge indicated[1] that he granted permission for the evidence in relation to the bond to be adduced. Lloyd Bowen was not able to tell the court where the vehicle had been taken or if the respondent had been able to retrieve it. Additionally, both witnesses for the appellant could not state where the vehicle could be located at the time of trial, neither did they give any evidence that the respondent knew specifically where her vehicle could be located at any time during the period preceding the trial. In the defence filed by the appellant on 25 June 2012, it was averred at paragraph 9 that the respondent knew the vehicle was taken to the Industrial Terrace Pound. However, in the reply filed by the respondent, on 23 July 2012, at paragraph 9, any such knowledge was denied. No evidence was led by the appellant challenging the respondent's evidence

[1] at paragraph [28] of his judgment

that she had made numerous attempts at the appellant's offices to locate her vehicle and was unsuccessful.

[14] The learned judge accepted[2] that the respondent had failed to prove that, at any time, an unqualified demand or that any demand had been made at all for the return of the motor vehicle. It is on this basis that he found that the tort of detinue had not been made out.

Ground 1: Whether the learned trial judge failed to give due consideration to the evidence before the court which ought to have satisfied that court that the respondent had failed to prove all the elements required under the tort of conversion

Submissions on behalf of the appellant

[15] Counsel for the appellant, Mr Campbell, submitted that since the learned judge found that the respondent did not make a demand on the appellant for her motor vehicle, there was no basis for the respondent's claim for conversion. Given what counsel referred to as the "scheme of arrangement" in relation to the bond, he contended that the respondent would have been required to serve the order which she received from the Traffic Court ordering the return of her motor vehicle, and that no evidence was provided to suggest that the order was served. She had an obligation to satisfy the bond which should have been submitted to the Traffic Court. The appellant would have had to act in accordance with the order of the court to return the vehicle.

[2] at paragraph [9] of his judgment

[16] Reference was made to section 16A of the Transport Authority Act, which, according to Mr Campbell, clearly provides that the burden was on the respondent to submit the bond. He submitted that the respondent did not do any act to repossess the motor vehicle to which she was entitled. Further, it was submitted that the seizure resulted in a temporary suspension of the respondent's right to possession and this right was restored by way of a court order. The order was subject to the respondent's compliance with the provision of section 16A in relation to the recovery of the vehicle on the bond.

[17] Mr Campbell agreed with the learned judge's statement[3] as to the elements of the tort of conversion that there are three distinct ways by which the tort of conversion could be committed: (1) by wrongly taking the property of another, (2) by wrongly detaining it or (3) by wrongly disposing of it. He argued that the learned judge erred in finding that the respondent's motor vehicle was wrongly taken. He relied on section 15 of the Transport Authority Act[4] which provides how actions or other legal proceedings are to be brought against Inspectors carrying out acts in pursuance of the said Act.

[18] Counsel also took issue with the pleading insofar as there was no averment that the appellant's agents acted without reasonable and probable cause as required by the said Act. Further, with regard to the evidence led in this regard, counsel submitted that

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[3] at paragraph [34] of his judgment

[4] Section 15 provides, "In any action or other legal proceedings brought against any Inspector in respect of any act done in pursuance or execution or intended execution of this Act or the regulations made thereunder the plaintiff shall not recover unless he alleges in his pleadings and proves at the trial that such act was done either maliciously or without reasonable and probable cause".

the appellant's agents acted with reasonable cause insofar as they witnessed certain events which permitted them to act within sections 13(1)(b) and 13(2)(a)(v) of the Transport Authority Act.

[19] Counsel did concede that there was no requirement that for conversion to be proved, one had to satisfy all three elements, that is, the motor vehicle was wrongfully taken, detained and disposed of. He submitted, however, that because of the appellant's unique statutory position, there would have to be a combination of all these three requirements. In relation to the issue of wrongful detention, he stated that if there was a failure to comply with the order for the return of the vehicle, then continuing detention by the appellant would be proved attaching to the rights of ownership. He also submitted that the vehicle was lawfully seized by virtue of the provisions of the Transport Authority Act. So in essence, counsel submitted that there was no proof that it was wrongfully taken.

[20] With regard to the disposal, it was argued that while the motor vehicle was never returned, there is no evidence as to whether it was disposed of and, in any event, he pointed out that there is a provision of the Transport Authority Act which allows the appellant to dispose of seized motor vehicles after six months.[5]

[5] see sections 13(3)(c), 3A, 3B and 13A of the Transport Authority Act

[21] While Mr Campbell did not agree with the learned judge placing the burden of proof on the appellant to prove that the prerequisites for the release of the vehicle had been met, he submitted that nonetheless, it was still satisfied.

[22] In the written submissions, it was argued that even if the respondent can contend that she had no knowledge of the whereabouts of her vehicle, there is documentary proof of this coming to her attention on 25 June 2012. He referred the court to paragraph 9 of the defence where the appellant had averred that the respondent was advised that her vehicle was stored at the Industrial Terrace pound. Further, counsel submitted that the appellant had no intention to exercise control over the respondent's property and she was free to retrieve her vehicle and chose not to do so. In the circumstances where the appellant's actions did not display any intention to exercise control in a manner inconsistent with the respondent's ownership of the vehicle, it was submitted that the learned judge should not have found that the respondent made out her case for conversion. The case of **Robert Salmon v Senior Superintendent Elan Powell and the Attorney General of Jamaica**[6] was cited in support.

Submissions on behalf of the respondent

[23] In relation to the wrongful taking, it was submitted by counsel for the respondent, Dr Lyttle, that it was improper to take a motor vehicle from the scene of an accident. It was undisputed that the motor vehicle was taken.

[6] [2012] JMSC Civil 15

[24] Further, Dr Lyttle submitted that the respondent was charged for operating a motor vehicle without the requisite licence and there was no evidence that such an offence was committed before the learned trial judge as the matter was dismissed by the judge of the Traffic Court.

