[2019] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 11/2015

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**REVEREND DR RALPH GRIFFITHS**	**APPELLANT**
AND	**ATTORNEY GENERAL FOR JAMAICA**	**1st RESPONDENT**
AND	**TRANSPORT AUTHORITY**	**2nd RESPONDENT**

Oraine Nelson instructed by Forsythe and Forsythe for the appellant

Harrington McDermott instructed by Campbell McDermott for the 2nd respondent

20 February 2018 and 20 December 2019

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my learned sister, Sinclair-Haynes JA. I agree with her reasoning and conclusion and, except for commenting on one salient issue, I have nothing further to add.

[2] The appellant has made a claim against the respondents to recover substantial damages arising from the seizure of his motor vehicle that he was operating as a public passenger vehicle at all material times. The gravamen of his claim lies in his contention

that the police had no lawful authority to seize his vehicle on 17 November 2015, for operating without a hackney carriage licence (road licence). His contention in this regard is that, although he was not issued a renewed road licence to operate the vehicle on the day it was seized by the police, he had submitted his application for renewal to the Transport Authority in March 2015. He maintained that the Transport Authority's policy, at the time, was to permit taxi operators to operate their taxis, while their applications for renewal were being processed and so, he had the legal right to operate his vehicle until the licence was received.

[3] The appellant also contended that the police ought to have accepted the receipt he was issued by the Transport Authority, upon submitting his application, as proof that he was authorised to operate his vehicle as a public passenger vehicle, pending the renewal of his road licence. The Transport Authority denied the existence of such a policy. Its case was that the appellant was never authorised to drive without the road licence.

[4] Whether or not there was such a policy as contended by the appellant was a question of fact for the learned trial judge. It depended on the credibility of the parties. The learned judge concluded at paragraphs [11] and [12] of his judgment that the vehicle was being unlawfully used on the day when it was seized "in that there was not then in place, in favour of the [appellant] the applicable road licence". This could translate into an acceptance of the case advanced by the Transport Authority, which would have amounted, in part, to a finding of fact. This finding was open to him on the

evidence and so, it cannot be said that he was plainly wrong in arriving at that conclusion.

[5] However, even if it was the policy of the Transport Authority to permit taxi operators to operate their vehicles as public passenger vehicles, while their applications for renewal were being processed, that was not the law.

[6] The vehicle would have been seized and detained by the constable pursuant to either sections 61(4A), 61(4B) of the Road Traffic Act or sections 13(2)(a)(v) and 13(2)(b) of the Transport Authority Act. These provisions make it palpably clear that the appellant was to have had the requisite licence in his possession at the time his vehicle was on the road being operated as a public passenger vehicle. He had no such licence. Therefore, the constable would have been right when he acted within the ambit of the law to seize and detain the vehicle. He would not have bound by any policy of the Transport Authority. Furthermore, and in any event, there is no evidence that the constable knew of such a policy.

[7] Therefore, when one applies the relevant law to the undisputed fact that was before the learned judge that the appellant's road licence had expired and had not yet been renewed at the time the vehicle was seized by the police, it cannot be said that he erred, in law or in fact, in concluding that the seizure was not unlawful.

[8] Accordingly, this court has no justifiable basis to disturb the learned trial judge's rejection of the appellant's case that the seizure and subsequent detention of his vehicle by the police, for operating without a road licence, was unlawful. It is, primarily,

for that reason that his claim for damages in the sum $9,779,500.00, which is predicated on his case of an unlawful seizure, detention and sale of his vehicle, cannot succeed.

SINCLAIR-HAYNES JA

[9] The appellant, Reverend Dr Ralph Griffiths, has appealed Kirk Anderson J's decision refusing his claim of $9,779,500.00 as damages against the Attorney General and the Transport Authority for detinue and negligence.

The background

[10] The appellant was at all material times the owner of a Toyota vehicle with registration number PB9407. The vehicle was primarily used as a public passenger vehicle. Operators of public passenger vehicles, by virtue of section 61(1) of the Road Traffic Act 1938, are required to be licensed to so operate. The Transport Authority was the entity responsible for issuing the hackney carriage/public passenger vehicle road licences.

[11] The appellant's vehicle was seized on 17 November 2005 by Constable Nelson, who identified himself as a member of the Jamaica Constabulary Force, for operating as a public passenger vehicle without a valid licence to do so. The vehicle was taken to the Transport Authority's pound where it remained until it was sold, on a date unknown, by the Transport Authority at an auction for the sum of approximately $50,000.00.

[12] It was the appellant's claim that the seizure and detention of his vehicle for allegedly operating without a valid road licence was wrongful and/or malicious, and

without reasonable or probable cause. The appellant consequently instituted proceedings in the Supreme Court against the Attorney General, Constable Nelson and the Transport Authority for negligence and detinue.

[13] The Attorney General was joined as a party to the claim, by virtue of the Crown Proceedings Act, as being vicariously responsible for the acts and/or omissions of Constable Nelson and the Transport Authority. It was averred that Constable Nelson, at the material time, was under the direction and control of the Crown in the performance of his duties. Constable Nelson was, however, not served with the claim form and particulars of claim. The claim expired against him and the matter proceeded in his absence.

The appellant's case

[14] It was the appellant's case that the road licence for the vehicle would have expired on 31 March 2005. In anticipation of its expiration, on 29 March 2005, the appellant attended the Transport Authority's office and paid the required fee for which he was given a receipt and instructions to have the vehicle tested. On 3 May 2005 the vehicle was duly tested and approved as being fit and road worthy. He submitted the certification to the Transport Authority as directed.

[15] On several occasions prior to the seizure of his vehicle, the appellant returned to the Transport Authority for the licence but on each occasion he was told that the licence "was not ready".

[16] The appellant averred that it was not customary for licences to be issued on the day the application was submitted and the payment made. On his evidence, he proceeded to operate the vehicle as a public passenger vehicle, pursuant to what he stated was the Transport Authority's policy permitting the holders of such receipts to operate their vehicles, pending the issuance of the licence.

[17] On 17 November 2005, the day of the seizure, Constable Nelson was provided with a copy of the application and the receipt, and it was explained to him that the appellant was awaiting the issuance of the road licence by the Transport Authority. Constable Nelson rejected his explanation, issued a ticket for operating as a public passenger vehicle without a valid road licence and seized the vehicle.

[18] It was the appellant's evidence that after the seizure of the vehicle, he returned to the Transport Authority on several occasions and enquired about the licence, but was eventually told that his application file could not be found. He attended the Traffic Court on four occasions in respect of the ticket but neither Constable Nelson nor any representative of the Transport Authority attended. The matter was consequently dismissed.

[19] Notwithstanding his many requests to have the licence issued and the vehicle returned to him, the Transport Authority refused and/or failed to return the vehicle. In support of that contention, the appellant exhibited the letters which he and his attorneys had written to the Transport Authority, the Ministry of Justice, the Office of the Prime Minister, the Office of the Public Defender and the Ministry of Transport and

Works, explaining the circumstances of the seizure of his vehicle and requesting their assistance to have the vehicle returned to him.

[20] The then General Manager of Legal and Corporate Services for the Transport Authority, Miss Jean Williams, advised the Office of the Public Defender, by letter dated 17 July 2007 that the appellant's file had been misplaced. The letter also requested that the appellant resubmit the documents for the licence, to enable the Transport Authority to create a duplicate file and proceed with the application for the Hackney Carriage Licence.

[21] By way of letter dated 9 June 2008, the Transport Authority expressed to the appellant its willingness to release the vehicle to the him. In response, the appellant informed the Transport Authority, *inter alia,* that "without the road license [sic] the car is useless and park indefinite [sic]". He expressed his dissatisfaction at having submitted his application, paid the requisite fees, but, up to that juncture, still not having received the licence and having the vehicle remain in the Transport Authority's pound. He lamented the futility of his many efforts to have the vehicle released, including his meetings with the Transport Authority's manager and the Transport Authority's letter indicating its willingness to release the vehicle. Notwithstanding, after several years, the Transport Authority failed to do so, and instead sold the vehicle at a private auction.

[22] The appellant complained that the deprivation of the use of his vehicle from 17 November 2005 to 30 April 2013 had resulted in "considerable trouble, inconvenience,

anxiety, expenses and loss". He claimed that he had also suffered the loss of use of his vehicle for social and domestic purposes in the sum of $2,722,000.00. He further claimed loss of the expenses of $80,000.00, which he incurred as payment for the insurance to operate the vehicle and loss of the sum of $20,000.00 which was paid to the Transport Authority for the renewal of the licence. He averred that at the point in time of its seizure, the vehicle was in good working condition and was valued at $160,000.00. He computed his loss of income in the sum of over $6,797,500.00.

The applications before the learned Master

The Attorney General's and the Transport Authority's defences before the learned Master

[23] The Attorney General and the Transport Authority failed to file their defences within the time prescribed; ergo, the appellant filed a notice of application for court orders for permission to enter judgment in default on 3 January 2011.

[24] On 28 March 2012, the Director of State Proceedings (DSP) filed a request for information and a notice of application for court orders, in which she sought permission to have the defences, which were filed out time, stand as having been properly filed. She also requested that the claim against the Attorney General be struck out as she was not a proper party to the claim. On 29 March 2012, the DSP filed a defence on behalf of the Transport Authority.

[25] In her defence, the Attorney General averred that, at the material time, Constable Nelson was not employed to the Jamaica Constabulary Force or the Island Special Constabulary Force, as he had resigned and had ceased to be employed by the

Crown as of 1 October 2005. The Attorney General consequently contended that the vehicle was not seized by an agent or servant of the Crown and she was therefore not vicariously liable for the Constable's actions.

[26] The Transport Authority averred, in its defence, *inter alia* that by virtue of section 3(1) and paragraph 9 of the First Schedule of the Transport Authority Act, it is a body corporate and therefore capable of being sued its own right. Accordingly, it argued that the Attorney General was not the proper legal representative for the Transport Authority, because it is not an agent or servant of the Crown.

[27] Master Audre Lindo, as she then was, acceded to the DSP's request and ordered, *inter alia,* that the defences were to stand as filed and that the claim was struck out against the Attorney General, on the ground that the appellant had no real prospect of succeeding against her, because she was not a proper party to the claim. The learned Master awarded costs to the Attorney General. No order was however made for the removal of the Attorney General's name from the proceedings.

The Transport Authority's defence at trial

[28] In its further amended defence, filed 11 November 2014, the Transport Authority maintained that the vehicle was not seized by its agent or servant, or with its prior knowledge or permission and thus it was not liable for its seizure and detention. It averred that its pound is utilized by the police. Vehicles which are seized for operating as public passenger vehicles without a valid road licence are stored there. It also averred that the appellant's application for renewal was not intentionally misplaced.

[29] The Transport Authority averred in its further amended defence that the road licence for the period of April 2005 to March 2006 had been made available for collection by the appellant by January 2008. It relied on its letter of 9 June 2008 addressed to the appellant, in which its Managing Director at the material time, indicated the Transport Authority's willingness to release the vehicle.

[30] The Transport Authority also contended that an application for the renewal of a road licence does not equate to an automatic granting of the licence itself. It was the appellant's "own negligence" of operating without a valid road licence, which resulted in the seizure and detention of his vehicle, it contended. The Transport Authority also declared that the vehicle was no longer in its possession as it was sold to recover storage fees.

[31] The Transport Authority further averred that the appellant's application for renewal of the road licence was not intentionally but rather inadvertently misplaced. It had taken reasonable steps, as soon as the misplacement was brought to its attention, to "have same remedied".

[32] The Transport Authority contended that there was no causal link between the appellant's alleged loss and any alleged act or omission on its part. It stated that the appellant's alleged loss suffered was not reasonably foreseeable and it cannot be liable for any damages allegedly sustained by the appellant.

[33] It also denied that the continued detention of the vehicle was as a result its negligence and instead averred that, in the circumstances, the appellant was negligent

and/or contributorily negligent. The Transport Authority contended that the appellant was under a duty to mitigate his loss, which he failed to do. The Transport Authority is consequently not liable for any loss sustained by the appellant.

Ms Banneta Benjamin's evidence

[34] On 3 November 2014, Ms Banneta Benjamin's witness statement was filed on behalf of the Transport Authority. At commencement of the trial, counsel for the Transport Authority requested that another witness statement of Ms Benjamin, dated 11 November 2014, be allowed to stand in place of her previous statement. The learned judge granted the application and allowed the witness statement to stand.

[35] Ms Benjamin was the acting Licensing Manager of the Transport Authority at the time of the trial. She had been employed to the Transport Authority for 19 years, 18 of which were spent in the Licensing Department. Although it was the Transport Authority's defence that they had misplaced the appellant's application file, Ms Benjamin's evidence sought, instead, to ascribe blame entirely on the appellant by her assertion that his file was incomplete. It was her evidence that the appellant failed to submit the necessary insurance certificate with his application. He was also instructed to have the vehicle inspected by examiners at the Transport Authority's Lakes Pen location, but he failed to do so until 3 May 2005, at which time the insurance certificate was still outstanding.

[36] At no time did the appellant return to the Transport Authority to submit the outstanding insurance certificate. Because of his failure to do so, his application

remained incomplete, consequently a renewed hackney carriage licence could not have been issued. According to her, the appellant only returned to the Transport Authority after the seizure of the vehicle.

[37] Ms Benjamin categorically rejected the appellant's contention that the Transport Authority's policy was to allow owners and/or drivers to operate with their receipts until the licence was issued. Constable Nelson therefore had reasonable and probable cause to seize the vehicle, she asserted.

[38] It was also her evidence that she was unaware of any demand made by the appellant for the return of the vehicle. The Transport Authority, according to her, only became aware of the issue of the seizure of the vehicle when it received a letter from the Public Defender in 2007, to which the then legal officer responded in July 2007.

[39] She referred to the Transport Authority's letter of 9 June 2008, in which it expressed its willingness to release the vehicle. The appellant, however, failed to collect it. She acknowledged that the vehicle was no longer in the Transport Authority's possession because it was sold by way of auction for approximately $50,000.00 to cover the storage fees. Her evidence was however silent as to when it was sold.

