[2014] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 168/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (AG)

BETWEEN	**DESMOND ROBINSON**	**1ST APPELLANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**2ND APPELLANT**
AND	**BRENTON HENRY**	**1ST RESPONDENT**
AND	**SARAH (BUTT) HENRY**	**2ND RESPONDENT**

Curtis Cochrane, Director of State Proceedings for the appellants

Garth E Lyttle instructed by Garth E Lyttle & Co for the respondents

12, 13 October 2011 and 16 May 2014

PANTON P

[1] This appeal concerns the detention by the appellants of a car owned by the respondents. The detention was on the basis that the respondents had made false declarations, and thereby had ended up paying less than they should have paid in

customs duties and general consumption tax. The respondents were the ones who initiated action in the Supreme Court. They sought:

a. a declaration that no further customs duty was payable to the Government of Jamaica;

b. the return of the motor car;

c. damages in detinue and or conversion in lieu of the said car;

d. damages for inconvenience, hardship and embarrassment suffered as a consequence of the seizure of the motor car;

e. interest on any sum the court thought fit; and

f. costs.

They succeeded before Sarah Thompson-James J (Ag) as she then was. The appellants, however, have appealed that decision.

Summary of the facts

[2] On 16 December 2004, the respondents imported into Jamaica a BMW motor car, which was in need of repairs. The customs department assessed duty at $1,188,158.37 which the respondents paid. The motor car was repaired and on 31 January 2006, on the instruction of the 1st appellant, it was seized and has been in the possession of the state since then.

[3] The appellants contended in their pleading and at the trial that there was a suspicion of fraud in the declarations that were made by the respondents. The

appellants stated that the assessment and payment of $1,188,158.37 created a shortfall of $7,576,491.99 in the customs duty which ought to be paid. Consequently, they counterclaimed that amount.

The decision of the trial judge

[4] Thompson-James J (Ag) having listened to the oral evidence and considered the documents presented, ordered as follows:

> 1. That no further Custom duties than the sum of $1,188,158.37 is payable.
>
> 2. The Claimants are entitled to the return of the motor vehicle.
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> 3. The Defendants pay to the Claimants the sum of $1,520,000.00 at 6% interest from the 31st January, 2006 to the 24th November, 2009.
>
> 4. The Defendants' Counter-claim is dismissed.
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> 5. Costs to the Claimants to be agreed or taxed.

The grounds of appeal

[5] The appellants have challenged the decision on the following grounds:

> "a. The learned Judge erred by failing to apply sections 13 and 33 of the Constabulary Force Act to the evidence led in the case by finding the First Appellant liable for detinue.
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> b. The learned Judge erred by misinterpreting section 31G of the Evidence Act and by extension, misapplied the said section to the evidence of Anthony Naylor and Gregory Dalton Brown and in the process unreasonably rejected their evidence.

c. The Learned Judge erred by failing to correctly interpret and apply sections 6, 19(2), 19(8) and 28 of the Customs Act to the facts of the case.

d. The learned Judge erred by deliberating on the misconception that there was contention that the relevant car, the subject of the claim, was new and similarly rejected the description of the motor car given by the Respondents, as imported and accepted the description of the motor car as given by the Appellants, as the motor car that was imported, but at the end of the day, unreasonably dismissed the Appellants'/Defendants' counterclaim.

e. The learned Judge erred by awarding interest of 6% from the 31st January 2006 to 24th November 2009 on One Million and Ninety Three Thousand Three Hundred and Thirty Three Dollars ($1,093,333.00) (special damages)."

The evidence

[6] The first respondent, a Jamaican, is an English barrister. He apparently maintains a strong connection with his Jamaican family. The second respondent is also a Jamaican. She is a teacher. They are husband and wife who live and work in England. They have not always lived together due to fear of a backlash from the fact that the wife is a Muslim whereas the husband is not. They purchased a BMW motor car from a dealer in used cars in England. The first respondent entered into a hire purchase agreement to facilitate the acquisition. The car, while being driven by someone else, was extensively damaged in an accident. The first respondent bought the salvage, minus the original engine, and exported it to Jamaica in the name of the

second respondent. The original engine had been removed from the shell and dismantled due to fire damage from the accident.

[7] The first respondent, in preparing to export the vehicle to Jamaica, purchased from the salvage company a used engine of 1995cc which was placed in the engine bay of the car but not in a working condition. The engine block of the original engine was placed in the car itself, along with other parts of the car. The intention was to repair the car in Jamaica, for use in Jamaica. The repairs were indeed carried out. It was after the repairs had been executed that the car was seized.