[25] He further argued that within 13 days after the motor vehicle was taken, the respondent went before the Traffic Court and an order was made for the return of the motor vehicle on 8 March 2011. He referred to the witness statement of the respondent in which she explained that the entire front of her motor vehicle was bashed in and that she saw the coolant running out. She also stated that she had been to the appellant's premises on several occasions, in particular 119 Maxfield Avenue and the pound at Lyndhurst Road, to demand answers about her vehicle. It was further submitted that numerous attempts were made by the respondent to find her vehicle at the Lyndhurst Road Pound, which was stated on the warning notice, as well as enquires made at the appellant's head office on Maxfield Road, and no one could account for the whereabouts of the motor vehicle. Counsel stated that this was not challenged by the appellant.

[26] Counsel referred the court to paragraph 4 of the particulars of claim of the respondent and submitted that it was so pleaded as a reasonable and prudent person would wish to see the condition of the vehicle before retrieving it. He argued that the respondent was aware that the vehicle was not at the Lyndhurst Road pound before the order was made for it to be returned to her on bond and she would wish to see the state of the motor vehicle before executing the bond. While counsel admitted that the court order relevant to the bond was never served on the appellant, he argued that this was

not an ordinary accident or seizure. The bond would usually be for a normal situation where the vehicle was seized and could be located at the place specified. It was argued that the circumstances as recited above were special. He stated that at the trial before the learned judge, the two witnesses for the appellant were asked in cross-examination where the respondent's motor vehicle was and neither could answer and they indicated that they did not know.

[27] In essence, it was contended that the wrongful taking and disposing was proved.

[28] On the issue of the burden of proof, counsel's position was that the appellant bore the burden to first establish that the motor vehicle existed somewhere. As it related to the bond, it was submitted that if the bond were entered into by the respondent, it would have been futile since no one knew where the motor vehicle was after the appellant took possession.

[29] In the written submissions, it was argued that the respondent gave evidence that the front of her motor vehicle was badly damaged and was not in a drivable state and under such conditions the appellant seized the vehicle with a dishonest motive as the vehicle was not taken to the stated pound.

Discussion and analysis

[30] Generally, there is some amount of deference that must be accorded by this court to the learned judge's assessment of the evidence and his ultimate findings of fact. I would adopt the words of my sister Edwards JA who concisely stated the principles as follows:

"It is also well known that an appellate court is loath to interfere with a trial judge's findings, with respect to facts. This is so, as trial judges often have the advantage of seeing and reviewing all the evidence first hand. This enables them to observe a witness' disposition so as to determine their credibility and reliability. Notwithstanding this position, the appellate court may disturb a finding of fact, in circumstances where it can be seen, among other things that, any advantage enjoyed by the trial judge, by reason of having seen and assessed the evidence first hand, does not sufficiently explain or justify the ultimate conclusion. This guidance has been applied continuously by this court. In **Price Waterhouse (A Firm) v Caribbean Steel Company Limited** [2011] JMCA Civ 29 Panton P, at paragraph [40], quoted with approval, the dictum of Lord Thankerton in **Watt (or Thomas) v Thomas** [1947] AC 484 at 487 and 488, thus:

> '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...'" [7]

[7] **Joni Kamille Young-Torres (As Administrator of the Estate of Karl Augustus Young) v Ervin Moo-Young et al** [2019] JMCA Civ 23, at paragraph [26]

[31] The learned judge came to a certain conclusion on the facts as to whether there was any justification for the seizure of the vehicle. Is there any basis to conclude that he was wrong in that regard?

[32] Having heard from both parties as to the circumstances under which the vehicle was seized, he rejected that the appellant's servants at any time saw the respondent operating her vehicle in the manner described by the witnesses for the appellant. He concluded also that the collision between both vehicles occurred as described by the respondent.[8]

[33] Section 15 of the Transport Authority Act requires that it must be alleged and proved by the respondent that the actions of the servants of the appellant were done without reasonable and probable cause.

The section is set out below:

> "In any action or other legal proceedings brought against any Inspector in respect of any act done in pursuance or execution or intended execution of this Act or the regulations made thereunder the plaintiff shall not recover unless he alleges in his pleadings and proves at the trial that such act was done either maliciously or without reasonable and probable cause."

[34] Apparently in an attempt to conform with section 15, the respondent drafted her particulars of claim as follows:

> "4. On or about the 15th February, 2011 while the Claimant was driving her Toyota Mark II motor car registered 5912 FQ in a southerly direction along Waltham Park Road, Kingston 11 in the

[8] See paragraph [62] of his judgment

> parish of Saint Andrew, when the firstnamed Defendant wilfully and or negligently and without reasonable and probable cause, drove on the wrong side of the road and violently collided into the front of the Claimant's vehicle, then placed the said vehicle on a wrecker and drove it away to an unknown destination and served the Claimant with a Warning Notice that the said vehicle will be kept at the Lyndhurst Road Pound and the secondnamed Defendant charged the Claimant with operating her said vehicle without a road licence and no insurance coverage."

[35] Section 13(2)(v) of the Transport Authority Act empowers the servants of the appellant to seize any vehicle that was being operated as a public passenger vehicle without the requisite licence. If the respondent's vehicle was seized with reasonable and probable cause for such a breach, there would be no unlawful taking. Once the learned judge found that the respondent had proved there was no reasonable and probable cause to take the vehicle, which he did[9], then an unlawful seizure would have occurred. This is to be distinguished from cases where the seizure could be considered lawful and amounted to no more than a suspension of the respondent's right (see **Webb v Chief Constable of Merseyside Police**[10] and **Costello v Chief Constable of Derbyshire Constabulary (CA)**[11]; referred to in **The Commissioner of Police and the Attorney General v Vassell Lowe**[12]).

