[2012] JMCA Civ 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 22/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**THE COMMISSIONER OF POLICE**	**1ST APPELLANT**
AND	**THE ATTORNEY GENERAL**	**2ND APPELLANT**
AND	**VASSELL LOWE**	**RESPONDENT**

Mrs Trudy-Ann Dixon Frith and Miss Lisa White instructed by the Director of State Proceedings for the appellants

Miss Audre Reynolds instructed by Bailey Terrelonge Allen for the respondent

23 and 24 November 2011 and 30 November 2012

MORRISON JA

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

DUKHARAN JA

[2] I too have read the draft judgment of McIntosh JA and agree with her reasoning and conclusion.

MCINTOSH JA

[3] This is an appeal from a decision in an action brought by the respondent in the Supreme Court which was delivered orally on 20 January 2010. The resulting order reads as follows:

> "Judgment for the [respondent] in the amount of US Dollars Twelve Thousand Sixty Five United States Dollars, Seventy-One Cents (US$12,065.71) with interest at the rate of One and a Half percent (1½%) per annum from the date of service of the Claim Form until [January 20, 2010].
>
> Costs to be agreed or taxed."

[4] The appellants challenge the learned trial judge's findings of fact and law as outlined in the note of her oral judgment, as well as her assessment of the quantum of damages she considered appropriate in the circumstances of the case. Hence, on 2 March 2010, they filed a notice of appeal listing 10 grounds to which I shall return after a brief look at the background leading to the appeal.

A summary of the background facts together with the trial judge's findings

[5] In essence, the parties accept that:

(i) The respondent, who resided in the USA up to 2006, shipped a truck to Jamaica sometime in December 2003, in anticipation of his retirement and relocation to Jamaica;

(ii) On its arrival in Jamaica in 2004 he cleared the truck through customs, paying the assessed customs duties and other charges and the truck was moved to his brother's residence in Grierfield, St Ann after which he returned to the USA.

(iii) On 18 May 2004 a team of police officers from the Narcotics Division went to Grierfield where the truck was located. Conroy Reid a Detective Inspector of Police at the time, and leader of the team, spoke with the respondent's brother telling him of information received as to the ownership of the truck by a person known to the police to be involved in certain criminal activities.

(iv) No documents were produced to the police in response to their queries relating to proof of the alleged ownership of the truck by the respondent, neither were any keys produced for it;

(v) With the assistance of a locksmith the side door of the truck was unlocked in the presence and view of the respondent's brother,

revealing what appeared to Conroy Reid, from a cursory glance, to be household items;

(vi) Thereafter, the police secured the side door with a padlock and removed the truck to the Narcotics Division where it was held until some time later in 2004 when it was handed over to the respondent's son who took it to his residence in Portland and, about two years later, returned it to Grierfield. There it remained until some time in 2006 when the respondent retired to Jamaica.

[6] The respondent testified that, in 2006, for the first time since the truck's arrival in Jamaica in 2004, its clearance through customs and its removal to Grierfield, he opened it, using a key given to him for the lock which had been placed on the side door, in his absence. He then discovered that several items which he had packed in the truck, prior to its shipment to Jamaica, were missing. He subsequently filed suit in the Supreme Court, claiming damages from the appellants for unlawful detention and or conversion, in that "Policemen as servants and or agents of the First Defendant [now the 1st appellant] entered upon premises at Grierfield, St Ann and without reasonable and or probable cause", removed his truck from the premises, packed with a quantity of items and failed to return some of the items "although specific demands were made on several occasions by the [respondent]". However, during the course of the

proceedings, his then attorney-at-law abandoned the claim in detinue and proceeded with his claim in conversion only.

[7] Although the respondent did not have a list of the items he allegedly packed in the truck, he claimed to recall what was missing. He was shown a C78 customs clearance form relating to the importation of the truck and it was pointed out to him that the items which he alleged were missing were not mentioned on the form. He disagreed with the suggestion that their omission meant that those items were never in the truck. To his credit, the learned judge accepted his evidence of the discovery of the missing items and his recollection of what they were, on the basis that he impressed her as being forthright and truthful and that he knew the items being their owner and the person who had packed them in the truck. Additionally, the learned judge accepted as accurate his recollection of their value which he gave as US$12,065.71 and noted that there was no challenge to its accuracy.