[40] Regarding the misplaced file, in her witness statement of 11 November 2014, Ms Benjamin said:

> "24. …[T]he file was not beneficial to the process as said file contained only vehicle documents as our Licensing Management Information System contained all information

> needed. In the interest of Mr Griffiths, he was asked to resubmit said documents, which he refused.
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> 25. Miss Williams then wrote a letter to the Collector of Taxes, dated August 29, 2007, requesting the assistance of his office in getting the Claimant's vehicle registered PB 9407 licensed. The Transport Authority therefore assisted in facilitating the renewal of the Claimant's hackney carriage license [sic].
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> 26. In spite of the attempts made by the Transport Authority to assist in resolving the matter of the seizure and licensing of the vehicle, the Claimant failed to co-operate with the Transport Authority by, among other things, attending with the requisite documents.
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> 27. The Claimant came in to the Transport Authority sometime in 2007 and resubmitted documents as well as the Certificate of Fitness so that a hackney carriage licensee [sic] for the period April 2005 to March 2006 could be processed.
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> 28. A hackney carriage license [sic] for the vehicle in question was printed January 10, 2008 for the period April 2005 to March 2006 to facilitate the renewal process."

[41] It was her evidence that although the appellant's file had been misplaced, the Transport Authority's "Licensing Management Information System" (LMIS), which is an electronic database for applications, confirmed that no insurance certificate had been submitted for him.

[42] The Transport Authority, by way of letter of 17 July 2007, had caused its legal officer to advise the Public Defender, that the appellant's file had been misplaced and it also requested that the appellant resubmit his documents. It was, however, Ms Benjamin's evidence that, in any event, the file would not have been beneficial because,

according to her, the LMIS revealed that not all the documents were on the file (that is, the insurance certificate was not on the file).

[43] It was also her evidence that the appellant had refused the Transport Authority's request for him to resubmit the documents. She then, in that same witness statement, seemingly contradicted herself by stating that he had resubmitted the documents "sometime in 2007".

[44] Ms Benjamin was unable to recall the exact date the appellant's file was misplaced and, although she was involved with the processing of the renewal of his application, she was unable to say for how long the file was misplaced.

[45] On Ms Benjamin's evidence, the licence was printed on 10 January 2008 for the period April 2005 to March 2006. It was, however, also her evidence that the appellant was contacted in 2007 and advised that the licence was "available for issuance and collection". In response to the learned judge's inquiry, she admitted that the licence was never issued to the appellant.

The judge's decision

[46] On 30 January 2015, K Anderson J dismissed the appellant's claim and entered judgment in favour of the Attorney General and the Transport Authority, with costs to the said respondents to be taxed if not agreed.

The appeal

[47] Displeased with the learned judge's decision, on 5 February 2015, the appellant filed a notice of appeal containing the following grounds of appeal.

The original grounds of appeal:

"1. That the learned trial judge took into account matters that were immaterial and or irrelevant in coming to his conclusions.

2. That the learned trial judge misdirected himself in his consideration of the material/evidence before him.

3. That in misdirecting himself the learned trial judge came to erroneous and or improper findings of fact.

4. That the claimant/appellant has a good and arguable appeal against the findings of the Honourable Court.

5. That the claimant/appellant has applied to this honourable court as soon as is reasonably practicable after the decision/orders have been made.

6. That the learned trial judge erred and misdirected himself when he found that the only proper defendant in the suit is the first defendant.

7. That the learned trial judge misdirected himself in his consideration of the material/evidence before the honourable court.

8. That in misdirecting himself, the learned trial judge came to erroneous and or improper findings of fact.

9. That the learned trial judge erred and misdirected himself when he found that the claim against the third defendant cannot succeed.

10. That the learned trial judge erred and misdirected himself when he found that the claim against the second defendant must fail.

11. That the learned trial judge failed to take into account that at all material times, the second defendant represented himself as a servant and/or agent of the crown or as the agent of the third defendant.

12. That the learned trial judge failed to take into account that the second defendant had no legal authority to seize the appellant's vehicle.

13. That the learned trial judge erred and misdirected himself when he filed [sic] to take into account that the third defendant had no basis for keeping the appellant's vehicle.

14. That the learned trial judge erred and misdirected himself when he found that the claimant/appellant did not make unqualified demands for the return of the vehicle.

15. That the learned trial judge erred and misdirected himself when he considered the question as to whether the claimant/appellant's vehicle was insured as this was not an issue raised in the pleadings and no evidence of this was led by any of the parties. The court in fact had ruled that he would not allow the defendant's witness to give evidence on this as it was not raised in the defence.

16. That the learned trial judge erred and misdirected himself when he found that the third defendant did not act unreasonably in not granting the licence when it was applied for.

17. That the learned trial judge erred and misdirected himself when he found that the claimant/appellant did not produce all the necessary documents required in law for him to obtain the licence.

18. That the learned trial judge erred and misdirected himself when he found that the vehicle was not wrongly seized in law.

19. That the learned trial judge erred and misdirected himself when he found that misplacement of a file in and of itself cannot assist the claimant in his claim.

20. That the learned trial judge erred and misdirected himself when he found that the claimant's claim in detinue and negligence must fail and has failed."

[48] On 16 April 2015, a supplemental notice of appeal was filed on the appellant's behalf, containing the following supplemental grounds of appeal:

The supplemental grounds of appeal:

"1. That at paragraphs four to six of his Lordship's judgment, that the learned trial judge fell into error when he found that the claim against the Transport Authority must fail in its entirety.

2. That further even if the crown was not liable, the third defendant was acting in its own capacity when it detained the claimant's vehicle.

3. That the defendants sought to amend their defence to include particulars concerning the claimant's policy of insurance for the vehicle. The honourable court did not allow this amendment and therefore the issue of the claimant's alleged lack of insurance for the said vehicle was not pleaded and was not in evidence before the honourable court. The only statement of lack of insurance was cited in the third defendant's witness statement.

4. That at paragraphs twelve and eleven of his Lordship's judgment, the learned trial judge fell into error and misdirected himself on the relevant law and the facts before him when he found that

'the claimant's vehicle was not unlawfully detained by the second and third defendants'.

5. That at paragraphs twelve and eleven of his Lordship's Judgment, the learned trial judge fell into error and misdirected himself on the relevant law and the facts before him when he found that 'the claimant's vehicle was being unlawfully used on the day when it was seized' as no such evidence was led before the honourable court during the trial of this matter.

6. That at paragraphs thirteen to fifteen of his Lordship's judgment, the learned trial judge fell into error and misdirected himself on the relevant law and the facts before him when he considered the issue of whether the claimant's vehicle was insured at the time that it was seized. That there was no such evidence before the Honourable Court and the learned trial judge had disallowed the defendants' sole witness from being questioned on the matter and then ought not to be a matter properly contemplated by his Lordship.

7. That at paragraphs eighteen to thirty-six of his Lordship's judgement, the learned trial judge fell into error and misdirected himself when he found that the claimant failed to prove his claim in negligence and detinue.

8. That the learned trial judge failed to properly consider and weigh the evidence before the honourable court concerning the extensive efforts made by the claimant to secure the release and return of his vehicle to the claimant.

9. That the learned trial judge ought to have properly considered the effect of the misplacement of the claimant's file by the third defendant had on the claimant's ability to move about freely, earn a living and carrying on his daily activities.

10. That the learned trial judge ought to have properly considered the purpose and reasoning behind the

third defendant's issuing of a hackney carriage licence for the claimant's vehicle in 2008.

11. That the learned trial judge failed to properly assess and weigh the evidence before the Honourable Court and erroneously concluded that the claimant's vehicle was lawfully detained and lawfully sold and also lawfully seized.

12. That the learned trial judge failed to properly assess and properly consider the extent of the claimant's losses arising from the seizure of his vehicle especially in the context that his evidence was not challenged by the defendants.

13. That the learned trial judge ought to have properly considered the issue of an award of nominal damages in the circumstances where the court rejected the evidence of the claimant as to the value of his vehicle.

14. That the learned trial judge failed to properly assess and weigh the evidence before the honourable court and erroneously concluded that the claimant's claim was purely for economic loss.

15. That the learned trial judge ought to have properly considered the circumstances under which the claimant's vehicle came into the third defendant's possession."

[49] On 15 April 2016, a further supplemental notice of appeal was filed on the appellant's behalf. It was, however, abandoned at the commencement of the hearing. Counsel sought to reduce the number of grounds argued to 13, namely original grounds 1, 2, 3, 6, 14, 15, 16, 17 and 19 and supplemental grounds 1, 2, 3 and 14. He found it convenient to argue original grounds 1, 2, 3, 15, 17 and 19 and supplemental grounds 1, 2, 3 together.

[50] I will first consider ground 6 of the original grounds of appeal.

Ground 6

> **"That the learned trial judge erred and misdirected himself when he found that the only proper Defendant in the suit is the First Defendant."**

Order of the Master

[51] It was the appellant's claim that the Attorney General was joined as a party to the claim by virtue of the Crown Proceedings Act as being vicariously liable for Constable Nelson and the Transport Authority, as servants and/or agents of the Crown.

[52] On 29 March 2012, as stated above, an application was made before Master Lindo, for the Attorney General to be removed as a party. Master Lindo acceded to the DSP's request and ordered *inter alia* that the claim against the Attorney General be struck out because that the claim against her disclosed no real prospect of success and she was not a proper party. The appellant was not represented at that hearing, although on the record he was served with the application.

[53] On 10 May 2013, the appellant filed an amended particulars of claim which still named the Attorney General as a party and included averments against the Attorney General. In spite of having obtained an order from the Master striking out the claim against the Attorney General, the DSP, who at all material times represented both the Attorney General and the Transport Authority, filed an amended defence and further amended defence on 9 November 2012 and 11 November 2014, respectively, on behalf of the Transport Authority, which named the Attorney General as a defendant. Although the claim was struck out against the Attorney General, her name remained on record as a party to the claim.

The learned judge's findings

[54] At the trial of the claim, it was the learned judge's view that the Attorney General was the only proper party. In so finding, at paragraphs [3] to [7] of his judgment, he enunciated:

> "[3] The defendants have been sued jointly and severally, in that, the Attorney General, is, as the Crown's representative for the purposes of this claim, sued in accordance with the legal principles of vicarious liability, this on the basis that, the allegedly unlawful actions of [Constable Nelson] and the 3rd defendants were committed by them, in their capacity as Crown servants or agents. Even if though, this court disagrees with the applicability of vicarious liability to the facts of this particular case, as such alleged applicability is being disputed by defence counsel, nonetheless, the 2nd and 3rd defendants have also been sued, severally. In other words, it is open to this court, for the purposes of this claim, to conclude that the 2nd and/or 3rd defendant(s) are liable or not liable to the claimant, as a person (in the case of [Constable Nelson]), or statutory corporation (in the case of [the Transport Authority]), capable of being sued in their own name (s).
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> [4] On the point as to whether the Transport Authority is a Crown servant or agent this court has taken careful note, of the dicta from England's Court of Appeal, in the case of **Tomlin v Hannaford** – [1950] 1 K.B. 18. Whilst it is true therefore, that a great deal of ministerial and thus, governmental control is exercised over the Transport Authority, that authority is nonetheless a corporation and has within its powers, all of the powers of a corporation, as set out in **section 28 of the Interpretation Act**. There is no provision in the Transport Authority Act which expressly provides that the Transport Authority is either to be treated as being a Crown servant or agent, or as a government servant or agent. In the circumstances, as there is expressly provided in the Transport Authority Act, at section 3 thereof, that the Transport Authority shall be a body corporate, to which, the provisions of section 28 of the Interpretation Act shall apply, this court has no doubt in its mind, that the Transport Authority is not a servant or agent of the Crown.

On that legal point alone therefore, the claimant's claim must fail in its entirety, since the claimant has alleged that at all material times, [the Transport Authority] was functioning as a Crown servant or agent. As such, it will be recognized, further on in these reasons, that this court's considered opinion, is that, as such, the claimant could not properly have maintained his claim against [the Transport Authority] and also, since it is also this court's considered opinion that the 3rddefendant, does not, when carrying out its functions under the Transport Authority Act, or even when merely purporting to carry out those functions, do so, as a Crown servant or agent, it inevitably follows that this court is also not of the view that the claimant's claim against [the Transport Authority] can properly succeed.

[5] In the event though, that this court is wrong in both of those respects, it will hereafter go on to set out its reasons for concluding that the claim as particularized, is only properly maintainable against the 1stdefendant – if it can properly be maintained at all and also, to set out other important conclusions of law and fact which are pertinent to the claimant's case

[6] The claimant has alleged that, at all material times, he 2nd and 3rd defendants were functioning as Crown servants or agents, and has not alleged, even in the alternative, that either [Constable Nelson] was acting in his personal capacity, or that [the Transport Authority] was acting in any private capacity. It was, in the absence of such allegations, not open to the claimant, to properly or successfully pursue his claim as against the 2nd and 3rd defendants. What was the only option available to the claimant, if he wished to have any chance at successfully proving his claim against either the 2nd or 3rd defendants, is that he would have had to have made the appropriate allegation, as against them, as aforementioned, further or alternative to that which was the main thrust of his allegation. That main thrust, if there had been an alternative allegation as to the capacity in which [Constable Nelson] and [the Transport Authority] had been functioning when they carried out their respective actions in respect of which complaint to this court is being made, would have been that at all material times, they were functioning as Crown servants or agents. As it was though, as particularized in the [appellant's] third further amended

> particulars of claim, no alternative allegation has been made in that respect. The claimant has instead, solely contended, in that respect, that at all material times, [Constable Nelson] and [the Transport Authority] were functioning as Crown servants or agents.
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> [7] That being so, this claim, it must be declared by this court, can only, if it is to succeed at all, properly succeed as against the Attorney General.This is so because, the **Crown Proceedings Act, at section 13 (a)** provides that – *'Civil proceedings against the Crown shall be instituted against the Attorney General.'* As a matter of law, since that statute – **Crown Proceedings Act**, has clearly specified the party against whom claims against the Crown are to be instituted, it is not open to a claimant, who is not claiming against anyone or any entity, other than someone or some entity whom or which he alleges, was, at the material time, functioning as a Crown servant or agent, to pursue his claim against anyone other than the Attorney General. The statutory provision at **section 13 (2)** would be redundant if it were otherwise. The latin maxim – *'expressio unius est exclusio alterius,'* which is a principle that may be used as a guide by the courts in interpreting certain statutory provisions, can properly and should and indeed, will be applied by this court, in interpreting the legal effect of **section 13 (2) of the Crown Proceedings Act**. See: **The Attorney General and Gladstone Miller** – Supr. Ct. Civ. App. no. 95 of 1997."