[36] For convenience paragraphs [53] and [54] of the learned judge's judgment are set out below:

> "[53] The claimant has proven that they did so without reasonable and/or probable cause. This court does not accept that at any

[9] See paragraph [53] of his judgment
[10] [2000] QB 427
[11] [2001] 1 WLR 1437
[12] [2012] JMCA Civ 55

> time, on the relevant occasion, did the 3rd defendant's servants or agents, see the claimant operating her vehicle in a manner which is typical of that in which a public passenger vehicle would have been operated. This court does not accept either, that at any material time, the 3rd defendant's servants or agents saw two (2) male passengers entering, remaining in and thus, utilizing the said vehicle, for hire.
>
> [54] The claimant has also proven that in having so unlawfully seized and detained the claimant's vehicle, without reasonable and probable cause, the 3rd defendant did so with intention to exercise dominion over that vehicle and to keep possession of the claimant's car, in defiance of the claimant's right to possession of same."

[37] In the circumstances before this court, the learned judge had evidence before him from which he could conclude that there was an unlawful seizure. He would have seen and assessed all the witnesses and preferred the evidence of the respondent as to what took place at the time of the incident. This is similar to the first instance case of **Robert Salmon v Senior Superintendent Elan Powell and the Attorney General of Jamaica** which was referred to this court by Mr Campbell. Simmons J, in considering the evidence[13], stated that serious doubts were raised whether the 1st defendant had an honest belief that the claimant was guilty of breaches of the Road Traffic Act. She concluded that his belief was not founded on reasonable grounds and as such he had acted without reasonable and probable cause. She concluded therefore that an unlawful seizure had occurred. In the circumstances being considered by this court, it was open to the trial judge to conclude that he preferred the evidence of the respondent on the

[13] at paragraph [47]

issues joined. As such, there is no basis to interfere with the learned judge's findings of facts and his conclusion that there was an unlawful seizure.

[38] It was the learned judge's view, however, that the appellant had the burden to prove the vehicle was lawfully seized as they had raised a positive defence.[14] He referred to Murphy on Evidence, 2009, 11th edition at page 79, in support of this point. He concluded that the appellant had failed to meet the burden and that the vehicle was unlawfully seized and detained.

[39] The learned judge would be correct that where an affirmative defence is asserted, the defendant must assume the legal burden of proving such a defence. The learned authors of Murphy on Evidence, 12th edition at paragraph 4.5, describe an affirmative defence as one that "raises facts in issue which do not form a part of the claimant's case." and further opine that "[i]t is a sound rule, therefore, that every party must prove each necessary element of his claim or defence".

[40] While the principle of the positive defence is of general application, the burden in this particular case has to be considered within the context of the Transport Authority Act that allows the servants of the appellant the authority to seize motor vehicles under certain conditions. Section 15 of that Act expressly places the burden on the respondent to plead as well as to prove that the vehicle was seized by the servants of the appellant without reasonable and probable cause.

[14] See paragraph [49] of his judgment

[41] While the learned judge would therefore have erred in expressing that this burden should be borne by the appellant, he did make the finding that the respondent had proved that the vehicle was seized without reasonable and probable cause. This is set out at paragraphs [53] and [54] of his judgment (see paragraph [36] above). In that event, there is no basis to disturb his ultimate finding that the vehicle was unlawfully seized.

[42] Additionally, Mr Campbell's contention concerning the lack of pleadings in relation to reasonable and probable cause is without merit. The respondent averred, albeit somewhat inelegantly at paragraph 4 of the particulars of claim[15], that the actions of the servants of the appellant were without reasonable and probable cause. She has therefore satisfied the requirement placed on her by section 15 of the Transport Authority Act with regard to the pleadings.

[43] The ultimate issue is whether there was sufficient evidence on the facts accepted by the learned judge to conclude that the tort of conversion had been established. Unlawful seizure, by itself, that is, wrongful appropriation, may merely be evidence of an act of trespass and not the tort of conversion (see Clerk & Lindsell on Torts 17th edition at paras 13-02 and 13-05). In **Fouldes v Willoughby**[16] the court held that "a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some

[15] Set out at paragraph [33] above
[16] (1841) 151 ER 1153

third person, or unless the act done has the effect, either of destroying or changing the quality of the chattel".

Conversion

[44] The law in relation to conversion has been comprehensively set out by McIntosh JA in **The Commissioner of Police and the Attorney General v Vassell Lowe**, which was relied upon by the learned judge.[17] For ease of reference, the relevant portions are set out:

> "[35] ...The learned trial judge had placed reliance on the definition of conversion in the 21st edition of Salmon & Heuston's Law of Torts...
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> > 'A conversion is an act or complex series of acts of which willful [sic] interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it.'
>
> [36] In addressing the elements required to constitute conversion the learned authors provide a brief and useful history of the tort, stating, inter alia, that there are three distinct ways by which one man may deprive another of his property and so be guilty of a conversion, namely: '(1) by wrongly taking it; (2) by wrongly detaining it and (3) by wrongly disposing of it'. Historically, the authors state the term conversion was originally limited to the third mode as merely to take another's goods, however wrongful, was not to convert them. However, in its modern sense, the tort includes instances of all three modes and not of one mode only. The authors point out that two elements combine to constitute willful interference: (1) dealing with the chattel in a manner inconsistent with the right of the person entitled to it and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right (see **Caxton Publishing Co v**

[17] At paragraphs [33] – [38] of his judgment

Sutherland Publishing Co [1939] AC 178, 189 and **Penfolds Wines Pty Ltd v Elliott** (1946) 74 CLR 204, 229) ...