[8] Other salient features of the learned trial judge's findings are that:

(i) Mr Reid saw what appeared to him to have been household items when the truck was opened, in the presence of the respondent's brother, at Grierfield.

(ii) It was significant that although the police claimed to have been in possession of a search warrant, they deny that the truck was searched.

She concluded that they did search it because "there is no evidence of the truck being seized for any reason other than to search".

(iii) "Apart from when the police seized the truck, it had remained at his brother's premises the entire period from when it had been cleared from the wharf until when he, [Mr Vassell Lowe] returned to Jamaica and opened it."

(iv) "The police cannot specifically dispute the veracity" of the respondent's claim that the truck had a quantity of items packed in it, because they failed to take inventory of the contents at the point when they seized the truck. Further, because they also failed to take inventory at the point when the truck was returned to the respondent's agent, the police could not credibly deny that the "listed" items were missing.

(v) There were "undisputed facts" namely: (a) that the police had information regarding the ownership of a truck, fitting the description of

the one seen at Grierfield, by a known criminal and (b) that no documentary proof of its ownership by the respondent had been presented to the police.

[9] The learned trial judge approved and applied to the facts she accepted as proved, a definition of conversion to be found in Salmon & Heuston's Law of Torts, 21st edition at page 97, where a conversion is described as "an act or complex series of acts of willful 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". Accordingly, the learned judge reasoned, the police "who took these items into their custody" without the consent of the respondent had deprived him of their use and possession and had therefore converted the items.

[10] In addition to the foregoing, the judge accepted, on a balance of probabilities, that the respondent had given relevant papers for his truck and its contents to a customs broker to effect clearance of these items and that after they were cleared the broker mislaid the documents so that they were unavailable to the court. Based on her conclusions, the learned trial judge then awarded judgment to the respondent as indicated in paragraph [3] above.

The grounds of appeal

[11] The appellants, being aggrieved by the learned judge's decision, filed the notice of appeal referred to above. Their grievances are captured in the 10 grounds listed in the notice, namely that:

> "1. The Learned Judge erred in disregarding the C78 form and failing to take its contents into account.
>
> 2. The Learned Judge erred by relying on inadmissible evidence.
>
> 3. The Learned Judge erred in finding for the Claimant in circumstances where the Claimant had not proved his case on a balance of probabilities.
>
> 4. The Learned Judge erred by awarding compensatory damages. In the alternative, the Learned Judge erred in failing to award nominal damages.
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> 5. The Learned Judge erred in making findings of fact in respect of the disputed items when the Court was not presented with any evidence that showed or from which the Court could reasonably infer that the disputed items existed and were in the truck at the material time.
>
> 6. The Learned Judge erred in finding that it was for the Defendants to disprove the Claimant's Case and not for the Claimant to prove his case; therefore applying a lower standard of proof than that required for a Claimant to prove his case on a balance of probabilities and going contrary to the maxim that '*He who asserts must prove'*.
>
> 7. The Learned Judge erred in making findings of fact (other than that which concerned the disputed items) when there was no basis for her

to make the said findings of fact.

8. The Learned Judge erred in making an award of compensatory damages in circumstances where there was no evidence before her as to the measure of damages.

9. The Learned Judge erred in treating the Claimant's unsubstantiated assertions about the value of the disputed items as a suitable measure of damages.

10. The Learned Judge erred in making an excessive award in the circumstances."

Arguments and analyses

Ground 1

[12] Mrs Dixon Frith, on behalf of the appellants, placed heavy reliance on the C78 form in support of her argument that it offers no assistance to the respondent's claim that he imported items in the truck as the form was concerned only with the importation of the truck. The learned trial judge fell into error, Mrs Dixon Frith argued, in thinking that forthright bald assertions could trump this documentary evidence which went to the root of the respondent's claim. It was counsel's contention that in circumstances where the C78 form omitted any reference to items in the truck thereby strongly contradicting the assertion that the "missing items" had been in it, the learned trial judge should have disclosed, in her oral judgment, how she treated with this glaring omission.

[13] On the other hand, Miss Reynolds argued for the respondent that the conduct of the case before the learned trial judge did not disclose that any issue

was joined between the parties as to the shipment of the truck and its seizure by the police with items stored in the back. It was counsel's submission that the learned judge gave the C78 form the necessary weight in all the circumstances so that the criticism was unwarranted.