The appellant's submissions

[55] The appellant challenged the judge's finding that the Attorney General was the only proper party. Counsel for the appellant, Mr Nelson, sought to impugn the learned judge's finding that the Attorney General was the only proper party, against whom the claim failed. He specifically directed the court's attention to paragraph [7] of the learned judge's reasons and argued that the Crown Proceedings Act does not alter the common law position that a master is responsible for acts committed by his servant.

The Crown Proceedings Act, he posited, allows a party to enforce a judgment against the Crown as being vicariously liable for the acts of his servant and/or agent.

[56] Counsel further argued that Master Lindo, having acceded to the Attorney General's application by her ruling that the Attorney General was not a proper party and having struck out the claim against her, the learned judge ought not to have entertained further arguments on her behalf; because at that juncture she had no further *locus standi.* The claim, counsel posited, should have proceeded between the appellant and the Transport Authority. The appellant was thereby prejudiced by the participation of the Attorney General at the trial.

[57] The learned judge, counsel argued, misdirected himself in his consideration of the evidence tendered by and the arguments made on behalf of the Attorney General, which led him to erroneous and improper findings of fact.

[58] Mr Nelson contended that the learned judge fell further into error and misdirected himself by his finding that the appellant's claim against the Attorney General, who was the proper party before the court, had failed in its entirety and by thereby dismissing the claim.

[59] Regarding the claim against Constable Nelson, counsel postulated that, even if the Crown was not liable for Constable Nelson's actions, the Transport Authority acted in its personal capacity by its detention and sale of the vehicle. For that submission, counsel relied on **Wallace Campbell & Winston Mahfood v Kingston & Saint Andrew Corporation, The Attorney General, National Water Commission and**

Asphalt Paving Company Limited (1992) 29 JLR 476. Mr Nelson submitted that, having found that the Transport Authority was not an agent/servant of the Crown, the learned judge ought to have allowed the matter to proceed only against the Transport Authority.

[60] The learned judge, counsel submitted, erred and misdirected himself by dismissing the Transport Authority and finding that the only proper defendant was the Attorney General.

The Transport Authority's submissions

[61] Counsel for the Transport Authority, Mr McDermott, submitted that it was regrettable that the order striking out the Attorney General as a party to the claim was not brought to the learned judge's attention. He further pointed to the fact that, subsequent to the Master's order, the parties continued to file documents in relation to the Attorney General and the Transport Authority.

[62] He conceded that the learned judge erred in his treatment of the Attorney General as the only proper party to a claim which had been struck out against her. Counsel, however, contended that the judge's consideration occasioned no prejudice to the appellant, which would warrant a mistrial.

[63] In support of that contention, he pointed out that:

(1) As there was no *viva voce* evidence adduced on behalf of the Attorney General, the learned judge's deliberations could not therefore have been affected.

(2) The Attorney General and the Transport Authority were both represented at trial by the same attorney-at-law and it was contended, on behalf of both respondents, that they were not liable for the torts which were alleged by the appellant.

(3) The documents which were tendered on behalf of the defence were agreed documents. The learned judge therefore did not consider separate documents for the Attorney General. All the documents tendered were directly related to the Transport Authority's defence.

(4) The learned judge was careful to treat with the Attorney General and the Transport Authority separately. He treated with the pleaded case against the Transport Authority separately from that of the Attorney General's. He made it plain that they were separate legal personalities to which the principles of vicarious liability did not apply. Where appropriate, he made findings in the alternative in relation to them.

[64] Counsel contended that, in light of the foregoing, especially the learned judge's approach in addressing the issues in relation to each respondent, there is nothing which

suggests that the continued involvement of the Attorney General coloured the learned judge's decision in relation to the appellant's claim against the Transport Authority, or that the appellant was otherwise prejudiced or disadvantaged.

Discussion

[65] The Attorney General, having succeeded in her application before the Master to be removed as a party to the proceedings, the appellant's amended claim ought not to have included the Attorney General as a party. Nor should the DSP have continued to participate in the trial on the Attorney General's behalf.

[66] It is noteworthy that the DSP filed a list of documents on 19 September 2014, which was headed "[the Transport Authority]'s List of Documents". It was however certified by the then Assistant Commissioner of Police and served on behalf of the Attorney General.

[67] The Attorney General's further involvement in the trial was noted by the representative for the DSP having introduced herself as representing both the Attorney General and the Transport Authority. The learned judge therefore considered the Attorney General to be a party and, in finding judgment in her favour, awarded her costs.

[68] Surely, had the learned judge been aware of Master Lindo's orders, he would not have considered the Attorney General as a party to the proceedings. Obviously ignorant of the Master's order, and misled by the documents filed thereafter, which included the Attorney General as a party, the learned judge, at paragraph [3], said:

> "[3] The defendants have been sued jointly and severally, in that, the Attorney General, is, as the Crown's representative for the purposes of this claim, sued in accordance with the legal principles of vicarious liability, this on the basis that, the allegedly unlawful actions of [Constable Nelson] and 3rd defendants were committed by them, in their capacity as Crown servants or agents. Even if though, this court disagrees with the applicability of vicarious liability to the facts of this particular case, as such alleged applicability is being disputed by defence counsel, nonetheless, the 2nd and 3rd defendants have also been sued, severally. In other words, it is open to this court, for the purposes of this claim, to conclude that the 2nd and/or 3rd defendant (s) are liable or not liable to the claimant, as a person (in the case of [Constable Nelson]), or statutory corporation (in the case of [the Transport Authority]), capable of being sued in their own name (s)."

[69] In spite of the learned judge's observation that the Attorney General, Constable Nelson and the Transport Authority were sued jointly and severally, and further that the Transport Authority as a statutory corporation was capable of being sued in its own capacity, the learned judge seemingly contradicted himself at paragraph [29] by stating:

> "[29] For reasons earlier provided, since it is that the claimant had chosen to pursue his claim against the defendants, collectively, on the basis that at all material times, the 2nd and 3rd defendants were functioning as Crown servants or agents, it is only the 1st defendant, if any of the defendants at all, who can properly be held liable to the claimant to any damages for detinue or negligence."

[70] As stated above, it was the appellant's pleaded case that the Attorney General was joined as a party by virtue of the Crown Proceedings Act, as the legal representative vicariously liable for the Jamaica Constabulary Force and the Transport Authority. Constable Nelson was said to have acted:

> "… [At] all material times… under the direction and control of the [Attorney General] in performance or the purported performance of his functions..."

[71] The Transport Authority was not so described. A reading of the further particulars of claim reveals that the Transport Authority was pleaded as being:

> "…the relevant Authority responsible to issue the road license [sic] to public passenger vehicles to enable them to operate legally in that capacity on the roads of Jamaica."

[72] In determining whether the Transport Authority was in fact a Crown servant or agent, the learned judge examined the case of **Tomlin v Hannaford** [1950] 1 KB 18 and arrived at the conclusion that the Transport Authority was neither. As cited above, he said:

> "[4] …Whilst it is true therefore, that a great deal of ministerial and thus, governmental control is exercised over the Transport Authority, that authority is nonetheless a corporation and has within its powers, all of the powers of a corporation, as set out in **section 28 of the Interpretation Act**. There is no provision in the Transport Authority Act which expressly provides that the Transport Authority is either to be treated as being a Crown servant or agent, or as a government servant or agent. **In the circumstances as there is expressly provided in the Transport Authority Act, at section 3 thereof, that the Transport Authority shall be a body corporate, to which, the provisions of section 28 of the Interpretation Act shall apply, this court has no doubt in its mind, that the Transport Authority is not a servant or agent of the Crown....**" (Emphasis supplied)

[73] Although it was the appellant's pleaded case that the Attorney General was vicariously liable for the Transport Authority, there was no assertion that the Transport

Authority at the material time acted "under the direction and control of the Attorney General" as was its case in respect of the Constable. Notwithstanding, the appellant's pleadings could have been more explicit by specifically stating that the Transport Authority was sued with the other parties collectively and individually.

[74] The learned judge, by his initial comment, had evidently formed the view from the appellant's pleadings that the Transport Authority was also sued in its personal capacity. Having so noted, he then found that the Transport Authority was not an agent/servant of the Crown. In the circumstances, the learned judge ought to have treated the Transport Authority as a proper party and ought not to have entertained any further arguments from or on behalf of the Attorney General. He instead found that:

> "[4] … [T]he claimant's claim must fail in its entirety, since the claimant has alleged that at all material times, the 3rd defendant was functioning as a Crown servant or agent.
> … "

[75] As earlier indicated, it was never asserted by the appellant either in his pleadings or evidence that the Transport Authority at the material time "was functioning as a Crown servant or agent".

[76] As indicated above, Mr McDermott acknowledged that the learned judge erred in treating the Attorney General as a party, the matter having been struck out against her.

[77] In his assessment of whether or not the Attorney General owed the appellant a duty of care, the learned judge examined a number of authorities and, at paragraph [28], said:

> "[28] …[T]his court believes it to be fair, just and reasonable, based on the particular facts of this particular case, that the law of negligence should impose such a duty of care on [the Transport Authority] and if [the Transport Authority] is considered as having been, for that purpose, functioning as a Crown servant or agent, then by extension, that duty would have been owed by the Crown, as represented by the [Attorney General], to him. If, on the other hand, at all material times, [the Transport Authority] was not functioning as a Crown servant or agent, then, no duty of care could possibly have been owed by the [Attorney General] to him and thus, at worst for the defendants, who are collectively represented by the office of the Director of State Proceedings, it would and could only be, if such is the case, [the Transport Authority] which would be exclusively held liable. The same would also be the case, as regards [the appellant's] claim for damages for detinue."

[78] The learned judge thereafter found that the appellant had pursued his claim against the Attorney General, Constable Nelson and the Transport Authority collectively, on the basis that the Constable and the Transport Authority were agents or servants of the Crown.

[79] The learned judge not only erred by finding that the Attorney General was the only proper party, but the error was further compounded by his award of costs to the Attorney General. This error, however, does not warrant a retrial, as contended for by Mr Nelson, as the award of costs can be remedied by this court. The learned judge's

finding was predicated on an error of law and fact, and was therefore palpably wrong. This complaint is meritorious. The appellant therefore succeeds on ground 6.

The issue of insurance for the appellant's motor vehicle

[80] Grounds 1, 15 and 17 and supplemental ground 3 can conveniently be dealt with together, as those grounds speak to whether the judge erred and/or misdirected himself, in considering and concluding that the appellant failed to submit his insurance certificate at the time of his application.

Ground 1

> **"That the learned trial judge took into account matters that were immaterial and or irrelevant in coming to his conclusions."**

Ground 15

> **"That the learned trial judge erred and misdirected himself when he considered the question as to whether the claimant/appellant's vehicle was insured as this was not an issue raised in the pleadings and no evidence of this was led by any of the parties. The Court in fact had ruled that he would not allow the Defendant's witness to give evidence on this as it was not raised in the defence."**

Ground 17

> **"That the learned trial judge erred and misdirected himself when he found that the claimant/appellant did not produce all the necessary documents required in law for him to obtain the licence."**

Supplemental ground 3

> **"That the defendants sought to amend their defence to include particulars concerning the claimant's policy of insurance for the vehicle. The honourable court did not allow this amendment and therefore**

> **the issue of the claimant's alleged lack of insurance for the said vehicle was not pleaded and was not in evidence before the honourable court. The only statement of lack of insurance was cited in the third defendant's witness statement."**

[81] Two issues emanate from these grounds. They are:

1. Whether the learned judge erred and misdirected himself in considering the appellant's alleged failure to produce the relevant proof of insurance required for the renewal of his road licence.
2. Whether the learned judge erred and misdirected himself in finding that the appellant failed to produce the relevant proof of insurance required for the renewal of his road licence.

The learned judge's findings

[82] In arriving at his conclusion, the learned judge remarked that, in any event, at the time of its seizure, the vehicle was being operated without the requisite road licence and was therefore being unlawfully operated. He relied on Ms Benjamin's witness statement of 11 November 2014, and accepted her evidence that the appellant did not submit the necessary insurance certificate. He concluded that a reasonable inference that could also be drawn, was that:

> "[12] …[A]t the time when his vehicle was seized, his vehicle did not have in place, any insurance for the purpose of its

> utilization to perform hackney carriage services, or for that matter, any insurance whatsoever. …"

[83] He continued his finding at paragraph [13] by concluding that:

> "[13]… [The] vehicle was seized, on November 17, 2005. At that time, the [appellant] had no licence for that vehicle (o/c a road licence). In the circumstances insurance for that vehicle could and would not likely then, or prior to then, between the time when his last road licence for that vehicle had expired and the time when that vehicle was seized, have been issued in his favour."

[84] In justifying the Transport Authority's failure to provide the appellant with the road licence, the learned judge referred to sections 4 and 9 of the Motor Vehicle Insurance (Third Party Risks) Act and opined:

> "[14] **Section 9 of the Motor Vehicle Insurance (Third Party Risks) Act**, makes it clear that to obtain a licence for a motor vehicle, there shall be appended to the application for that licence, a certificate of insurance, or a certificate of security, or *'shall produce such evidence as may be prescribed that either (a) on the date when the licence comes into operation there will be in force the necessary policy of insurance or the necessary security in relation to the user of the vehicle by the applicant or by other persons on his order or with his permissions or (b) the motor vehicle is a vehicle to which this Act does not apply.'* In the circumstances, the [Transport Authority] did not act unreasonably, or carelessly, in having not issued a licence to the [appellant] following upon his application for same. The [Transport Authority] was acting in accordance with the laws of Jamaica, in not having issued the licence to him. The [appellant's] vehicle was at all times, a motor vehicle in respect of which, the provisions of **the Motor Vehicles Insurance (Third Party Risks) Act**, was applicable. It is of course, also, an offence under that Act, to drive one's vehicle, without insurance for that vehicle, if one is driving same, on any of our nation's roadways. See: **section 4 of the Act**, in that regard." (Emphasis as in original)

The appellant's submissions

[85] In addressing the first issue, Mr Nelson pointed to the fact that the issue of whether the appellant's vehicle was insured was never raised in the pleadings nor was any evidence regarding insurance led by any of the respondents. Counsel also pointed out that the learned judge had refused the Transport Authority's application to amend its defence to aver that the appellant's application for licence renewal was incomplete because of his failure to submit a current certificate of insurance.