[37] The courts have determined that in the absence of willful and wrongful interference there is no conversion even if by the negligence of the defendant the chattel is lost or destroyed (see **Ashby v Tolhurst** [1937] 2 KB 242). Further, the authorities show that every person is guilty of a conversion who without lawful justification takes a chattel out of the possession of anyone else with the intention of exercising a permanent or temporary dominion over it because the owner is entitled to use it at all time (see **Fouldes v Willoughby**)...But, a mere taking unaccompanied by an intention to exercise dominion is no conversion. Further, the detention of a chattel amounts to conversion only when it is adverse to the owner or other person entitled to possession – that is, the defendant must have shown an intention to keep the thing in defiance of the owner or person entitled to possession. The usual way of proving that a detention is adverse within the meaning of this rule is to show that the party entitled demanded the delivery of the chattel and the defendant refused or neglected to comply with the demand...

[39] ...it is evident that the key to the establishment of the tort is wrongful interference or unjustifiable interference with the chattel so as to question or deny the owner's title to it (see **Kuwait Airways v Iraqui Airways** [2002] 2 AC 883)..."

What did the learned judge find in relation to conversion?

[45] The learned judge rightly stated[18] that he had to first consider whether the respondent's vehicle was lawfully seized and whether, having seized it, the appellant is to be taken as having intended to exercise dominion over it, in disregard of the respondent's right to possession. Relying on **Vassell Lowe**, he stated[19] that one of the means by which an intention to exercise dominion over a chattel in disregard of another's legal right can be established, is by leading evidence that a demand was made for the

[18] at paragraph [4] of his judgment
[19] at paragraph [45] of his judgment

return of the vehicle and this was not done. He stated, however, that this was not the only means to establish this intention.

[46] He went on to say at paragraphs [46] and [47]:

> "[46] The claimant, this court has already found, has wholly failed to establish that any such demand was made either by the claimant personally or by anyone acting on her behalf. What the claimant is also seeking to rely on, to prove that the 3rd defendant in having unlawfully seized the claimant's vehicle, did so with intent to exercise dominion over it, is that the Magistrate's Court ordered that the said vehicle be released to the claimant 'on bond', but the same was never so released to her.
>
> [47] It is the considered opinion of this court that the claimant is entitled to rely on such circumstance, if she can prove it, as constituting proof that in having unlawfully seized the said vehicle and thus having unlawfully detained the same, the 3rd defendant did so with intention to exercise dominion over same."

[47] The learned judge then went on to conclude[20] that the burden was not on the respondent to satisfy the court that she had met all the prerequisites for the actual release of her vehicle on the bond. It was his view that since the appellant wished to rely on the respondent's alleged failure to comply with the prerequisites, this fell within the category of a positive defence and "he who alleges must prove". He relied on the case of **Joseph Constantine Stewardship Line Ltd. v Imperial Smelting Corporation Ltd**[21] and concluded that since the appellant led no evidence of the same, the appellant had both unlawfully seized and detained the respondent's vehicle and the claim based on the tort of conversion must succeed.[22]

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[20] See paragraph [51] of his judgment
[21] [1942] AC 154
[22] See paragraph [52] of his judgment

[48] Section 16A(1) of the Transport Authority Act provides:

> "Where a vehicle is seized in the circumstances specified in section 13(2)(a)(i),(ii),(iii) or (iv), the Court may, on an application made by its owner, release the vehicle to the owner or operator before the matter is determined if the owner has –
>
> (a) paid to the Authority fees for the removal and storage of the vehicle; and
>
> (b) submitted to the Court, a bond, with such sureties as the Court may determine, in an amount not less than the minimum fine prescribed in respect of an offence under section 61(5) of the Road Traffic Act."

[49] The bond permits the release of the vehicle to the respondent pending the determination of the trial and required certain actions to be fulfilled by her. She had not made any averments in her particulars of claim in relation to this issue but neither did the appellant in the defence. The evidence concerning this matter came out during the trial.

[50] If the respondent had fulfilled the prerequisites required by section 16A(1) of the Transport Authority Act for the vehicle to be released, the appellant would have been obliged to release the vehicle to her. If it was not so released, this would be clear evidence of an unlawful detention and, as conceded by Mr Campbell, this continuing detention without any reasonable explanation, such as destruction or loss of the vehicle by negligence, would give rise to a strong inference of the intention required to prove wilful interference. The learned judge understood the importance of such factors being established by the evidence.

[51] The learned judge stated[23] that the order of the Traffic Court, releasing the respondent's vehicle to her on bond, must be of significance as the respondent was seeking to be awarded damages for conversion, based on the vehicle not having been released to her. He also stated that if the vehicle had been lawfully held by the appellant and they had lost the vehicle, that would not be conversion. Additionally, he referred to the fact that if it was lawfully held for such a lengthy period of time that by law, the Transport Authority was entitled to dispose of it, that would not constitute conversion.

[52] However, the learned judge's conclusion that the necessary intention to exercise dominion over the respondent's vehicle was established because the appellant failed to prove that the respondent had not fulfilled the prerequisites pertaining to the bond is difficult to sustain for two reasons. The notes of evidence relevant to the evidence of Pauline Saunders, one of the witnesses for the appellant, reveal the following:

> Pauline Saunders – Cross- examination
>
> Page 216:
>
> "Q. Did you hear based on an application made by the claimant's counsel, the court ordered the return of the claimant's vehicle, on bond?
>
> A. Yes sir.
>
> …
>
> Q. Did the Transport Authority comply with the court's order to give back the vehicle to the claimant?
>
> A. I have no knowledge of that."

[23] at paragraph [39] of his judgment

Page 221:

" Q. What happened to the claimant's vehicle?

A. My knowledge is that the claimant and the claimant's lawyer did not take up the offer and it remained in the Transport Authority's pound.

Q. Would you be surprised to learn that on several occasions the claimant went to the Transport Authority for her vehicle and it was never returned to her?