Analysis

[14] To my mind, there was sufficient evidence before the learned trial judge to support a finding that items were in the back of the truck. The respondent's brother said in his witness statement that when the police opened the truck he was called to look in it and he "noticed that it was tightly packed with all manner of household and other articles. It looked so tightly packed to me that even breeze couldn't blow through it". The appellants' witness, Conroy Reid, had also looked in the truck and saw what appeared to him to be household items. This would have been consistent with the respondent's evidence, which the learned judge accepted as true, that he had stored items in it, prior to its shipment to Jamaica. Therefore, the omission from the C78 form of a list of the items clearly could not mean that there were no items in the back of the truck. The most that could be said, in my opinion, was that they were un-customed goods but that was not the focus of the proceedings before the learned trial judge and I am constrained to conclude that the C78 form was really of no assistance to the appellants' case as it did not support their contention that there was no proof that the disputed items ever existed or were ever imported into Jamaica. In the

circumstances, there was no real need for the learned trial judge to make any reference to the C78 form in what, after all, was an abbreviated judgment.

Ground 2

[15] Mrs Dixon Frith submitted that the learned judge made findings that were inconsistent with the respondent's case as pleaded and relied on matters in her judgment that did not form part of the evidence before her. The learned judge accepted, for instance, that the truck was searched by the police but that was not the respondent's case, counsel argued. Neither was there any evidence on the appellants' case that the truck was searched. It was Mrs Dixon Frith's contention that the respondent had asserted only that the police had seized the truck with items in it and when he later opened it, he discovered that some items were missing. Counsel argued that the learned judge was in error in finding support for the respondent's recollection of the missing items in his testimony that he had given a list of the items in the truck to a customs broker. That was inadmissible hearsay, said counsel and ought to have been rejected.

[16] Miss Reynolds submitted, on the other hand, that this evidence, rather than being hearsay, was direct or secondary evidence provided by the respondent on the whereabouts of the list of items which he had stored in the truck and shipped to Jamaica. For this submission she relied on the learning in Phipson on Evidence, 13th edition, paragraphs 1-04 to 1-07, under the subhead "Classifications" which, she contended, showed that the evidence was

admissible. Counsel argued that the learned trial judge had accepted the respondent as a credible witness and accepted his evidence as to the existence of a list of items which could not then be located. Further, it was just not credible that the police seized the truck, opened it but did not search it, Miss Reynolds contended and the learned trial judge had rightly found that they did.

Analysis

[17] Firstly, it is my view that whatever list the respondent may have given to the customs broker was, unless produced to the court, of no assistance to the respondent's case in support of the claim that items were missing. All, it seems to me, that the learned judge could be indicating here, was that she accepted as true the respondent's evidence of what he had done, namely, that he had engaged the services of a customs broker to whom he had given documents inclusive of a list, to effect clearance through customs, of his truck and its contents and the documents had not been returned to him.

[18] Secondly, the learned trial judge's finding that the police had searched the truck, that being their only objective in seizing it, was, in my opinion, flawed. Even if there was evidence that the police had seized the truck in order to search it, there was no evidence that it was searched. The pleadings did speak to a thorough search of the truck and its contents purportedly for firearms and or illegal drugs, further stating that when nothing illegal was found the truck was "relocked and it and its contents [were] handed over to the Respondent's agent".

But, it is firmly settled law that pleadings are not evidence and no evidentiary support was provided. The respondent did allege in his witness statement that the truck was opened and searched but that was clearly hearsay as his evidence was that he was out of the jurisdiction at the time the truck was taken into the custody of the police and in his witness statement his son stated that the police had told him they wanted to search it but he had denied them permission to do so. The appellants' witness also testified that he had no knowledge of any search. If it is that the learned trial judge sought to draw the inference that in searching the truck the police had the opportunity to remove items from it the same opportunity presented itself in their possession of the key to the side door while the truck was in their custody. What the evidence disclosed is that the police had seized the truck under the mistaken belief that it belonged to a named criminal and in furtherance of their enquiries in that regard.