[86] Counsel further submitted that the learned judge had disallowed questions posed by the Transport Authority regarding insurance. In support of that submission, he directed the court's attention to the judge's order at page nine of the record that:

> "[The respondents] will not be allowed to question [the appellant] as regards any alleged failure on his part to have insurance for his vehicle at the time when he sought to renew his vehicle's licence."

[87] Consequently, no evidence was adduced regarding the appellant's alleged lack of insurance. The learned judge, he submitted, in light of that ruling, erred and misdirected himself by proceeding to consider section 9 of the Motor Vehicles Insurance (Third Party Risks) Act, which mandates the production of a certificate of insurance with an application for a vehicle licence.

[88] In any event, Mr Nelson submitted that there was no evidence before the court that the appellant did not have vehicle insurance at the time of the seizure. In support of his contention, he pointed to the fact that the appellant was not issued a ticket for operating a vehicle without a valid certificate of insurance. He was only issued a ticket

for operating a public passenger vehicle without a valid road licence; and that charge was eventually dismissed for want of prosecution. Accordingly, he posited, "the learned trial judge addressed his mind to matters that were not pleaded and were not in evidence before the Court".

The Transport Authority's submissions

[89] Mr McDermott argued that it was open to the learned judge to have regard to all the evidence contained in Ms Benjamin's witness statement, including her averment that the appellant had failed to submit a valid insurance certificate at the time he applied for the renewal of his road licence.

[90] It was also Mr McDermott's submission that the learned trial judge considered the provisions of the Road Traffic Act and thereafter inferred that the appellant did not have insurance. In support of that submission, he directed our attention to the learned judge's statement at paragraph [33] of his reasons, that:

> "[33] In any event though, not only is there no evidence which was led before this court by anyone, which would have entitled this court to draw the conclusion that the [appellant] ought to have obtained a licence for the relevant vehicle, in point of fact, the evidence given by the only defence witness and which is unchallenged in that regard, has been that the [appellant] was not entitled to have got a licence until he submitted his vehicle's proper insurance documentation and further, there is no evidence from anyone, that the [appellant] ever did submit same."

[91] Counsel submitted that it was "incumbent on the appellant to have led evidence" that he had submitted a certificate of insurance at the time of his application and was therefore entitled to receive a road licence. According to counsel, no such evidence was

led, and as such the learned judge was, in the circumstances, correct in his finding that the appellant was not entitled to a road licence.

[92] Counsel did, however, concede at the hearing that the learned judge was wrong to have drawn the inference that the appellant had not presented a valid certificate of insurance with his application.

Discussion

[93] The appellant's alleged failure to submit his insurance certificate at the time of his application was not pleaded in any of the defences which were filed. Rule 10.7 of the Civil Procedure Rules 2002 speaks to the consequences of not setting out the defence. It reads:

> "The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."

[94] The court refused the Transport Authority's application to amend its defence to include an averment that the appellant's renewal application was incomplete because he did not submit the insurance certificate. The learned judge then disallowed questions from the Transport Authority regarding that allegation.

[95] In all three defences the Transport Authority admitted to misplacing the application. Although it denied any negligence or liability for any tort, and asserted that the appellant was contributorily negligent, because he was not in possession of a valid

licence at the time of the vehicle's seizure, there was no mention of the appellant's alleged failure to provide insurance as a reason for the non-issuance of the licence.

[96] It was only on Ms Benjamin's witness statement that another reason for the non-issuance emerged, that is, the appellant's alleged failure to provide a valid certificate of insurance for the vehicle, which rendered the application incomplete.

[97] In light of the Transport Authority's belated assertion that the issuing of the licence was delayed because of the appellant's failure to provide the required insurance, the credibility and reliability of its case were called into question. The learned judge was, in the circumstances, obliged to analyse the evidence.

[98] It was Ms Benjamin's evidence that the appellant had submitted all the documents except the certificate of insurance. There is no averment prior to her evidence, that the appellant was ever advised that the granting of the licence was delayed because he failed to submit his vehicle's insurance certificate. The learned judge plainly erred in placing reliance on that evidence, because not only was it undermined, but the learned judge had disallowed the Transport Authority's application to amend its defence to include such an averment.

[99] The failure to provide the insurance certificate for the completion of the application was hence never pleaded. The learned judge ought not to have countenanced any argument pertaining to the appellant's alleged lack of insurance, in the absence of pleadings. Having not granted the Transport Authority's application to amend the defence, the learned judge ignored his earlier ruling which forbade the

Transport Authority from adducing evidence in cross-examination of the appellant on the matter.

[100] The learned judge not only allowed evidence concerning the appellant's lack of insurance at the material time, he made several findings of fact which were directly premised on evidence which he had ruled to be inadmissible, for example, his finding that the appellant had failed to submit the necessary insurance certificate at the time of his renewal application. From that finding, he inferred that the appellant did not actually have insurance at the time of his application or at the time of the seizure. Consequently, the appellant was deprived of an opportunity to refute the Transport Authority's claim. Grounds 1, 15, 17 and supplemental ground 3, in my view, succeed.

Was the Transport Authority liable for/in negligence, detinue and conversion?

[101] The original grounds 2, 3, 16, 17, and 19 as well as supplemental grounds 1 and 14 dealt with the issue of negligence, whereas, original ground 14 and supplemental ground 2 addressed the issue of the detention of the vehicle.

[102] It should be noted that although submissions were made regarding the issue of conversion, that was never a part of the appellant's pleaded case.

Ground 2

> **That the learned trial judge misdirected himself in his consideration of the material/evidence before him.**

Ground 3

That in misdirecting himself the learned trial judge came to erroneous and or improper findings of fact.

Ground 14

That the learned trial judge erred and misdirected himself when he found that the claimant/appellant did not make unqualified demands for the return of the vehicle.

Ground 16

That the learned trial judge erred and misdirected himself when he found that the Third Defendant did not act unreasonably in not granting the licence when it was applied for.

Ground 17

That the learned trial judge erred and misdirected himself when he found that the Claimant/Appellant did not produce all the necessary documents required in law for him to obtain the licence.

Ground 19

That the learned trial judge erred and misdirected himself when he found that misplacement of a file in and of itself cannot assist the Claimant in his claim.

Supplemental Ground 1

That at Paragraphs Four to Six of His Lordship's Judgement, that the learned trial judge fell into error when he found that the claim against the Transport Authority must fail in its entirety.

Supplemental Ground 2

That further even if the crown was not liable, the third defendant was acting in its own capacity when it detained the claimant's vehicle.

Supplemental Ground 14

> **That the learned trial judge failed to properly assess and weigh the evidence before the Honourable Court and erroneously concluded that the Claimant's claim was purely for economic loss.**

The seizure and detention of the vehicle

The learned judge's findings

[103] The learned judge accepted that the appellant's vehicle, having been seized on 17 November 2005, remained at the Transport Authority's pound until it was eventually sold. He examined the relevant legislation and referred to section 13(1)(a) of the Transport Authority Act, which authorizes a constable:

> "[t]o stop and inspect any public passenger vehicle to ensure compliance with the terms of the road licence and any relevant road traffic enactments."

[104] He also considered section 13(2)(a)(v) of the Transport Authority Act and section 61(4A) of the Road Traffic Act, which permit a constable to seize any vehicle which is either being used, or caused or permitted to be used on any road, without the owner of that vehicle then being in possession of a 'road licence' for that vehicle.

[105] In further rationalizing the detention of the vehicle, section 61(4B) of the Road Traffic Act was also examined, which provides *inter alia* that:

> "…a vehicle shall be kept in the possession of the Police or the Transport Authority, as the case may be, until the licence required under this Part is obtained and produced to the Police or the Transport Authority."

[106] The learned judge also relied on section 13(3) of the Transport Authority Act and stated that:

> "[27] …The **Transport Authority Act, at section 13 (3)** thereof, provides that a vehicle which is under detention by the Transport Authority, may be sold, to cover the costs of the vehicle's detention …"

[107] In applying the maxim *'Omnia Praesumuntr rite esseacta'* (all things are presumed to have been rightly done), he opined that the vehicle would not have been in the Transport Authority's possession if it had not been seized, pursuant to an official act. In support of his finding that the vehicle was lawfully seized, detained and sold, the learned judge said at paragraph [44]:

> "[44] …In the absence of there having not been in place any valid licence for that vehicle at any time prior to when it was sold- this bearing in mind of course, that for reasons already given herein, the licence which was printed in 2008, clearly could not and would not have been valid or effectual, the vehicle was lawfully detained and lawfully sold and also, lawfully seized-if it was, as the claimant has testified, seized in his presence, as he was driving the vehicle just before it was stopped and then seized by [Constable Nelson]- a constable."

[108] The learned judge stated that the burden was the appellant's to prove. He stated:

> "[9] As regards the claim against the Crown, with the Attorney General being the 1st defendant and the only defendant against whom, if it is to succeed at all, this claim can properly be proven, it is this court's conclusion that the claimant needed to have proven, not merely that his vehicle was unlawfully detained, but furthermore that there was made by him or by an agent of his, or employee of his, such as for instance, an attorney-at-law (agent), an unqualified

> demand for the return of his vehicle to him and an unjustifiable and unqualified refusal by the relevant Crown servant or agent, to have delivered the same to him, within a reasonable time after such demand had been made. See: Suit No. C. L. 1990/G 096 – **Owen Grant and Supt. Gladstone Grant and The Attorney General**; **and George and Branday Ltd. –** [1964] 7 WIR 275**.**
>
> [10] Even if the claimant had been able to prove that there was the unlawful detention of his vehicle by [Constable Nelson] and [the Transport Authority], acting in conjunction with one another, it is apparent that the claimant has been wholly unable to prove that he or any agent of his, had, at any time, made any unqualified demand for the return of the vehicle, or that, there was any unjustifiable refusal by Crown servants or agents, in particular, the Transport Authority, to release his vehicle to him within a reasonable time thereafter."

[109] In finding that the appellant failed to prove his claim for damages for detinue, the learned judge said, at paragraph [46]:

> "[46] …The essence of a claim for damages for detinue is not proof, as against the defendant, of the unlawful seizure by the defendant, of an item which the claimant either had possession of, prior to that seizure, or had a right to the possession of. In fact, as a matter of law, there need not be proof of any unlawful seizure at all, in respect of a claim for damages for detinue. Furthermore, even if the detention of that item was unlawful, that in and of itself, does not mean that the party who/which has unlawfully detained same, has committed, in relation to the person/party who/which has a right to possession of that item, the tort of detinue, in relation to that item. There must also be proven that there was an unqualified demand for the return of same, which was made by the person/party entitled to the possession of same. The claimant has, in respect of this claim, failed to prove this. Also, he has failed to prove another important element of this tort, which is that there was following upon such unconditional demand for the return of the item having been made, an unqualified refusal to return same within a reasonable time."

[110] The learned judge was of the view that whether or not the appellant proved that the detention was unlawful, he failed to prove that there was an "unqualified demand for the return of the vehicle" as well as an "unjustifiable refusal by Crown servants or agents, in particular, the Transport Authority".

[111] In rejecting the appellant's claim for, detinue, the learned judge relied on the case of **Owen Grant v Supt. Grant and The Attorney General** (unreported), Supreme Court, Jamaica, Claim No CL1990 G 096, judgment delivered 24 November 2003, and **George and Branday Ltd v Lee** (1964) 7 WIR 275, in support of his finding that there was no unqualified demand for the return of the car.

The appellant's submissions

[112] It was the appellant's case that it was the Transport Authority's policy to allow the operation of hackney carriages with the renewal receipts because of the difficulty the Transport Authority was experiencing in issuing licences.

[113] At the time of the seizure of vehicle, Constable Nelson was presented with copies of the application to renew and receipt as proof of a pending licence decision. It was also explained to him that the Transport Authority had misplaced the appellant's file, which delayed the issuance of the licence.

[114] Despite numerous efforts made, and meetings with the Transport Authority's Manager, the appellant received neither the licence nor his vehicle. Counsel for the appellant submitted that the Transport Authority knew or ought to have known that its

failure to return the vehicle to the appellant could have resulted in it falling into disrepair or damage, because of improper and/or lengthy storage.

[115] Mr Nelson indicated that the Transport Authority not only neglected for 10 years to issue a road licence, but sold the vehicle and failed to account for the proceeds of sale. Consequently, the appellant has been permanently deprived of its lawful use. He relied on the case of **Attorney General & Transport Authority v Aston Burey** [2011] JMCA Civ 6, in which Harris JA said:

> "The authorities show that an action for detinue lies not only where a person wrongly detains the chattel or goods of another but also where a person who has possession of such goods or chattels improperly parted with possession…"

[116] Counsel averred that the court ought to have considered that the Transport Authority:

> "[f]ailed to give good, sufficient and valid reasons for their undue delay in returning the vehicle to the [appellant] and issuing him with the road license [sic]."

[117] Counsel also pointed to the fact that the Transport Authority sold the vehicle without "any due, reasonable and/or proper notice being given to the appellant of the imminence of the sale and disposal of the vehicle".

[118] It was counsel's submission, therefore, that the Transport Authority acted "wrongfully, unlawfully, maliciously, unfairly, unjustly, improperly, negligently, wilfully, carelessly, recklessly in seizing, depriving, retaining, selling and disposing of the said vehicle". He pointed to the fact that the Transport Authority has deprived the appellant

of his means of earning his primary source of income as a hackney carriage operator from 17 November 2005.