A. I have no knowledge of that sir."

Re-examination

"Q. Are you aware of the process involved when the Traffic Court vehicles to be [sic] released to an accused person on bond?

A. The owner of the vehicle will go to room 2 at the Traffic Court – that is the office with the documents for the vehicle inclusive of the title. The Judge will make the ruling that the vehicle is released to the owner on bond of 100 some or 200 some. She will also state that all fees are to be paid. After going to the office, the owner will get a letter to proceed to Transport Authority. There at the Transport Authority – 119 Maxfield Avenue the pound fee will be paid. Managers will then sign the relevant documents for the release of the vehicle. Nothing else.

Q. After the relevant documents are signed for the release, what happens?

A. The owner of the vehicle would go to pound and retrieve the vehicle."

[53] Based on the line of questioning in cross-examination, Dr Lyttle had sought to infer that in spite of the court order, the appellant did not return the vehicle to the respondent. On re-examination, counsel for the appellant then sought to clarify the process where the vehicle is ordered to be returned to a defendant on bond.

[54] There was no suggestion that the respondent failed to fulfil the prerequisites of the bond and thus, the vehicle was not returned to her. It is my opinion, therefore, that the issue cannot be placed squarely in the category of an affirmative defence.

[55] Secondly, the respondent gave no evidence that she had entered into any such bond but merely that she had been attempting to locate the whereabouts of her vehicle and was unable to do so. Counsel, Dr Lyttle, in his submissions admitted this to be the case. As such, there would have been no need, in any event, for the appellant to produce witnesses or documents to prove that she had not fulfilled the prerequisites. Consequently, the learned judge erred in placing such a burden on the appellant and erred in finding that the appellant had not discharged this burden as this was never a fact in issue.

[56] However, in relation to the tort of conversion, there is no merit in Mr Campbell's submission that the three elements of wrongful taking, detention and disposal or a combination of those three, must be made out against the appellant as a state agency. The tort can be made out by any one of the above, but the evidence must suggest something more than a mere trespass (see the dictum of McIntosh JA in **Vassell Lowe** quoted at paragraph [44] above).

[57] In this event, did the learned judge have sufficient proved facts before him from which it could be ultimately concluded that there was an intention by the appellant to exercise dominion over the vehicle inconsistent with the rights of the respondent?

[58] The essence of Mr Campbell's complaint is that there was no such evidence, bearing in mind the lack of a demand as well as the authority given to the appellant under the Transport Authority Act to dispose of vehicles not claimed after six months.

[59] In **Kuwait Airways v Iraqui Airways**[24], the court undertook a review of the tort of conversion and commented[25] that the tort existed to provide a remedy in a large variety of situations in which a third party exercises dominion over a claimant's goods and treats them as his own. The court also commented[26] that a lot of difficulties have occurred because the acts of conversion may take so many different forms. The essence of the tort, however, was reiterated, that there must be an intention on the part of a defendant to deny the owner's right or to assert a right which is inconsistent with the owner's right. The court also referred[27] to **Caxton Publishing Co Ltd v Sutherland Publishing Co**[28] and, in particular, to Lord Porter's adoption of Atkin J's definition of conversion which had been approved by Scrutton LJ in **Oakley v Lyster**[29]:

> "Atkin J goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter**. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intended to challenge the property or possession of the true owner**." (Emphasis supplied)

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[24] [2002] 2 AC 883
[25] at paragraph 414
[26] at paragraph 415
[27] at paragraph 423
[28] [1939] AC 178
[29] [1931] 1 KB 148, 153

[60] What was the evidence before the learned judge? The vehicle would have been removed by the agents of the appellant after a motor vehicle accident, which the judge found to have been due to the negligence of those agents.

[61] The respondent was informed that the vehicle would be taken to a particular pound. She was unable to locate the vehicle within days of it being removed to that pound and was not given any information about where it could be located. This continued even up to the trial, over three years later. The appellant had suggested that she knew that the vehicle could be found at a particular location, but no evidence was led to support this allegation. Any such knowledge was denied by the respondent both in her pleadings and in the evidence. If the whereabouts of the vehicle had been discovered by her and the bond not entered into, then the respondent would have failed to establish the tort of conversion.

[62] On the facts established in this case, even if she had posted the bond, which might have been prudent, and taken steps to pay the storage fees, it is not readily apparent how those fees would have been assessed as she was unable to obtain information about the location of her vehicle. This would have been one of the prerequisites required of her by virtue of the Transport Authority Act. If it was disposed of by virtue of the Act, that fact would be peculiarly within the knowledge of the appellant. Further, if the vehicle was indeed sold by virtue of the said Act, the appellant would have had to authorise payment of the proceeds to the respondent through the Accountant-General once she applied

within a year after the sale.[30] Similarly, if the vehicle was lost or destroyed due to negligence, this would be knowledge in the province of the appellant. The respondent could not be expected to prove these factors.

[63] In relation to the tort of detinue, Brooke LJ in **Kuwait Airways** at paragraph 438, opined that where there is an inability to deliver up the goods, the burden of proving matters which will, if proved, enable a defendant to escape liability, lies with the defendant. This would equally apply to the tort of conversion. In essence, this was the learned judge's assessment of the evidence before him[31]. It is only logical that the appellant should have within its knowledge, whether the vehicle was stolen, lost, destroyed or sold. If such evidence had been led by the appellant, it would be difficult for any court to conclude that the intention to exercise dominion had been established on the facts.