Grounds 3 and 5 to 7

[19] These grounds may conveniently be dealt with together. Mrs Dixon Frith referred to the time-honoured and fundamental principle relating to the conduct of civil proceedings that "he who alleges must prove" and submitted that, although the seizure of the truck was admitted, the onus was on the respondent to prove its contents. The respondent had no documentary proof to support his bald assertions that items were stored in the truck, counsel argued and his witnesses were of no assistance to him in that regard as they could not speak to

the contents of the truck, although each had had it in his custody for some time. It was counsel's contention that the learned judge ought not to have relied on the memory of the respondent (which was demonstrably faulty) as to what was missing, purely on the basis that she believed him. She argued that on the evidence adduced by the respondent, the learned trial judge could not properly conclude that the respondent had exported the alleged missing items into Jamaica and therefore could not properly have found that he had proved his case to the required standard.

[20] It was Mrs Dixon Frith's submission that notwithstanding the learned judge's finding that the "listed" items were in the truck, she had expressed uncertainty about their existence, using the words "whatever it might have been" in reference to them. However, Miss Reynolds argued that this submission was an attempt by the appellants to mislead the court as the words used by the learned trial judge were taken out of context and this is clearly to be seen by a perusal of the full transcript of the evidence. Counsel argued that it was not the existence of the items but their identity and value that were in issue. Further, counsel submitted, relying on paragraph 4.02 of Phipson's text, since it was not in issue that items were in the back of the truck when it was seized by the police, the question of burden of proof did not arise. Citing the case of **Morrison v Wiggan et al** SCCA No 56/2000, delivered on 3 November 2005, counsel further argued that an appellate court will not lightly interfere with a trial judge's findings of fact and in this case no basis for the court's

intervention has been established.

[21] In her response to the appellants' submission that the learned trial judge should not have accepted the valuation of the missing items given by the respondent from his memory, with no supporting receipts, Miss Reynolds contended that the appellants had failed to provide any evidence of the value of these items, so that the learned trial judge was correct in accepting the only evidence of value, which was that given by the respondent.

[22] Turning to the question of the applicable law, Mrs Dixon Frith argued that the respondent had failed to establish the elements of the tort of conversion and she referred to Clerk & Lindsell on Torts, 18th edition, paragraphs 14-03 and 14-08 in which the learned authors state that the essence of conversion is the unauthorized dealing with the claimant's chattel so as to question or deny his title to it. Seizure under a valid warrant, counsel argued, was not an unauthorized dealing for the purposes of this tort and in this regard she referred to the case of **Webb v Chief Constable of Merseyside Police** [2000] QB 427 where May LJ stated that a person in possession of goods may have his right of possession temporarily suspended or temporarily divested if goods are seized by the police under lawful authority. She also cited the case of **Costello v Chief Constable of Derbyshire Constabulary (CA)** [2001] 1 WLR 1437 which relied on the principle in **Webb**.

[23] In the instant case, Mrs Dixon Frith argued, the learned trial judge did not

make a finding concerning the warrant, but, nevertheless, concluded that the police seized the truck without lawful justification. Counsel submitted that the existence of the warrant was not in dispute (but this was erroneous, Miss Reynolds said, as the appellants' witness was cross-examined at length about the warrant). Mrs Dixon Frith cited the cases of **Fouldes v Willoughby** (1841) 8 M & W 540; (1841)151 ER 1153 and **Lancashire and Yorkshire Rail, Co and Others v MacNicoll** [1918-19] All ER Rep 537, as authority for the proposition that simple asportation of a chattel, without any intention of making further use of it, is not sufficient to establish conversion as mere possession of another's goods does not amount to conversion. Counsel argued that the seizing of an item does not equate to converting it to one's own use with the intention that the tort requires, so that the learned trial judge erred in finding that the absence of justification to remove the truck and its alleged contents amounted to conversion.

[24] Further, counsel argued, with no evidence that the alleged missing items went missing while the truck was in the custody of the police and not while in Portland, the court could not properly conclude that the items were taken by the police and converted to their own use. There was a two year gap between the handing over of the truck to the respondent's brother and its opening by the respondent and the learned trial judge did not make any determination as to the nexus between the police and the alleged missing items in those circumstances. She referred the court to the judgment of Viscount Maugham in the case of

Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd [1942] AC 154, 174 as supportive of her submission. It was counsel's contention that the learned trial judge's ruling was unsound and she relied on the case of **Watt (or Thomas) v Thomas** [1947] AC 484 for its clear exposition of the role of the appellate court in reviewing the trial judge's findings of fact with the jurisdiction to intervene and reverse findings which are plainly wrong.