[119] Counsel contended that an action for detinue lies not only where goods or chattels are wrongly or improperly parted with, but also if the goods are ordered to be returned but cannot be returned. He asserted that the Transport Authority is entirely responsible for the seizure, detention and sale of the said vehicle, which was entirely within its province and control. He submitted that the Transport Authority is wholly liable for the loss suffered by the appellant, and further that the appellant is entitled to an award in detinue for the value of his vehicle, as at the date of the judgment. For that submission, he relied on **Transport Authority v Alromeo Brown** [2011] JMCA App 17 and **Rosenthal v Alderton** [1946] 1 KB 374.

[120] Counsel also referred the court to the cases **Attorney General & Transport Authority v Aston Burey**, **Jones v Dowie** (1841) 9 M&W 19, and **Ballett v Mingay** [1943] 1 ALL ER 143 (CA), and submitted that if the chattel is not ordered to be returned, the ordinary measure of damages is the value of the goods, as well as the loss arising by reason of the detention of the goods.

[121] He also relied on the case **General Finance Facilities v Cooks Cars (Romford)** [1963] 1 WLR 644 for the proposition that a claim in detinue, may result in judgment either for:

(1) the recovery of value of the chattel as assessed and damages for its detention; or

(2) the return of the chattel.

[122] He argued that not only is the appellant entitled to damages for detinue and for having been unlawfully deprived of his vehicle, but the situation has been exacerbated by the sale of the vehicle at a private auction, thus permanently depriving the appellant of the lawful use, possession and enjoyment of his property.

[123] It was counsel's submission that the court fell into error when it found that there was no unqualified demand for the return of the vehicle, because the evidence suggested otherwise. He posited that the learned judge failed to properly consider and weigh the evidence regarding the appellant's extensive efforts to have his vehicle released and returned to him, and the consequences of the Transport Authority's failure to return same.

The Transport Authority's submissions

[124] Mr McDermott contended that the learned judge was correct in finding that the appellant had failed to prove the requisite elements of the tort of detinue. Regarding the issue of whether the vehicle was unlawfully seized, he submitted that at the time of its seizure, the vehicle was being operated in breach of the Road Traffic Act. It was therefore, the appellant's illegal act and unlawful operation of the vehicle without the requisite licence, which led to its lawful seizure. The Transport Authority, he argued, cannot be held liable in detinue in those circumstances. In support of that proposition he relied on **George and Branday Ltd v Lee**.

[125] Counsel further argued that it was not reasonably foreseeable that the appellant would have operated without a road licence in breach of the law. The Transport Authority, he submitted, denied categorically the appellant's assertion that it was the Transport Authority's policy to permit drivers to operate with their renewal application receipt. He referred the court to Ms Benjamin's evidence in support of that contention. An application for a licence does not equate to the automatic granting of a licence, he submitted.

[126] Mr McDermott submitted that there was neither written nor oral evidence from the appellant that an unconditional demand was made of the Transport Authority to return the vehicle. Nor was there an unjustifiable refusal by the Transport Authority. The pleadings, he contended, were also silent as to any unconditional and specific demand of the Transport Authority for the return of the vehicle, or that the Transport Authority categorically and unequivocally refused to return same. Counsel contended that those allegations were only made in relation to the constable. Consequently, there was no claim for detinue against the Transport Authority, he posited.

[127] Counsel directed our attention to Ms Benjamin's evidence under cross examination and indicated that no suggestion was made to her concerning a demand or refusal to return the vehicle. It was counsel's submission that the letters between the various lawyers and government agencies, which were tendered on behalf of the appellant, were not sufficient evidence of a demand being made of the Transport Authority, or a refusal by the Transport Authority to return the vehicle. He contended

that by those letters, the appellant's main concern was the "non-issuance of the road licence".

[128] Mr McDermott also referred the court to the Transport Authority's letter of 9 June 2008 and submitted that the letter demonstrated the Transport Authority's willingness to release the vehicle to the appellant and advised him to direct his claim to the Attorney General. It was the appellant who failed to attend the Transport Authority's pound to collect it.

[129] Counsel also submitted that the appellant's pleadings failed to disclose any allegation of unlawful detention against the Transport Authority. He submitted that the appellant's claim failed in its entirety because there was no direct evidence or evidence adduced during cross-examination in support of the appellant's claim in detinue.

[130] Counsel, however, admitted his inability to admit or deny the appellant's assertion of having made numerous efforts to have the vehicle released. According to him, those allegations were not within the Transport Authority's knowledge.

Discussion

[131] The appellant's pleaded case and his evidence stated that he had numerous meetings with the Transport Authority's manager, in an effort to secure the licence, but, notwithstanding those meetings and the Transport Authority's letter expressing its willingness to release the vehicle, the Transport Authority failed and/or refused to release the vehicle.

[132] On his evidence, the appellant certainly did not rest on his laurels, but rather actively sought the issuance of his licence by retaining several attorneys-at-law to secure the release of the vehicle. As early as 6 February 2006, the appellant had engaged the services of the law firm, K Churchill Neita and Company, to write to the Transport Authority regarding its failure to provide the licence.

[133] In furtherance of his quest to retrieve his vehicle and to obtain a licence, he sought the intervention of the then Minister of Justice, by way of letter dated 24 September 2007. The Prime Minister, having received that letter, advised him by way of letter dated 17 October 2007 that his complaint was forwarded to the Minister of Transport and Works.

[134] On 27 March 2008, the Transport Authority wrote the appellant having received the appellant's letter from the Minister of Transport and Works, and informed him that it had been trying to contact him by telephone.

[135] It was the appellant's evidence that, on 28 April 2008, he met with the Transport Authority's then Managing Director, Mr Keith Goodison, regarding the estimated value of the vehicle, which was requested by Mr Goodison. Counsel directed the court's attention to Ms Benjamin's evidence that she was aware that meetings were held between the Transport Authority and the appellant in 2008. He complained that notwithstanding the appellant's numerous efforts to secure the release of the vehicle, the vehicle was still detained at the pound.

[136] The learned judge's conclusion rested on the fact that the vehicle was being unlawfully operated without a valid licence. The learned judge's finding that the seizure was unlawful cannot be challenged. The appellant was, indeed operating without the requisite licence, contrary to the law. Notwithstanding, the issue of whether the Transport Authority is liable for negligence is extant and will therefore be examined.

[137] In order to sustain a case in detinue, the appellant must demonstrate that an unqualified demand was made for the return of the vehicle and that the Transport Authority unjustifiably refused to comply with the request. In **Owen Grant v Superintendent Gladstone Grant and The Attorney General**, on which the learned judge relied, I referred to the statement of the learned authors of Halsbury 3rd edition, and indicated that:

> "The gist of the cause of action in detinue is wrongful detention. In order to establish detinue it is usual to prove demand and refusal after the expiration of a reasonable time to comply with the demand (Halsbury's Laws of England, 3rd Edition Volume 38).
>
> > 'Where a person has possession of goods of another and a valid demand is made for them by the owner and an unqualified, unjustifiable refusal to deliver them up entitles the owner to sue in detinue...' (Halsburys Laws of England 3rd Edition Volume 38)'. "

Whether there was an unqualified demand?

[138] On the appellant's case, in spite of his efforts, without notifying him, the Transport Authority sold the vehicle. But was there evidence of the required unqualified demand? It is indisputable that the nub of the appellant's complaint in most

of the letters was the Transport Authority's failure to issue the licence. In his letter to the Minister of Transport and Works, which was forwarded to the Transport Authority, the appellant also complained that his car had been in the Transport Authority's pound since its seizure. There was however, no unqualified demand.

[139] Consequent on the receipt of that letter, the Transport Authority alleged that it wrote to the appellant on 27 March 2008, requesting that he contact them. That letter apparently did not reach the appellant.

[140] On 9 June 2008, three years after the seizure, the Transport Authority wrote the following letter to the appellant:

> "We wish to inform you that your vehicle was seized by the Police on November 17, 2005 for operating as a public passenger vehicle without a road licence. The vehicle was then placed in our pound and it has remained there to date, despite the Transport Authority expressing its willingness to release the vehicle to you.
>
> The Transport Authority pounds are utilized by the Jamaica Constabulary Force and the Island Special Constabulary Force for vehicles seized by these bodies, hence the storage of your vehicle in our pound."

[141] The appellant responded by letter denying ever attending any meeting with Mr Goodison on 16 May 2005 regarding the seizure of the vehicle. He complained of having paid for the licence since March 2005 and having had the vehicle inspected eight months prior to the vehicle being seized for not having a valid licence.

[142] He pointed out that without the licence, the vehicle would be "...useless and park [sic] indefinite [sic]". He complained of his many futile efforts to retrieve the vehicle.

He also referred to the meeting he had with Mr Goodison on 28 April 2008, instructing him to obtain an estimate and address it to him.

[143] The appellant also indicated *inter alia* that he had duly provided the estimate to Mr Goodison on 30 April 2008, to which he failed to respond. He referred also to another meeting he had with Mr Goodison on 15 May 2008, in Mr Goodison's office, at which time Mr Goodison informed him that the Transport Authority would no longer be responsible.

[144] Notwithstanding his efforts, there is no evidence of an unqualified demand of the Transport Authority for the vehicle or an unqualified refusal by the Transport Authority to return the vehicle. In the absence of same, his claim for detinue is unsustainable.

[145] Ground 14 and supplemental ground 2 therefore fail.

The issue of negligence

[146] The original grounds 2, 3, 16, 17 and 19, and supplemental grounds 1 and 14 can conveniently be dealt with together as the gist of the complaint levelled at the learned judge was his failure to recognize that it was the respondent's negligence, consequent on the misplacement of the appellant's application, which resulted in the seizure, detention, and subsequent sale of the appellant's vehicle, which led to the appellant suffering loss, for which he is entitled to damages.

[147] The appellant's complaints in respect of the Transport Authority's negligence were particularized as follows:

> "(a) Failing to deliver the road licence to the Claimant in due course of time of [sic] at all;
>
> (b) Misplacing the Claimant's application for renewal of his road license;
>
> (c) Failing to make available and deliver a duplicate road license to the Claimant."

The learned judge's findings

[148] In considering the claim for negligence, the learned judge stated that no duty of care or "a limited/restricted duty" of care arises in cases of "economic loss" or "pure economic loss". At paragraph [24], the learned judge discussed the law on economic loss. He said:

> "… it is the law, which has been recognized by the Privy Council – Jamaica's highest court, that in order for pure economic loss to be recoverable, pursuant to a claim for damages for negligence, in circumstances wherein, no injury to the person or damage to property is being alleged, it must be shown that there also existed, as between the party who/which is pursuing the claim for damaged [sic] for negligence and the defendant to that claim, a 'special relationship', or in other words, sufficiently close 'proximity' between the parties, whereby the defendant (s) has/had knowledge, or, at least, the means of knowledge that a particular person and not just a member of an unascertained class of persons will rely upon them and would be likely to suffer economic loss as a consequence of their negligence, and possibly; (3) it must be fair, just and reasonable that the law should impose a duty of the scope contended. …"

[149] The learned judge held that the appellant's claim for damages for negligence was for pure economic loss despite counsel's argument that it was not. He further found that the claim was not brought as a consequence of any injury to any person or any damage to his property, but arose from the non-issuance of the licence. He found

that the appellant's claim was for loss of profits consequent on his inability to operate his vehicle as a hackney carriage; loss of use for domestic purposes; and the value of his vehicle which was sold.

[150] The learned judge also disagreed with defence counsel's submission that "no special relationship existed between the parties". At paragraph [28], he stated:

> "… This court disagrees with that assertion because it is clear that at the material time [the Transport Authority] would have been aware that the [appellant] had applied to it for a vehicle licence pertaining to the relevant vehicle. The [Transport Authority] would also have been aware that the [appellant] had applied for a hackney carriage licence and that as such, it was the [appellant's] intention to utilize that vehicle for the purpose of transporting persons for hire. As such, [the Transport Authority] would have at all material times, either known, or at the very least, have been in a position to know, that if they acted negligently either in terms of failure to make available to the [appellant] at all, the licence which he had applied for, or in failing to make same available to him, within a reasonable time after he had applied for same, such negligence could, in all reasonable likelihood have caused to the [appellant], financial loss. When considered carefully, this court has no doubt in concluding that at all material times, the required 'special relationship' did exist as between the [appellant] and [the Transport Authority], such that a duty of care was owed by [the Transport Authority] to the [appellant], to treat with his application for the hackney carriage licence, in an appropriate and responsible manner. …"

[151] In his deliberations as to whether or not the Transport Authority owed the appellant a duty of care, the learned judge, as earlier pointed out, erroneously relied on sections 4 and 9 of the Motor Vehicles Insurance (Third Party Risks) Act to bolster his finding that the appellant did not have insurance, which thereby justified the Transport Authority's failure to issue the licence.

[152] The learned judge attributed the seizure of the vehicle to the appellant's lack of insurance, by deducing that:

> "[13] … [The] vehicle was seized on November 17, 2005. At that time, the [appellant] had no licence for that vehicle (o/c a road licence). In the circumstances insurance for that vehicle could and would not likely then, or prior to then, between the time when his last road licence for that vehicle had expired and the time when that vehicle was seized, have been issued in his favour."

[153] It was the learned judge's finding that the Transport Authority and, "by extension", the Attorney General were not negligent in the seizure, detention and sale of the appellant's vehicle and neither was a duty of care owed to the appellant. That finding was consequent on his previous finding that the appellant's application was incomplete by reason of his failure to submit the requisite insurance certificate.