[64] So although six months had passed without there being an actual demand for the return of the vehicle, the appellant, within days of the seizure and continuing up to the trial, would have been aware that the respondent was seeking to locate her vehicle. No attempt was made by them either documentarily or orally through witnesses to assist the respondent as to where her vehicle was located. She experienced a wilful disregard of her rights as the owner of the vehicle as she was subjected to a total blackout of

[30] Sections 13(3)(c), (3A) and (3B)
[31] see paragraph [41] of his judgment

communication for days, weeks, months and years even in the face of a letter written by her attorney to the appellant.[32]

[65] The facts of this case are unusual, as contended by Dr Lyttle, but they are facts from which it can be inferred that the wilful disregard by the appellant of the rights of the respondent amounted to acts intentionally done inconsistent with her rights as the owner of the vehicle. Alternatively, the acts of the appellant, over the period of time, to all intents and purposes, demonstrated an "unjustifiable interference with the chattel so as to question or deny the owner's title to it".[33] There are no contrary factual assertions to suggest otherwise.

[66] This ground of appeal therefore fails.

Ground 3: Whether the learned judge wrongfully admitted into evidence some paper writings said to be receipts in breach of section 31E of the Evidence Act

Submissions on behalf of the appellant

[67] In the written submissions, counsel submitted that, in response to the "Notice of Intention to Tender into Evidence and Rely on Hearsay Evidence" filed 15 May 2014 (in respect of the receipts numbered 1-56), the respondent was served with a counter notice of objection, filed 30 May 2014, in respect of receipts numbered 1-56 and 57-85. This counsel contended, had the effect of advising that the appellant required Mr Tingling to attend court for cross-examination in relation to the receipts that would have been signed by him for the rental of the vehicle. Counsel submitted that there was no evidence that

[32] Letter dated 23 September 2011
[33] See **Kuwait Airways v Iraqui Airways**

Mr Tingling attended court and was released. As such, in the absence of Mr Tingling's appearance, the burden would have been on the respondent to prove that one of the circumstances in section 31E of the Evidence Act existed before the receipts could be tendered into evidence.

[68] Counsel also contended that the ruling of the learned judge that the receipts were not hearsay documents was incorrect, in the face of Mr Tingling's absence from court. Further counsel stated that there were two sets of receipts which bore different signatures. The essence of counsel's submission was that the evidence did not meet the level of proof required in order for the receipts to be tendered into evidence and therefore the judge erred in admitting the two sets of paper receipts.

[69] In the written submissions, it was contended that the judge erred in making the award of $10,000,000.00 by virtue of admitting the receipts into evidence prior to the appellant being served with the supplemental list of documents listing the said receipts. This deprived the appellant of the opportunity to serve a notice on the respondent to prove the authenticity of the receipts. Reliance was placed on rule 28.19 of the Civil Procedure Rules (CPR).

[70] A point was also made that the said receipts did not comply with section 36 of the Stamp Duty Act. The case of **Garth Dyche v Juliet Richardson and Michael**

Banbury[34] was cited in support. These submissions however were not pursued before this court.

Submissions on behalf of the respondent

[71] Dr Lyttle acknowledged that there were two "notices of intention to tender hearsay documents" relevant to the receipts. The first was in respect of receipts numbered 1 – 56 and the second was in respect of receipts numbered 57 – 85. He contended that both were duly served on the appellant's attorneys. In the written submissions, he contended that the attorney who appeared for the appellant below served counter-notices objecting to the two sets of receipts. He stated that counsel also required that the maker be called to give evidence. It was against the background of the said counter-notice of objection that the court made the order that the supplemental notice list should be served listing the corresponding receipts. The receipts were provisionally accepted by the court and were marked pending proof. Counsel contended, therefore, that the appellant is not sincere in saying that the judge was misguided as it related to section 31E(4) of the Evidence Act as there were written objections to the notices served by the respondent.

[72] Dr Lyttle informed this court that as a result of these written objections or counter-notice filed by the appellant, the maker, Mr Tingling, was brought to court to give evidence. He stated that when Mr Tingling attended court, prior to the start of the court sitting, the attorneys for the appellant below were informed that he was present. It was at this time, Dr Lyttle stated, that, counsel Miss Bolton, one of the attorneys for the

[34] [2014] JMCA Civ 23

appellant, acknowledged his presence and indicated that Mr Tingling would no longer be needed. Counsel stated that at the resumption of the court proceedings, at 10:00 am, the judge was so advised by counsel, Dr Lyttle, and it was at this point the receipts were admitted into evidence without any further protest.

[73] It was argued that since the appellant had the opportunity to cross-examine Mr Tingling, it was not in the mouth of the appellant to now question if the monies were actually charged.

[74] In essence, he submitted that the receipts were properly tendered and received by the court as evidence, without any further challenge to their authenticity. The respondent having satisfied the evidentiary requirements, the judgment should not be disturbed.

Discussion and analysis

[75] Section 31E of the Evidence Act allows for documents to be put into evidence without the maker being called under certain conditions. For ease of reference the section is set out below:

> "(1) In any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
>
> (2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.

(3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.

(4) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person –

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practical to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm.

(5) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.

(6) The court may, where it thinks appropriate having regard to the circumstances of any particular case dispense with or modify in relation to any party to the proceedings, the requirements for notification as specified in subsection (2).

(7) Where the party intending to tender a statement in evidence has called, as a witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the court."

[76] It is undisputed that the appellant was served with the notices relevant to that section in relation to the two sets of paper receipts numbered 1-56 and 57-85. It is undisputed also that a counter-notice was served requiring that the maker of the receipts attend court. At page 10 of the notes of evidence, made on 7 January 2015 (the first day

of trial) it is recorded that counsel appearing for the appellant below stated that Mr Tingling needed to attend court to give evidence in relation to the receipts and objected to the receipts being admitted into evidence as hearsay evidence. The record of evidence then sets out the following:

> "Court over-rules objection.
>
> Documents (receipts) are not hearsay documents. Defence counsel also objects to these documents: Documents not disclosed. Counsel for the claimant informs the court that these documents were 'disclosed' as copies attached to the Notice of Intention to tender.
>
> Court over-rules objection, provisionally."