[25] Importantly, counsel submitted, the learned trial judge did not appear to have had regard to section 33 of the Constabulary Force Act (the Act) which mandates that it is for the respondent to prove his case and not for the appellants to disprove it. The judge made no finding that the police had acted without reasonable or probable cause or acted maliciously in seizing the truck and/or in relation to the alleged missing items, counsel contended. In all the circumstances her orders should be set aside with judgment entered in favour of the appellants, Mrs Dixon Frith submitted.

[26] In her submissions Miss Reynolds contended that the learned trial judge, having examined the circumstances of the seizure of the truck, concluded that there was no lawful excuse for it. In counsel's view it was the responsibility of the officer who seized the truck to make a list of the contents of the truck and have the respondent's brother sign it. The learned trial judge, on the case before her, was entitled to find that there was a demand for the return of the goods and that conversion was established.

Analysis

[27] In my view, these grounds require a determination of three issues, namely:

(i) whether the learned trial judge had properly taken into account section 33 of the Constabulary Force Act and the evidence relating to the warrant, in coming to her determination that the police acted unjustifiably;

(ii) whether the learned trial judge had correctly appreciated the evidence of the missing goods and their value and whether she had been correct in her finding which indicated that the appellant had a duty to disprove the respondent's assertions as to the missing goods and their value; and

(iii) whether the learned trial judge had correctly applied the law relating to the tort of conversion to the circumstances of the instant case.

Issue (i)

[28] It is useful at this point to refer to the provisions of section 33 of the Act

which read as follows:

> "33 Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; **and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.**" *(Emphasis added)*

It was therefore incumbent upon the learned trial judge to make a determination as to whether the respondent had proved that the police had acted maliciously or without reasonable or probable cause in seizing the truck. The section makes it exceedingly clear where the burden of proof resided.

[29] It was perhaps open to the respondent to argue that the learned trial judge's finding that the police acted without lawful justification in seizing the truck, could be interpreted as meaning that she found that the police had acted maliciously or without reasonable and/or probable cause. Miss Reynolds did contend that the learned judge had examined the circumstances of the seizure and concluded that there was no lawful excuse for it. The argument would therefore seem to be that, inferentially, the learned judge had rejected the evidence that the police acted under the authority of a warrant. But, these, in my view, are fundamental aspects of the case and should have been directly addressed by the learned trial judge, notwithstanding that she did not give a full and detailed judgment. This omission becomes even more significant when

juxtaposed with her findings of "undisputed facts" which, in my opinion, must adversely impact considerations of malice and reasonable and probable cause for the actions of the police.

[30] The learned judge should have shown, even briefly, how, in light of the undisputed facts, she nevertheless found that the seizure was unjustified. And, although it is correct that questions were asked of the appellants' witness about the warrant one question of significance which bears highlighting was whether he would have been surprised to learn that the respondent's brother had said he was given no warrant by the police. The witness' response was that he would have been surprised and the matter ended there. No suggestion followed that the warrant did not exist, for instance and, in all the circumstances, the learned judge was obliged to make a finding in this regard. In my view, the appellants' submissions on this issue are sound.

Issue (ii)

[31] I must admit to a difficulty in understanding the basis for the learned trial judge's finding of a duty on the part of the police to make a list of the items in the truck. It certainly may have been helpful to them if they did, but why was there a duty on the police more than on the respondent's agent at the point when the truck was being handed over to him, especially since he claimed to have seen the truck open on an occasion when he went to the Narcotics Division, before it was delivered to him? Furthermore, in circumstances where

the truck had been opened and another key then existed besides the key which the respondent had kept in his possession, on what basis did the learned trial judge conclude that whatever goods may have been missing were the responsibility of the police? There was no evidence as to where and how that key was kept, after the truck was handed over to the respondent's agent and why, according to the respondent, on his return to the island on two occasions before 2006 he could not open the truck and was able to open it only in 2006 when he was given the key to the side door. Why was this key not available to him before? The respondent's son testified that only the key for the ignition and the front doors was given to him when the truck was returned to him so from whence came the key for the side door, allowing access to the back of the truck, in 2006?