[154] In rejecting the appellant's claim that the Transport Authority was negligent, the learned judge, opined that:

> "[32] …[N]o licence for that vehicle could lawfully have been issued to him, unless and until that omission on his part, had been rectified. There is no evidence from either party, as to when same was rectified or if same was rectified at all. It is true, as per the evidence of the respective parties, that for some unknown reason, a licence was printed in relation to the relevant vehicle on January 10, 2008 and that when printed, that licence related to the period – April, 2005 to March 2006, but no evidence was provided to this court by anyone, based upon which it could even be appropriately inferred that this means that the [appellant] did in fact provide to the [Transport Authority], the insurance certificate, or insurance cover note, for the relevant vehicle, for the period April 2005 to March 2006, or for that matter, draw any inference whatsoever, as to when said insurance certificate or insurance cover note, would have been

> provided to them by the [appellant]. Of course, therefore, the printing of that licence, as and when same was printed by the [Transport Authority], is not capable of constituting evidence which either assist the [appellant] in proving any aspect of his claim or for that matter, assist the defendant in disputing any aspect of the [appellant's] claim. That evidence was entirely weightless. Also, the effect of the printing of that licence in 2008, so as to purportedly have same be pertinent to a period of time between 2005 and 2006, was weightless. Clearly, if one is driving a vehicle on any of this nation's roads, in 2008 with a vehicle licence which has long since expired, by means of effluxion of time, then it would mean that one is driving an unlicensed vehicle unlawfully, on this nation's roads! A licence for a vehicle, pertaining to the year of 2005-2006, can hardly constitute a valid licence in the year 2008, or at any time thereafter! The printing of same was thus, an entirely pointless exercise."

[155] In finding that the Transport Authority did not breach any duty of care owed to the appellant, the learned judge enunciated:

> "[15] In the circumstances, [the Transport Authority] and by extension, the [Attorney General] did not breach any duty of care that was owed to the [appellant] in terms of his vehicle licence application. The issuance of a vehicle licence is not a matter of unqualified right, nor is it automatic that a person who applies for a vehicle licence must be issued with same. At most, it is a qualified right, if one is in compliance with the law in terms of meeting the requirements for the obtaining of a vehicle licence, that one can reasonably then expect to be issued with said licence, within a reasonable time after all of those requirements have been met."

[156] At paragraph [28], however, the judge seemingly vacillated and found that the Transport Authority owed the appellant a duty of care. As previously quoted, he said:

> "[28] … When considered carefully, this court has no doubt in concluding that at all material times, the required 'special relationship' did exist as between the [appellant] and [the Transport Authority], such that a duty of care was owed by

> [the Transport Authority] to the [appellant], to treat with his application for the hackney carriage licence, in an appropriate and responsible manner. …"

[157] The Transport Authority, he said, would have been aware that the appellant had applied to it for his hackney carriage vehicle licence with the intention of utilizing it "for the purpose of transporting persons for hire".

[158] At paragraphs [33] and [34], he said:

> "[33] In any event though, not only is there no evidence which was led before this court by anyone, which would have entitled this court to draw the conclusion that the [appellant] ought to have obtained a licence for the relevant vehicle, in point of fact, the evidence given by the only defence witness and which is unchallenged in that regard, has been that the [appellant] was not entitled to have got a licence until he submitted his vehicle's proper insurance documentation and further, there is no evidence from anyone, that the [appellant] ever did submit same.
>
> [34] In the circumstance, there having been no duty of care owed by the Crown, or by [the Transport Authority], to the [appellant] to award him a licence or to provide him with a licence whether in original or duplicate form in respect of the relevant motor vehicle, it inexorably follows that the negligence as particularized at (a) and (c) of the [appellant's] particulars of negligence, have been wholly unproven."

[159] In further support of his finding that the Transport Authority owed no duty of care to the appellant, because he was not entitled to receive a licence, the learned judge relied on Ms Benjamin's evidence that the application was not accompanied by the required insurance certificate and therefore a licence could not have been lawfully issued. He further opined at paragraph 28 that:

> "[28] …[T]he [Transport Authority] would have at all material times, either known, or at the very least, have been in a position to know, that if they acted negligently either in terms of failure to make available to the [appellant] at all, the licence which he had applied for, or in failing to make same available to him, within a reasonable time after he had applied for same, such negligence could, in all reasonable likelihood have caused to the [appellant] financial loss. …"

The learned judge's view of the misplaced file

[160] The learned judge stated at paragraph [35]:

> "[35] As regards the alleged negligence of [the Transport Authority] and by extension, the Crown, in having misplaced the [appellant's] application for the hackney carriage licence, for the relevant vehicle, it being entirely unknown by this court, as to why said application was misplaced, or in other words, without knowing anything as to the circumstances surrounding the misplacement thereof, it would not even be open to this court to properly conclude that such misplacement must have been, or was likely caused by carelessness. Everything must be considered in its proper context and if the court does not know that context, it is never properly open to this court, to speculate as to same."

[161] The learned judge expressed the view that the appellant ought to have adduced evidence as to the length of time his file was misplaced. He also expressed the view that the consequences to the appellant would not have been detrimental if his file had been misplaced for one day, as opposed to a period of over two years. At paragraphs [17] and [18], he said:

> "[17] There is evidence which has been provided during the trial of this claim, from the [Attorney General] and [the Transport Authority], through their witness, Mrs. Banneta Benjamin…and also, …a letter which was written by [the Transport Authority's] then legal officer – Miss Jean Williams, which make it clear that the [Transport Authority's] file pertaining to the [appellant's] application of March 29,

2005, to renew hackney carriage licence, had been misplaced by the [Transport Authority]. There exists through, no oral evidence from anyone, nor any documentary evidence admitted during trial, nor any information provided by any of the defendants in response to any request for information which could have been made of them, by the [appellant] and which information, if had been provided, would then have formed part and parcel of the [Transport Authority's] statement of case, specifying how long that file was misplaced for. The claimant's failure to provide any such evidence to the court, whether through, or by means of cross-examination of the only defence witness that testified, or otherwise, must inevitably mean that said misplacement of that file, cannot, by any means, in and of itself, be properly considered by this court, as constituting anything more than a factual scenario which, even though proven, goes no further than enabling this court to draw an inference that, at some point in time and for some uncertain period of time, the [Transport Authority] may have been less than sufficiently careful, in safeguarding the file and contents thereof pertaining to the [appellant's] relevant application for renewal of hackney carriage licence. Even if this court were minded to draw such inference, which incidentally, it is not, since, if this court were to do so, it would in reality, be doing nothing more than acting on speculation, nonetheless, such an inference, if drawn, could not be properly accepted by this court as constituting evidence of that which is known in law, as the cause of action - negligence. The reasons for the court being unable to so accept that; are set out in some detail, further on, in these reasons for judgment.

[18] As far as particulars (a) and (c) of the [appellant's] particulars of negligence, are concerned, it is worthwhile noting, at this juncture, that the only means by which said particulars can properly be accepted by this court, as constituting negligence on the part of the [Transport Authority], arising from which, the [appellant] should be awarded judgment in this claim, is if this court were minded to also conclude that the [appellant] ought to have been granted a hackney carriage licence for the vehicle registered as PB 9407, at some point in time between when it was that he applied for same, that having been on March29, 2005 and when it was, that a license [sic] was, at best from the

> defendants' perspective, according to the evidence of the only defence witness, 'printed' by [the Transport Authority], on January 10, 2008 - albeit that said license [sic], when printed, was printed as pertaining to the period of April, 2005 to March, 2006. …"

[162] The learned judge concluded that the evidentiary burden rested on the appellant, to prove that he was entitled to the licence, by reason of having submitted a completed application, and that it was the misplacement of the file by the Transport Authority, which caused the delay in the issuance of the said licence. At paragraph [19] he said:

> "[19] It is the [appellant] who had, resting on his shoulders, at all times throughout this trial, the burden of proving negligence against the [Attorney General] and [the Transport Authority], or either of them. Furthermore, it is he who had the burden of leading such evidence as would have been sufficient to prove his claims in detinue and negligence, on a balance of probabilities. Even further still, he was limited at trial in seeking, to prove the particulars of negligence as alleged, as those particulars, would have been expected by the defendants and also, by this court, to outline the ambit of the primary bases underlying the [appellant's] claim against the [Attorney General] and [the Transport Authority], for damages for negligence. The [appellant] has, for several equally compelling reasons, all of which will be set out in some detail, further on in these reasons, failed to meet the evidentiary burden and accordingly also, the legal burden of proof, of negligence."

[163] Regarding Ms Benjamin's statement that the misplaced file would not have been beneficial, the learned judge stated:

> "[39] This court does not accept the evidence of Ms. Benjamin, either as regards the [appellant] having allegedly refused to resubmit the said documents, or as to the file not being 'beneficial to the process.' If indeed, the latter assertion was true, why then would [the Transport

> Authority's] attorney, have required the relevant documentation to have been re-submitted? Also, as regards the assertion that the [appellant] 'refused' to resubmit said documentation, this is belied by Ms. Benjamin's own evidence, also given during her testimony in chief, that – *'The claimant came into the Transport Authority sometime in 2007 and re-submitted documents as well as the Certificate of Fitness, so that a hackney carriage licence for the period April 2005, to March 2006 could be processed.'* " (Italics as in the original)

[164] He accepted Ms Benjamin's evidence that the Transport Authority only became aware of the seizure upon the receipt of the Public Defender's letter in 2007. He also accepted that the Transport Authority's then legal officer, Ms Jean Williams, responded by way of letter dated 17 July 2007, in which she advised that the file had been misplaced and requested that the appellant resubmit the documents. The learned judge, however, rejected Ms Benjamin's evidence that:

> "The file was not beneficial to the process as said file contained only vehicle documents as our Licensing Management Information System contained all information needed."

[165] He also rejected Ms Benjamin's initial allegation that the appellant did not resubmit the documents. He, however, accepted her antithetical evidence that in 2007, the documents were resubmitted, which enabled the processing of the hackney carriage licence for the period April 2005 to March 2006.The learned judge then arrived at the conclusion that:

> "[40] … There is no doubt therefore, that in the absence of the [appellant] proving that he had submitted all required documentation to the [Transport Authority] and by extension, the Crown, prior to the application file in which such documentation should have been kept, having become

> misplaced and that, it was therefore, as a consequence of the misplacement of that file, that the relevant hackney carriage licence was not issued, the [appellant's] claim for damages for negligence, based upon misplacement of the relevant application file, cannot properly succeed."

The appellant's submissions

[166] The appellant refutes the Transport Authority's claim that drivers were not permitted to operate with the payment receipt until the licence was issued. He is insistent that it was the Transport Authority's policy at the time to allow owners or drivers of such vehicles to operate until the issuance of the licence. Counsel, Mr Nelson, contended that even if a road licence had been printed in January 2008, the appellant was never notified or advised that a licence was available and to date he has not received same.

[167] It was counsel's submission that the learned judge's reasoning in respect of whether the Transport Authority owed the appellant a duty of care was contradictory. In support of that contention, he directed the court's attention to the judge's finding that "there existed a special relationship" between the appellant and the Transport Authority. He also cited, as an example, the learned judge's statement that the Transport Authority knew or was in position to have known that the failure to make the licence available within a reasonable time, was likely to cause the appellant financial loss. Contrary to those findings, the learned judge proceeded to state that the Attorney General and by extension, the Transport Authority owed no duty of care to the appellant.

[168] According to Mr Nelson, it was the misplacement of the appellant's file and the incidental delay in the issuance of the licence which amounted to negligence. Counsel posited that, the learned judge erred in his finding that, notwithstanding the Transport Authority's admission that it misplaced the appellant's file, that admission did not constitute negligence. He further argued that the learned judge erred in his finding that the misplacement of the file could not assist the appellant's claim.

[169] It was his further submission that the appellant was neither negligent nor did he contribute to the seizure, detention or sale of the vehicle. He had no control over the detention and sale of the vehicle, counsel posited. Those matters were entirely within the remit of the Transport Authority, he submitted.

[170] Mr Nelson adverted to the fact that the vehicle was sold without any and/or any due, reasonable and/ or proper notice having been given to the appellant of the imminence of the sale and disposal of the vehicle. The actions of the Transport Authority, therefore, deprived the appellant of his means of earning his primary source of income as a hackney carriage operator from 17 November 2005.

[171] The Transport Authority was negligent in failing to provide the appellant with the licence, at the time of his application or on any of the several occasions he visited its office to collect it. Counsel posited that the Transport Authority was also negligent in failing to attend the Traffic Court in December 2005 and January 2006 to have the matter resolved. It was for those reasons, he contended, that the appellant operated

his vehicle as a hackney carriage with the copy of the application and receipt as proof of its renewal, instead of the licence.

[172] Counsel further argued that the Transport Authority accepted that it was negligent by the averment in its further amended defence, that a road licence was later issued, which it alleged was collected by the appellant. He found it curious that the Transport Authority would have issued the licence, two years after the application, in light of its claim that the appellant did not submit the mandatory insurance certificate. Counsel postulated that even if a road licence had been printed, the appellant was never notified or advised of its availability and to date he has not received the licence. The Transport Authority is, therefore, wholly liable for the loss suffered by the appellant, consequent on the detention and conversion of his vehicle.

The Transport Authority's submissions

[173] Mr McDermott, on the other hand, submitted that the appellant failed to establish all three elements of the tort of negligence, by his failure to demonstrate that the Transport Authority owed him a duty of care; the duty of care was breached; and the breach resulted in loss to him. Counsel, however, acknowledged at the hearing that there existed a special relationship between the parties, but contended that the Transport Authority was not negligent. He submitted that there were sufficient bases upon which the learned judge correctly entered judgment in favour of the Transport Authority.

[174] Counsel further submitted that the learned judge accepted Ms Benjamin's evidence that the appellant had failed to submit the required insurance certificate with his application for the hackney carriage licence. He directed the court's attention to Ms Benjamin's witness statement, from which he indicated nothing was struck out and which supported the Transport Authority's contention that the appellant did not submit all the documents in a timely manner. Ms Benjamin referred to the Inspection Form for the vehicle, which was submitted on 5 May 2005, and on which counsel relied in support of the Transport Authority's contention that the appellant's conduct in completing his application for the said licence was dilatory.

[175] Mr McDermott posited that the learned judge was entitled to accept or reject aspects of the statement, as he deemed fit. He contended that there was evidence that the licence was not issued because of the appellant's failure to submit the required insurance certificate. He was also adamant that it was never the Transport Authority's policy to allow persons to operate vehicles without a valid licence.

[176] According to Mr McDermott, the foundation of the appellant's particulars rested on the assumption that the appellant had presented a completed application for the road licence. He also pointed to the learned judge's finding that, in seeking to establish negligence, the appellant bore the evidential burden to prove that he had submitted a "completed" application. The appellant, he submitted, failed to adduce evidence which could have enabled the learned judge to arrive at a finding that the appellant was entitled to the grant of the licence.