[77] It is not clear to this court on what basis the ruling that the documents were not hearsay was made in the face of the objection and the requirement for Mr Tingling to attend court at that specific time in the proceedings. However, the learned judge merely allowed the receipts to be put into evidence on a provisional basis, as submitted by Dr Lyttle, until a supplemental list of documents containing all the receipts had been served on the appellant. This would have been required by rule 28.8(2) of the CPR. It is not contested, however, that all the above-mentioned receipts had been disclosed to the appellant as they were attached to the notices of intention. The learned judge ordered that the supplemental list of documents in compliance with the rules of court referring to each of the receipts was to be filed by 8 January 2015.

[78] The matter was eventually adjourned during the month of January to October 2015. On 5 October, it is noted on the record that various receipts were accepted and marked as exhibits 6 to 71, and that by 6 October counsel for the respondent was to

provide to the court proof of service of the supplemental list of documents which was filed on 8 January 2015.

[79] There appears on the record to be no further objection made to the receipts being put into evidence on 5 October 2015 without the appearance of Mr Tingling. The initial challenge made in relation to these receipts at trial was that Mr Tingling should appear.

[80] The evidence of the respondent was to the effect that she had rented the vehicle from Mr Tingling and had received all the relevant receipts from him. While there is no affidavit speaking to Mr Tingling's appearance in court, there is also no affidavit disputing Dr Lyttle's account as to what took place. At that time, counsel for the appellant below was not the same counsel who appeared before this court. Dr Lyttle, however, was the counsel appearing for the respondent below. Mr Campbell did not challenge in any meaningful way this information given by Dr Lyttle on the point. Further, there is no notation made by the learned judge that there was a continued objection to the receipts being unconditionally admitted into evidence on 5 October 2015. The record therefore is supportive of Dr Lyttle's contention on this point.

[81] As it relates to the signatures which counsel for the appellant sought to impugn, this court does note that there is somewhat of a dissimilarity between the signature appearing on receipts 1-56 when compared to receipts 57 – 85. Section 31E(2) of the Evidence Act does state that there should be notification of the maker of the statement. However, since Mr Tingling's presence appeared to be no longer required by counsel for the appellant below, and there being no evidence from any handwriting expert disputing

the authenticity of the signature, there is no basis to challenge the admission of the receipts into evidence. No procedural irregularity has been established by the appellant relevant to section 31E(2) of the Evidence Act. This ground of appeal is therefore without merit and must fail.

Ground 2: Whether the respondent proved the consequential loss flowing from such conversion

Submissions on behalf of the appellant

[82] It was argued that the respondent's consequential loss must be a provable figure and that the learned judge failed to properly consider the supporting evidence. Mr Campbell also contended that even if all the receipts were properly admitted, they did not amount to the $10,000,000.00 awarded.

[83] He submitted that what the learned judge appeared to use was an odd computation as the receipts numbered 1- 54 totalled $1,956,000.00 and the remaining ones which bore, in his estimation, an unknown signature, totalled $5,004,000.00. The overall amount would have been $6,960,000.00. Mr Campbell also submitted that the learned judge erred by including in the award the sum of $186,000.00 which was claimed by way of an unsigned receipt.

[84] In the written submissions, the issue of mitigation was raised. It was contended that the learned judge was wrong in awarding the respondent damages for loss of use of her motor vehicle from the day it was seized to the date of judgment, insofar that the learned judge failed to give any weight to the respondent's duty to mitigate her loss notwithstanding the appellant cross-examining the respondent on same.

[85] It was submitted that the rental of the motor vehicle at such a cost for such a duration was excessive and the judge, as a matter of law, had a duty to consider the point of mitigation even if the appellant's counsel did not pursue the point in submissions. Particularly, since in less than three months the respondent paid to Mr Tingling an amount that was in excess of the value of her motor vehicle. Reference was made to the dictum of Viscount Haldane from **British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited**[35], wherein he opined that while a claimant is entitled to compensation for pecuniary losses which flow from the defendant's breach, the first principle is qualified by a second which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[86] Another argument raised in the written submissions, which was not pursued before the court in oral submissions, was that the contract between the respondent and Mr Tingling was illegal. This was so because the agreement was not stamped in accordance with the Stamp Duty Act, and also because Mr Tingling was not carrying on a registered business at the time when the contract was entered into. Section 3(1) of the Registration of Business Names Act was referred to.

[35] [1912] AC 673

Submissions on behalf of the respondent

[87] Dr Lyttle submitted that the sum of $10,000,000.00 was awarded to reimburse the respondent for the monies she paid to one, Mr Tingling, for the rental of a motor vehicle that she was compelled to rent from the date of seizure to the date of the trial.

[88] Regarding the correctness of the figure, Dr Lyttle submitted orally that it was $12,000,000.00 that was being claimed for the loss of the use of the vehicle and that the learned judge reduced the award to $10,000,000.00 as he made a reduction for Saturday and Sunday. Dr Lyttle conceded orally that he would not be resisting the challenge to the unsigned receipt for the sum of $186,000,00. Counsel made no submissions as to whether the figure awarded was correct based on the totality of the receipts.

[89] Counsel relied on two cases, the first was **Macrae v HG Swindells**[36] where it was held that the hiring of another car was the result of the negligence of customers, as such the length of time the car ceased to be available was irrelevant.