[32] A most significant error made by the learned trial judge, in my view, was her finding that the truck had remained in Grierfield for the entire time after it was cleared from the wharf, apart from when it was seized by the police. This, in large measure, may well have been what informed her finding of responsibility in the police for the missing items but, the respondent had made no such assertion. It was never in dispute that the truck had been returned to the respondent's son who took it to Portland where it remained for about two years before it was returned to Grierfield. There is no indication that the learned trial judge took this into account in arriving at her decision.

[33] As Mrs Dixon Frith correctly submitted, the burden of proving his case

was on the respondent, on a balance of probabilities. There was no reverse burden on the appellants to disprove his case and I cannot agree with the respondent's submission that there was a burden on the appellants to provide evidence of the value of the items asserted to have been in the truck, leaving the learned judge free to accept the respondent's valuation. That submission was consistent with the learned judge's observation that the respondent's valuation was unchallenged, but, with all due respect to the learned trial judge, the appellants never acknowledged the existence of the alleged missing items. From the very outset they sought to challenge their existence on the basis that the respondent had failed to provide any evidence of them, apart from his "bald assertions". Therefore, for their part, the question of valuation would not have arisen. And the valuation of the goods to the last cent without benefit of receipts did attract the attention of the appellants as indeed it should especially since there was evidence that receipts existed and were in the possession of the respondent's son, yet they were not provided to the court. How were the probabilities effectively to be balanced when all that the learned trial judge had before her, were forthright and truthful impressions, according to her findings, without the requisite evidence to support the claim. There is, it seems to me, merit in the appellants' submission that, implicit in this approach, was a lowering of the required standard of proof.

[34] It follows from the above that the respondent's submission that no issue was joined between the parties on the existence of the missing items was also

inaccurate. The defence filed by the appellants had made it clear that the respondent would be put to proof concerning the items. Accordingly, Miss Reynolds' reliance on the statement in Phipson's text to the effect that the question of the burden of proof does not arise where the issue is not joined between the parties, is misplaced. In my opinion, there was no burden on the appellants to prove that the items did not exist and if they were found to exist, to provide evidence of their value.

Issue (iii)

[35] The learned trial judge's finding that the police had converted the items she found to have been missing, must now be addressed. The learned judge had placed reliance on the definition of conversion in the 21st edition of Salmon & Heuston's Law of Torts which was referred to in paragraph [9] above but is repeated here for convenience:

> "A conversion is an act or complex series of acts of willful 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 and merely to detain them in defiance of the owner's title 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) a 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 Sutherland Publishing Co** [1939] AC 178, 189 and **Penfolds Wines Pty Ltd v Elliott** (1946) 74 CLR 204, 229). It seems to me that Mrs Dixon Frith was correct in her submission that the learned trial judge failed to take account of these two elements which she was obliged to do before she could make a finding that the action of the police amounted to conversion.

[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 the use of it at all times (see **Fouldes v Willoughby**). This, at first glance, would seem to provide some authority for

the learned trial judge's finding that in taking the truck and its contents into their custody without the consent of the respondent, the police had deprived him of the use and possession of his "missing" items and had therefore converted them. 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 that the defendant refused or neglected to comply with the demand. In the instant case, the learned trial judge did not make a finding that there was a demand, so that her finding that there was conversion was clearly not based upon this method of establishing the tort (see **Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd** [1992] 1 WLR 1253).

[38] The case of **Brightside Co-operative Society v Phillips** [1964] 1 WLR 185 provides authority for the proposition that if a claimant alleges the conversion of a number of chattels, it is not necessary to particularize them item by item as a general description of their nature and value is sufficient. Accordingly, for the purposes of a finding of conversion it would seem that the learned trial judge need not have had a list of the items but would have needed to place reliance on a general description of them, so that her reference to the

"missing" items as "whatever it might have been" would not suffice. She clearly expressed a finding that "the listed items were in the truck", referring to the respondent's evidence of what the items were, which she accepted as truthful, so that it is difficult to understand why after making that finding she would go on to refer to them in that "off-hand" manner. The words certainly would seem to provide a basis for Mrs Dixon Frith's contention that it is an expression of uncertainty about the existence of the "missing" items.