[177] Mr McDermott further argued that the misplacement of the appellant's file *ipso facto* was not evidence of the Transport Authority's negligence, in the absence of evidence regarding the circumstances of the misplacement or how long it was misplaced. It was his submission that there was no evidence that the misplacement of the file accounted for the delay in the processing of the application.

Discussion

[178] It is settled law that an appellate court ought not to interfere with the findings of facts of a trial judge who has had the advantage of having seen and heard the witnesses. This court's interference is only warranted if the trial judge has demonstrated a misunderstanding of the law or the evidence and has thereby arrived at manifestly erroneous conclusions.

[179] To succeed in its claim for negligence, the appellant must surmount the following legal hurdles. He must prove that:

(a) the Transport Authority owed him a duty of care to secure his application;

(b) the Transport Authority breached that duty by misplacing his application; and

(c) the misplacement of his application resulted in his loss of earnings by depriving him of a valid licence to operate.

[180] The learned judge was correct in his view that, for the applicant to succeed on his claim that he was entitled to damages for negligence, the onus was on the appellant to first prove that the Transport Authority owed him a duty of care. The learned judge found that this claim was for economic loss and although it resulted from the non-issuance of the licence, the necessary special relationship existed, as the Transport Authority would have been aware that the appellant had applied for a hackney carriage licence and would have known the purpose for which it was sought. He further expressed the view that if the Transport Authority was negligent by failing to issue the licence within a reasonable time or at all, there was likelihood that the appellant would suffer financial loss.

[181] Mr McDermott having acknowledged at the hearing that although the claim had been purely for economic loss, there existed a special relationship between the parties; it is unnecessary to deal further with that issue. Suffice, however, to note that distilled from the decided cases is the principle that such claim must not to be remote, as established in **Spartan Steel and Alloys Ltd v Martin and Company (Contractors) Ltd** [1973] 1 QB 27.

[182] By virtue of the Transport Authority Act, a special relationship existed between the parties, as the Transport Authority is the body responsible for issuing licences. In order to obtain a licence to operate as a hackney carriage the appellant was obliged to fulfil the requirements of the Transport Authority Act. Upon so doing, the Transport Authority was obliged to provide the licence. Undoubtedly, the Transport Authority

owed a duty of care to the appellant to secure his application, to consider it, and if approved, to provide him with the renewed road licence upon the vehicle being tested and approved and its receipt of the certificate of fitness within a reasonable time thereafter. That duty was breached by the misplacement of the appellant's file. It was the misplacement of the appellant's application, which resulted in its inability to process the licence application.

[183] The learned judge's conclusion, therefore, that the required "special relationship" to establish proximity did exist and a duty of care was owed by the Transport Authority "to treat with [the appellant's] application for the hackney carriage licence in an appropriate and responsible manner", cannot be faulted. His ensuing analysis, however, is in issue.

[184] Having refused the Transport Authority's application to amend its defence to plead the allegation and having prevented the appellant from being questioned in relation to it, the learned judge, in determining the effect the misplaced file could have had on the appellant's claim, said:

> "[41] Misplacement of that file, in the absence of there existing any evidence as to how it became misplaced and/or for how long said file remained misplaced and in the absence of any evidence capable of satisfying this court that it was due to the misplacement of same and not any other reason - such as, the failure by the [appellant] to submit all required documentation prior to that file having been misplaced, must and does lead this court to the conclusion, bearing in mind other conclusions already drawn by this court, that the [appellant] has wholly failed, to prove his claim against the crown for damages for negligence."

[185] The learned judge proceeded to accept Ms Benjamin's evidence that the appellant's application was incomplete because of his failure to submit an insurance certificate. Consequently, he held that the appellant had forfeited the duty of care which had been owed to him. The learned judge also found that the burden was on the appellant to prove that he submitted a completed application.

[186] As already observed, that allegation of the appellant's failure to submit the vehicle's insurance certificate was not pleaded and ought not to have been considered by the learned judge. That allegation only arose on Ms Benjamin's witness statement. Furthermore, the learned judge had disallowed an amendment to the defence to include that assertion. He was therefore plainly wrong in relying on that evidence.

[187] The misplacement of the appellant's file was one of three averments of negligence particularized in the appellant's claim. As already observed, the Transport Authority accepted, without demur in its defence, amended defence and further amended defence, that it had misplaced the appellant's file. The learned judge apparently ignored or placed no significance on that admission in all three defences, the last of which was filed on 11 November 2014, which without more, in my view, was *prima facie* an admission of one aspect of negligence relied on by the appellant.

[188] Indeed, that admission, that is, the misplacement of the file, had been made by the then legal officer, Miss Jean Williams' by way of letter, as early as 17 July 2007, in response to the Public Defender's enquiry about the status of the appellant's application. Miss Williams had also requested that the appellant resubmit his vehicle

documents to enable the Transport Authority to "create a duplicate file and proceed with the application for the Hackney Carriage Licence". Of importance is that Ms Williams' letter attributed the reason for the failure to issue the licence to the misplacement of the file. No mention was made of the appellant's alleged failure to submit his insurance certificate.

[189] The learned judge observed that there was no oral or documentary evidence which spoke to how long the file had been misplaced. Despite the Transport Authority's pleadings and evidence of having misplaced the appellant's file, he sought to place the onus on the appellant to provide answers as to when and for how long, the file which was at all material times in the possession of, and under the control of the Transport Authority, was misplaced. On the Transport Authority's evidence, the file had not been found up to the point of the trial before the learned judge.

[190] Mr Nelson directed the court's attention to the learned judge's subsequent finding regarding the appellant's "failure" to provide evidence either directly or by cross-examination, as to the length of time and the circumstances under which the file was misplaced, as being fatal to his claim for negligence. He juxtaposed that finding to the cross-examination of Ms Benjamin at trial, which sought to elicit the circumstances under which the file was misplaced and her inability to respond regarding how, and/or the period the file was misplaced.

[191] The learned judge's finding that there was no evidence as to the length of time, or the circumstances under which the file was misplaced, is also not supported by the

evidence. In the absence of evidence to the contrary, the file would have been opened on the day the appellant submitted his application. The appellant's file was at all material times in the possession of the Transport Authority.

[192] Having submitted his application to the Transport Authority with the necessary documents, it was wholly unreasonable to place the responsibility on the appellant, who had no access to the file, to provide such information, which would exclusively have been at all material times, within the Transport Authority's knowledge. The Transport Authority created and had custody and control of the file and, as such, it owed the appellant a duty of care to secure it.

[193] It was Ms Benjamin's evidence that she checked the Transport Authority's LMIS and it confirmed that at the time the application was submitted, the appellant did not submit a valid and current insurance certificate and that he has never submitted same. It is significant that this allegation was made by way of Ms Benjamin's witness statement of 11 November 2014, in which she sought to ascribe the reason for the delay entirely on the appellant's alleged failure to submit the vehicle's insurance certificate.

[194] Ms Benjamin also stated that the LMIS had all the documents that would have been on the misplaced file, and as such the file would not be relevant to the processing of his application. It should be noted that no documentary evidence was provided in support of her account of the documents on the LMIS. The learned judge correctly

questioned the reason Ms Williams would have requested that the appellant resubmit his documents, if the LMIS possessed all the documents he submitted in 2005.

[195] If the non-issuance of the licence was in fact because of the appellant's failure to submit his insurance certificate, as Ms Benjamin alleged, the reasonable inference is that Miss Williams would have cited that as the reason for the delay and would have specifically requested that he submit his insurance certificate.

[196] Although in its defence and amended defence, the Transport Authority had averred that the road licence which had been applied and paid for in 2005 had only become available for the appellant's collection by April 2007 for the period April 2007 to March 2008, in its further amended defence, the Transport Authority recanted and asserted instead that the licence was issued in January 2008 for the period April 2005 to March 2006 "to facilitate the renewal application for hackney carriage license [sic] process".

[197] The learned judge inferred that the insurance document was resubmitted, hence the licence being made available by January 2008. However, even if the insurance certificate was resubmitted in 2007 along with the other vehicle documents, this is not evidence that the insurance certificate was not submitted at the time of the appellant's renewal application in 2005. Furthermore, in order for a licence to be issued for the period April 2005 - March 2006, the appellant would have had to resubmit an insurance certificate for that period. Therefore, the judge's acceptance that the insurance certificate was resubmitted, contradicts his previous finding that the appellant did not

have insurance for his vehicle at the time of his application or the seizure; because if the vehicle was not insured in 2005 then he would not have been able to resubmit an insurance certificate for that period in 2007.

[198] The Transport Authority's assertion that the licence was eventually printed and made available to the appellant raises the issue: what change of circumstance resulted in its issuance in light of Ms Benjamin's evidence that the appellant "failed to co-operate with the Transport Authority by, among other things, attending with the requisite documents", and her further assertion that, "sometime in 2007" the appellant "resubmitted documents which included the Certificate of Fitness which enabled the processing of a hackney carriage licence for the period April 2005 to March 2006".

[199] It should be noted that the learned judge rejected Ms Benjamin's evidence that, when requested, the appellant refused to resubmit the said documents. He accepted her testimony that the appellant resubmitted documents in 2007. It was also the appellant's evidence that in 2007, at the request of the Public Defender, he resubmitted documents.

[200] Applications for renewal of road licences ought not to be accepted unless a certificate of insurance or a certificate of security is provided. Section 9 of the Motor Vehicles Insurance (Third Party Risks) Act, on which the learned judge relied as a basis for justifying the Transport Authority's failure to provide the licence, mandates the attachment of an insurance certificate or certificate of security to such applications. It provides, as stated above that:

> "A person applying for a licence in respect of a motor vehicle under the law for the time being in force relating to motor vehicles **shall** append to the application a certificate of **insurance or a certificate of security, or shall produce such evidence as may be prescribed that either-**
>
> (a) on the date when the licence comes into operation there will be in force the necessary policy of insurance or the necessary security in relation to the user of the motor vehicle by the applicant or by other persons on his order or with his permission; or
>
> (b) the motor vehicle is a vehicle to which this Act does not apply." (Emphasis supplied)

[201] The Transport Authority has failed to point to any evidence that the appellant, in lieu of the required insurance, provided the "necessary security", yet a licence was allegedly issued in January 2008. Evidently, all the necessary documents were submitted in 2005 and resubmitted in 2007 to have enabled the granting of the licence retroactively for that period.

[202] In respect of the certificate of fitness, it was the appellant's unchallenged evidence that, upon making his application, he was given the necessary documents to have the vehicle tested to determine its roadworthiness. In compliance, the vehicle was duly tested and he returned to the Transport Authority with the required certificate of fitness on 5 May 2005. As already noted, by virtue of section 9 the Motor Vehicles Insurance (Third-Party Risks) Act, it was a condition precedent to the licensing, that the vehicle be insured. It follows, therefore, that it ought to have been upon presentation of proof that the vehicle was insured that the Transport Authority, on a balance of probabilities, would have provided the appellant with the documents to have the vehicle

tested for its road-worthiness. It would certainly have been a derogation of the Transport Authority's duty if it had allowed the appellant to have the vehicle so certified without submitting the necessary insurance.

[203] Although it is the Transport Authority's case that a licence was eventually printed and made available by January 2008, the appellant disputes ever having been informed of its availability or having received a road licence. Significantly, there is no evidence from the Transport Authority that the required insurance certificate, the only outstanding document and the alleged reason for the delay, was ever submitted, which would have enabled the availability of the licence. In the absence of such evidence, the Transport Authority's issuing of the licence without the appellant providing the necessary insurance would have been in breach of the law. In fact, it was the appellant's evidence that in March 2008, he met with the then Managing Director of the Transport Authority, Mr Keith Goodison to discuss and resolve the matter.

[204] Assuming the application was in fact incomplete, it would have been irresponsible of the Transport Authority to have accepted it. Applications are to be accepted upon the applicant's fulfilment of the requirements. The fact that the appellant's application was accepted belies, on a balance of probabilities, the assertion that it was incomplete, and seriously undermines the Transport Authority's case.

[205] The Transport Authority's assertion that it issued a licence in 2008 also raises the question of whether it had validated, retrospectively, the operation of the vehicle during

the period April 2005 – March 2006. Regarding the Transport Authority's evidence that a licence was eventually issued, the learned judge said:

> "[32] …There is no evidence from either party, as to when same was rectified, or if same was rectified at all. It is true, as per the evidence of the respective parties, that for some unknown reason, a licence was printed in relation to the relevant vehicle on January 10, 2008 and that when printed, that licence related to the period- April, 2005 to March 2006, but no evidence was provided to this court by anyone, based upon which it could even be appropriately inferred, that this means that the [appellant] did in fact provide to the [Transport Authority], the insurance certificate, or insurance cover note, for the relevant vehicle, for the period of April 2005 to March 2006, or for that matter, draw any inference whatsoever, as to when said insurance certificate or insurance cover note, would have been provided to them by the [appellant]."

[206] By that finding, the learned judge failed to consider the effect of the late issuance of the road licence which was allegedly issued in January 2008 for the period April 2005 – March 2006, which the appellant had not received. The learned judge also failed to attribute the appropriate weight to the Transport Authority's evidence in that regard. His concentration was instead misplaced on the Transport Authority's evidence that the appellant had failed to submit his certificate of insurance with his application for renewal .

[207] The learned judge, therefore, failed to address his mind to the following pertinent issues:

(i) whether the Transport Authority would have accepted the application without the mandatory insurance; or the

necessary security in light of the proscription of section 9 of the Motor Vehicles Insurance (Third-Party Risks) Act;

(ii) the fact that the application was in the sole custody and exclusive control of the Transport Authority; and crucially;

(iii) the reason a licence for the period (April 2005 - March 2006) was eventually generated in January 2008.

[208] In assessing and weighing the evidence on a balance of probabilities, the learned judge ought to have considered the foregoing matters and demonstrated how he had resolved such anomalies. Although the determination of issues of fact is entirely the prerogative of the learned judge, he was obliged to demonstrate not only that he was cognizant of them, but that they were rationally resolved.