[90] In relation to mitigation, counsel relied on **Watson-Norie Ltd v Shaw**[37] where the issue was that the plaintiff failed to mitigate as he hired a car for £40 per week. The defendant placed before the court at trial that there were other cars which could have been rented for lesser amounts. The Court of Appeal held that there was material placed before the court that a reasonable substitute could have been hired for £25 per week, so the judge was entitled to reach the conclusion he did. In the present case, counsel

[36] [1954] 2 All ER 260
[37] [1967] 1 Lloyd's Rep 515, 111 Sol Jo 117

contended that there was no issue raised or objection taken by the appellant's attorney about the daily rate for rental or that a motor vehicle could have been rented at a lower daily rate. It would have been for the appellant to put before the court that a similar motor vehicle could have been rented at a lower rate, and this was not done.

[91] On the other hand, Dr Lyttle submitted that the appellant could have mitigated damages by entering into some form of settlement.

[92] On the issue of illegality of the contract, as previously mentioned, this contention was raised in the written submissions and not pursued in oral submissions. In any event, it was argued by Dr Lyttle that this was never mentioned in the appellant's pleadings or raised in the court below.

Discussion and analysis

[93] The learned judge made an award of damages for conversion in the sum of $10,400,000.00. The amount of $400,000.00 is not being contested by the appellant as this relates to the value of the vehicle which was never restored to the respondent. What remains in contention is the award of $10,000,000.00. The learned judge apparently arrived at this figure by approximating to the nearest million dollars, 6/7 of $12,000,000.00.[38] This would amount to $10,285,714.30 and would be based on the totality of monies paid out to Mr Tingling as evidenced by the two sets of receipts. His justification for awarding only 6/7 of the total sum was that the respondent would not have needed to rent an alternate motor vehicle for more than six days per week. This

[38] as stated at paragraph [68] of his judgment

was contrary to Dr Lyttle's submission that it was reduced by two days which would be 5/7. The judge approximated this sum to the nearest million dollars which was $10,000,000.00.

[94] It is clear that this award was made for special damages[39] and that the learned judge appreciated that generally such damages should be specifically pleaded and proven.[40]

[95] In the particulars of claim, the respondent particularised her loss as follows: "Loss of use of vehicle from 15 February 2011 to 24 April 2012 amounting to 440 days at $6,000 per day and is continuing". This is consistent with the respondent's evidence that she rented a Toyota Ace Van at a rate of $6,000.00 per day and that sometimes, she would pay fortnightly and the receipts would be written monthly. The receipts tendered are for the period starting 16 February 2011 to 10 May 2014. This period amounts to 1180 days (three years, two months and 25 days), inclusive of the start and end dates. Using the daily rate of $6,000.00, this would amount to $7,080,000.00.

[96] It is noted that in cross-examination, the respondent was asked if she paid Mr Tingling over $8,000,000.00 in cash over three years, and she responded that she was not "counting it like that", but eventually agreed. This court agrees with the written submissions of counsel for the respondent that the appellant did not provide any evidence in relation to mitigation of damages in terms of comparable rental amounts, as was done

[39] as demonstrated at paragraph [68] of his judgment
[40] see paragraph [60] of his judgment

in the case of **Watson Norie Ltd v Shaw**. In that case, evidence had been provided of alternatives which were less costly. The judge found that one of the alternatives would have been suitable and considered that the plaintiffs had been casual in hiring a replacement not to have made inquiries if a suitable car could have been obtained more cheaply. The issue of a suitable replacement would have been well appreciated by the appellant in the case at bar as the evidence also revealed that the respondent had communicated via her attorney with the appellant by letter prior to the trial claiming loss of use of her vehicle at $6,000.00 per day.[41] It is difficult therefore to conclude that the learned judge erred in accepting the evidence of the respondent in relation to what she paid for a comparable vehicle.

[97] The issue of illegality was not raised by counsel below nor argued before this court, so this court will make no pronouncement on the issue as set out in the written submissions.

[98] The respondent, therefore, did prove her consequential loss in relation to expenses for daily rental of a comparable vehicle and the learned judge was correct in making an award.

[99] In relation to the actual sum awarded by the learned judge, Dr Lyttle has conceded that the unsigned receipt in the amount of $186,000.00 ought to be excluded from the total. The learned judge did not indicate by what means he came to the sum of

[41] Letter dated 23 September 2011 from Garth E Lyttle & Company to the Transport Authority – attached to the particulars of claim

$12,000,000.00. As mentioned previously, if one were to use the pleaded daily rate of $6,000 this would amount to $7,080,000.00 for seven days per week for the total period. However, based on this court's own computation of the receipts tendered into evidence (excluding the unsigned one) the total is $6,960,000.00 which is consistent with the figure which Mr Campbell submitted. It is apparent therefore that the learned judge made an error in the calculation of the total. The award should therefore be adjusted to 6/7 of $6,960,000.00 which is $5,965,714.29.

Conclusion

[100] Based on the evidence, the learned judge cannot be faulted for concluding that the tort of conversion had been proved by the respondent against the appellant. He was also correct in his conclusion that the consequential loss was proved, however, the proper sum to be awarded is in the amount of $5,965,714.29, as calculated at paragraph [99] above. The amount of $400,000.00 which was awarded for the value of the motor vehicle and which was not contested by the appellant will remain.

[101] The egregious conduct of the servants of the appellant gave rise to these proceedings. This court has found that the respondent had been treated with scant regard and this continued even up to the hearing of the appeal as no explanation or acknowledgement of responsibility has been given to the respondent in relation to her vehicle. Although the appellant has experienced some measure of success on its appeal, in the interests of justice it should not be awarded any costs. In the circumstances, the respondent should be entitled to all of her costs.

FRASER JA (AG)

[102] I too have read the draft judgment of my sister Straw JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1) Appeal is allowed in part.

2) The order of K Anderson J is varied in relation to order 1, which order shall now read as follows:

> "The [respondent] is awarded damages for conversion in the sum **$400,000.00 in respect of the motor vehicle and $5,965,714.29** with interest at the rate of 3% from May 14, 2012 (date of service of claim forms) to date of judgment."

3) Costs to the respondent to be agreed or taxed.