[39] The authors of Clerk and Lindsell on Torts, 18th edition, relied on by Mrs Dixon Frith, state, at paragraph 14-03 that "the essence of conversion lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party", so it clearly is not concerned merely with an interference with the claimant's possessory interest in his chattels but also with "an injury to his right or title in them". However, whether guidance is taken from Salmon & Heuston or Clerk and Lindsell, 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 Iraqi Airways** [2002] 2 AC 883). The appellants made submissions on who was entitled to sue – whether it was the respondent as the alleged owner or his brother in whose possession the truck and contents were at the time of the seizure but, in my opinion, that need not detain the court. What is at issue here is whether the tort of conversion had in fact occurred. Did the evidence before the learned judge support a finding that conversion had

occurred?

[40] I am of the view that the learned trial judge did not adequately analyze the evidence before her and erred in her application of the law in relation to the tort of conversion, to that evidence. There was no analysis relating to the two elements necessary to establish willful interference. Further, in my opinion, the learned judge could not properly come to a conclusion that the police had acted without lawful justification without first making a determination concerning the existence of a warrant. The appellants' submissions that when goods are seized by the police under a warrant the possessor's right or title to the goods is not abridged and that possession is thereby merely suspended, are soundly based on authority such as **Webb** and **Costello v Chief Constable of Derbyshire Constabulary**. It was the contention of the appellants that the police derived lawful authority to detain the truck and its contents from a lawful warrant. In the circumstances, the learned judge was obliged to expose her thinking on the existence of the warrant.

[41] The evidence indicated that once the police no longer had an interest in the truck it was returned to the respondent's agent. Indeed, there was no evidence of any intention on the part of the police to exercise dominion over the respondent's truck and its contents. Merely to take the items into their custody without the permission of the respondent, as found by the learned trial judge, did not suffice to establish that conversion had occurred. The learned trial judge stated that because she found that the respondent had been deprived of the use

and possession of his items it followed that the police had converted them. However, it is clear from the authorities that the mere taking without the intention to exercise dominion over them is no conversion (see **Fouldes v Willoughby** and **Lancashire and Yorkshire Rail** where Atkin J said "it appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion providing it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right").

[42] The appellants' notice of appeal listed 10 challenges to the learned trial judge's findings of facts. They challenge for instance the judge's finding about the existence of items in the truck, some of which were missing; the basis for accepting the respondent's evidence; the searching of the truck; and the failure of the police to take inventory of the items. It is therefore necessary to examine the role of the appellate court in dealing with challenges of this nature. It is well established that an appellate court will only interfere with a trial judge's finding of fact if the finding is based on some error of law or if the judge misapplied some principle of law or so misdirected himself/herself on the facts as would entitle the appellate court to say that it would be manifestly unjust to allow the judgment to stand (see **Edwin Clarke v Colin Edwards** (1970) 12 JLR 133).

[43] In **Watt (or Thomas) v Thomas** Lord Simon had this to say:

> "... the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and

> circumstances of the case under consideration".

Lord Du Parcq expressed his opinion in the following terms:

> "All the authoritative decisions which relate to the proper attitude of an appellate court towards the findings of fact of the trial judge naturally tend to lay emphasis on one aspect of the question, either on the fact that the appellate court's duty to see justice done may constrain it to reject the judge's findings or on the undesirability of deciding a case on a written record against the view of the judge who heard the witnesses.
>
> But, though one aspect may be emphasized, the other must always be present to the mind of the court. Thus, in **Yuill v Yuill** where the decision of the judge was reversed, Lord Green M.R. said: "It can, of course only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

This case has been approved and consistently applied in this jurisdiction and must similarly be applied in the instant case. Her significant findings of fact were unsupported by the evidence and she misapplied principles of law relating to the burden and standard of proof and the requirements for establishing the tort of conversion. Therefore, the learned trial judge's order cannot stand and should be set aside.

[44] In my view, the foregoing make it unnecessary to consider grounds 4, and 8 to 10, dealing with quantum of damages. Therefore, in the final analysis, I would allow the appeal, set aside the order made on 20 January 2010 and enter judgment for the appellants with agreed or taxed costs both here and in the

court below.

MORRISON JA

ORDER

Appeal allowed. Order made on 20 January 2010 set aside. Judgment entered for the appellants. Cost to the appellants both here and in the court below to be taxed if not agreed.