[209] In the absence of cogent evidence to the contrary, it is reasonable to assume from the belated issuance of the licence, that the appellant would have been granted a licence in 2005, were it not for the misplacement of his file and would, therefore, have been able to lawfully operate his vehicle. It was therefore foreseeable that by issuing a licence in 2008 for the period 2005 to 2006, the appellant would not have been able to lawfully operate his vehicle in 2008, and would therefore suffer loss.

[210] Indeed, whether his loss of income was consequential on the seizure of the vehicle, or if it had not been seized, but had not operated during the period he awaited the issuance of the licence, his inability to earn during that period would have been

directly consequent on the Transport Authority's act of misplacing his file and issuing a licence after the expiration of the period to which it relates.

[211] The misplacement of the appellant's file deprived him of the opportunity to have his application, for which he had duly provided the required fee, considered within a reasonable time. The inordinate delay in the issuance of the licence for April 2005 – March 2006, prevented the appellant from operating the vehicle as a hackney carriage during the period for which he had paid, which resulted in his loss of income. The Transport Authority was therefore liable for loss consequential on its negligence in misplacing the appellant's file and therefore not being able to consider his renewal application, which resulted in his inability to operate his vehicle as a hackney carriage during the period. The appellant thereby suffered loss as a consequence of which he is entitled to be compensated. This loss was a foreseeable consequence of the misplacement of the appellant's file.

[212] Although issues of credibility are entirely within the learned judge's purview, it was nonetheless his task to have weighed the evidence. The Transport Authority having asserted the appellant's failure to provide an insurance certificate, the burden to prove his failure to do so, rested on them. Significantly, as noted earlier, there is no evidence that the appellant had belatedly provided the certificate of insurance, which the Transport Authority alleged was outstanding, and which on Ms Benjamin's evidence had delayed the granting of the licence. It is therefore curious that the Transport Authority would have, in breach of the law, provided the licence, albeit a number of years later,

in the absence of evidence that the appellant had complied, by providing the required certificate of insurance or security.

[213] In determining the matter, the parties' credibility was the main consideration, it was therefore incumbent on the learned judge to have demonstrated that he had properly analysed the evidence and had resolved the significant conflicts in the evidence. Moreover, as already pointed out, the learned judge ought not to have countenanced the Transport Authority's belated assertion regarding the appellant's alleged failure to provide insurance.

[214] In light of the foregoing, the learned judge's rejection of the appellant's claim for negligence was erroneously premised on an issue which was not pleaded in accordance with rule 10.7 of the Civil Procedure Rules 2002, as stated above, and which he had disallowed cross-examination on. His finding that no duty of care was owed to the appellant because his application was incomplete and further that the Transport Authority was not liable for negligence consequent on the misplacement of the appellant's file, was hence, plainly wrong. In light of the foregoing, grounds 2, 3, 16, 17 and, 19 and supplemental grounds 1 and 14 succeed.

The measure of damages

The learned judge's findings

[215] The length of time the file was misplaced is important in determining the appellant's loss. I agree with the learned judge's view that:

> "[36] …Surely, if it was only misplaced and thus, temporarily lost for one day, the consequences thereof, for the applicant whose application has been lost, may not be as detrimental to him, as it may have been, if his application had been temporarily lost, for a period of over two years! ..."

[216] His subsequent finding that there was no evidence as to how long the file was lost is, as already noted, erroneous. The appellant applied for the renewed licence on 29 March 2005 and his vehicle was seized on 17 November 2005. The letter from the Transport Authority to the Public Defender dated 8 June 2007 stated that the appellant's file was misplaced. Therefore, the appellant's vehicle would have been impounded in the Transport Authority's pound since 2005, and almost two years after his application, his file was still not found; his file having been misplaced sometime between March 2005 and June 2007.

The appellant's submissions

[217] Mr Nelson argued that the Transport Authority failed to give good, sufficient and valid reasons for its undue delay in returning the vehicle to the appellant and issuing him with the road licence. There is also no evidence of the Transport Authority taking any step whatsoever to minimise the loss, damages and expenses suffered by the appellant.

[218] The appellant has been unlawfully and improperly deprived of the means of earning his primary source of income from 17 November 2005. He has also been unlawfully and improperly deprived of the use, benefit and enjoyment of his vehicle from 17 November 2005. To date, the Transport Authority has failed to provide the appellant with the road licence he applied and paid for on the 29 March 2005.

[219] Counsel contended that the appellant had taken all reasonable steps in pursuit of his duty to mitigate his losses consequent on the unlawful seizure and detention, by his repeated requests for the return of his vehicle and the issuance of the road licence. He pointed out that it was Ms Benjamin's evidence that, at the Transport Authority's request, the appellant had resubmitted the documents.

[220] Counsel further contended that the appellant is entitled to an award of damages based on the market value of the car at the date of the trial. Especially since, at the time the matter was heard, the vehicle was no longer in the Transport Authority's possession. The appellant itemized the following special damages, as amended in his submissions at trial:

"i.	Loss of use of motor car from November 17, 2005 To January 26th, 2015 at $2,500,00 [sic] per day as a Taxi Operator	$8,430,000.00
ii.	Loss of use for social and domestic purposes at $1,000.00 per day from November 17, 2005 to January 26th, 2015	$3,372,000.00
iii.	Loss of insurance paid to operate car	80,000.00 [sic]
vi.	Money paid to Transport Authority	4,250.00 [sic]
v.	Approximate value of motor car	160,000.00 [sic]
		$12,046,250.00"

The Transport Authority's submissions

[221] The Transport Authority denied liability for any alleged damage sustained by the appellant. Mr McDermott, however, contended that if the appellant is found to be

entitled to an award of damages, he was under a duty to mitigate his loss, which he failed to do.

[222] In its defence, the Transport Authority averred that "the vehicle was made available for return to the [appellant] within reasonable time of its seizure and request, in April 2007 and at the very latest, by June 9, 2008 and the [appellant] has to date, failed to mitigate loss in not collecting same". The Transport Authority relied on its 9 June 2008 letter to the appellant, as evidence of its willingness to release the vehicle to him.

[223] Regarding the appellant's alleged loss, the Transport Authority contended that the appellant failed to prove his alleged loss and provided no evidence to support the value of the vehicle, his loss of income and other losses. Instead, he "merely flung figures before the court without substantiating same". It was also submitted that, notwithstanding the evidence that the appellant paid taxes, no documentary evidence such as tax returns or any bank account information to substantiate his earnings was tendered.

[224] Counsel relied on the case of **Lawford Murphy v Luther Mills** (1976) 14 JLR 119 in support of his submission. He contended:

> "In an action in which a plaintiff seeks to recover special damage the onus is on him to prove his loss strictly. It is not enough for a plaintiff to write down particulars, and, so to speak, throw them at the head of the court, saying: This is what I have lost; I ask you to give me these damages. They have to prove it."

In relying on that case, counsel submitted that the appeal should be dismissed in the circumstances.

Discussion

[225] The appellant's claim for detinue having failed, he is not entitled to recover damages, that is, loss of income from the date of the seizure. He is, however, entitled to damages, that is, compensation for loss of the income he would have earned, but for the Transport Authority's negligence. He has claimed this as part of his special damages.

The absence of documentary proof

[226] Lord Goddard's oft cited statement in **Bonham-Carter v Hyde Park Hotel Ltd** (1948) 64 TLR 177 has been accepted by our courts as correct. He stated:

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

Has the appellant merely tossed figures at the court?

[227] On 12 May 2010, the appellant obtained a valuation of the vehicle from the Director of Auto Electrical Specialist Limited, a member of the Loss Adjusters Association of Jamaica. Pursuant to that assessment, the appellant claimed his estimated loss of income from 17 November 2005 to 26 January 2015, at $2,500.00 per day, which amounted to $8,430,000.00. He also estimated his loss for "social and

domestic purposes" at $1,000.00 per day, which amounted to $3,372,000.00, and the approximate value for the 1988 Toyota Corolla at $160,000.00.

[228] No documentary evidence in support of the estimate or his income, was however provided. Should the appellant then be driven from the seat of justice? The vehicle was used to transport passengers along specified routes. Unlike the government operated buses, there was no requirement to issue tickets which could have allowed for the availability of an accurate record of the number of passengers transported. Our courts have repeatedly drawn a distinction between well-organized corporations and "casual work cases". Rowe P, in **Central Soya Jamaica Ltd v Junior Freeman** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 18/1984, judgement delivered 8 March 1985, observed that:

> "[i]n casual work cases it is always difficult for the legal advisors to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence.
>
> This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of accounts. They buy, and replenish their stock from each day's transaction. They pay their domestic bills from the day's sale. They provide their children with lunch money and bus fare from the day's sales without regard to accounting."

[229] Wolfe JA (as he then was), in the case of **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173, also recognised the difficulty of obtaining precise figures from the casually employed. He said:

> "Without attempting to lay down any general principle as to what is strict proof, to expect a side walk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J., referred to as ' the vainest pedantry'."

[230] **Dalton Wilson v Raymond Reid** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 14/2005, judgment delivered 20 December 2007, was a case in which this court found that a part time welder's oral testimony, was "...unsupported by even a tittle of documentary evidence", and was "disinclined to disturb the trial judge's assessment of the claimant's/welders loss of earnings".

[231] In the absence of evidence materially impugning the sum of $2,500.00 claimed as the daily earnings from the vehicle, I cannot find a basis for rejecting that claim. However, the appellant's calculation of $8,430,000.00 for the period claimed is incorrect. From 17 November 2005 to 26 January 2015 are 3358 days, which would amount to $8,395,000.00 for loss of earnings and not $8,430,000.00 as claimed.

[232] Regarding the appellant's claim for damages for detinue, although the Transport Authority, except for Ms Benjamin's *ipse dixit* by way of her witness statement, provided no evidence that it complied with the requirements of advertising the sale of the vehicle, the appellant was nevertheless advised by the Transport Authority to collect the vehicle on 9 June 2008, but he declined to do so on the ground that the vehicle would have been no use to him without the licence. He was however obliged to mitigate his loss by collecting the vehicle and attempting to renew his licence in order to operate the vehicle.

[233] In determining the appellant's loss of income for the period of two years and six months from 17 November 2005 to 9 June 2008, consideration must necessarily be given to the impact the cost of operating the vehicle would have had on his profits. In the absence of evidence regarding the expenses the appellant would have incurred over the two years six months and 24 days in maintaining the vehicle, this court considers that he would have incurred expenses for: fuel, tyres, maintenance/servicing, licence, fitness, registration and insurance. It is reasonable to find that a vehicle operating as a public passenger vehicle would require regular servicing and/or other repairs. Moreover, on the appellant's evidence, a driver was employed to operate the vehicle. The appellant would therefore have incurred the further expense of paying the driver. In the absence of evidence, the appellant's vehicle, considering its age, being a 1988 model, and the nature of its operations, would have, on a balance of probabilities, necessitated servicing or otherwise been out of operation , about thrice per year, for an estimated average of two days at a time. Although he would not have reached the income tax threshold, he would have been required to pay NIS and education taxes.

[234] His claim for the sum of $1,000.00 per day for loss of use of the vehicle for social and domestic purposes was also challenged for the same reason as that preferred in respect of the claim for loss of daily earnings. This claim for "loss of use for social and domestic purposes" is unsustainable because the absence of a road licence to operate as a public passenger vehicle did not prevent him from operating the vehicle for social and domestic purposes. The Transport Authority, having not been found responsible for the seizure and detention of his vehicle, but only in negligence for losing his application,

cannot be required to refund him for loss of use for social and domestic purposes. That would be too remote.

[235] In the absence of documentary evidence to support his claim for $80,000.00 for loss of insurance paid to operate his vehicle, that claim must fail. The receipt evidencing the payment of $4,250.00 to the Transport Authority for the road licence was however submitted.

[236] Moreover, consequent on the appellant's failure to substantiate his claim for detinue and his failure to mitigate his losses by collecting the vehicle from the pound, an award for the value of the vehicle cannot be made.

[237] On a balance of probabilities, the vehicle would have operated as a hackney carriage for approximately 921 days from 17 November 2005 (date it was seized by the police for operating without road licence) to 9 June 2008 (date the appellant was advised by letter to retrieve the vehicle from the pound). At $2,500.00 per day, his estimated loss of income for that period would be $2,302,500.00. Taking into account the above mentioned expenses, vagaries and vicissitudes, had the vehicle operated for the two years six months and 24 days less the 15 days over that period that it would on a balance of probabilities have been out of service; the amount of $2,325,000.00 would be reduced by one half to make allowance for those matters. The award for loss of income should therefore be $1,151,250.00.

[238] In light of the foregoing, I would allow the appeal, in part; set aside the judgment of Kirk Anderson J; enter judgment for the appellant on the claim; and award damages to him as follows :

(1) Special damages for loss of income for the period 17 November 2005 to 9 June 2008, in the sum of $1,151,250.00;

(2) Special damages for the money paid to the Transport Authority in the sum of $4,250.00 (as proved).;

(3) Interest on the total sum of damages awarded at 6% per annum from 17 November 2005 to 30 January 2015.

I would also award 50% of the costs down below and on appeal to the appellant to be paid by the Transport Authority, to be agreed or taxed. This would reflect the partial success of the Transport Authority on the claim and on the appeal. I propose that there should be no order for costs in respect of the Attorney General.

F WILLIAMS JA

[239] I too have read in draft the judgment of Sinclair-Haynes JA. I agree with her reasoning, conclusion and the orders proposed and I have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed, in part

2. The order of Kirk Anderson J made on 30 January 2015 granting judgment to the Attorney General and the Transport Authority on the claim with costs to be agreed or taxed is set aside and substituted therefor is the following order:

    i. The claim for damages for detinue is dismissed.

    ii. Judgment for the appellant in respect of his claim for negligence against the Transport Authority.

    iii. Damages awarded to the appellant against the Transport Authority in the sum of $1,155,500.00 with interest thereon at 6% per annum from 17 November 2005 to 30 January 2015.

    iv. 50% costs of the claim to the appellant against the Transport Authority to be agreed or taxed.

    v. No order for costs in respect of the Attorney General.

3. 50% of the costs of appeal to the appellant to be agreed or taxed.