[8] The first respondent employed a customs broker to deal with the clearance of the car through the customs upon importation into Jamaica. The car was shipped aboard the vessel "Pilgrim" which reported at Kingston Wharves on 21 November 2004. A security supervisor examined the car on its arrival and noted its condition.

[9] Several documents were admitted as exhibits during the evidence of the respondents. These documents include:

a. an import entry C78 form;
b. a form headed "German Salvage";
c. a pro forma invoice;
d. a bill of lading;
e. an order and clearance permit;
f. a document headed BMW dated 9 September 2003; and
g. a declaration of particulars – form C84.

There were other documents that were admitted into evidence – documents such as a vehicle registration document out of England certified by the Licensing Agency with the specifications of the car. All relevant documents indicate that the BMW motor car had a

cubic capacity rating of 1995. This fact has become the bone of contention between the parties as the appellants are maintaining that the cubic capacity rating is incorrect, hence the need for more customs duties to be paid by the respondents.

[10] Mr Anthony Naylor testified on behalf of the appellants. He said he was Area Fraud Manager employed to Black Horse Limited at the company's office in Cardiff, Wales. According to him, Black Horse Limited is the title owner of the vehicle in question, based on his determination that an amount is still owed by the first respondent on the hire purchase agreement. The first respondent has not missed any payments, however, he said. He confirmed that the statement of accounts on which he relied was prepared by someone else and he has no firsthand knowledge of the details of the transaction.

[11] Mr Gregory Dalton-Brown, a mechanical engineer, said in his witness statement that he was employed to Sterling Motors Limited, Jamaica, as a sub-contractor for BMW Germany. He said that he has vast experience with all the motor vehicles manufactured by BMW. On 12 May 2006, at the request of the police, he inspected the BMW vehicle in question. On a physical examination of the car, he said it appeared to him to be in the same condition as manufactured without any alteration. I find this observation by the witness quite interesting in view of the fact that he had not seen the car at the time it was manufactured. By using a diagnostic machine and also checking on what he described as the PUMA system, he found that the car was manufactured on 21 November 2002, and was sold on 30 December 2002. It had a 3.2 litre engine. In his oral evidence, during examination-in-chief, Mr Dalton-Brown confirmed that the

engine in the vehicle was a 3.2 litre engine. Under cross-examination, he said that the number of the engine as recorded in his witness statement is incorrect. Indeed, he said that he had not checked the engine block number. He noticed that there was dust in the headlights, and this was unusual for a BMW. He was asked several questions as regards the condition of the vehicle but in most cases he answered that he did not remember what he had observed.

[12] The security officer, Ms Sidonne Foster, said that she conducted a detailed examination of the motor car on 21 November 2004 and recorded her observations on a document that was admitted in evidence at the trial as exhibit 8. She said that the vehicle "did not look like a brand new vehicle". It appeared to her to be one that "had been used". The recorded observations indicate quite clearly that there was no clock, no tape deck, no CD, no spare tyre, no tools set in the car. There is no notation as to seeing the fenders, bumpers or trunk keys; nor did she note the condition of the body. However, there are notations as to the presence of lights, windshield, windshield wipers, battery, horn, tyres on the car, mirrors, cigarette lighter, hood, trunk lid, doors, gas tank and gas tank cover, gear shift knobs, antenna and floor mats. In re-examination, Ms Foster said that the fact that she made no note does not mean that the part was not seen.

[13] The first appellant, Mr Desmond Robinson, also gave evidence. He said he was regional director of special investigations at the Financial Investigations Division of the Ministry of Finance and the Public Service. His main responsibilities include investigations into suspected breaches of the Customs Act, primarily cases involving

fraud against the revenue. In September 2005, he commenced investigation into the circumstances surrounding the importation of the car in question. His focus was on the fact that it had a declared salvage value of £10,000.00 whereas it had been purchased a few months before for £41,115.00. In addition, there was a question mark over the declared cylinder capacity of 1995.

[14] Mr Robinson gave evidence questioning the authenticity of the "VEHICLE REGISTRATION DOCUMENT V5" that was admitted in evidence as exhibit 13, it being part of the documentation submitted to the customs authority by the respondents. He mentioned three areas on this form that aroused his suspicion. I must say that having viewed the areas of complaint with my non-expert eyes, I fail to see the reason for the suspicion. Mr Robinson said that this document was "the primary document relied on by the Customs Department as to the vehicle's specification". He went on, in his witness statement, to say that he sought assistance from Sterling Motors Limited of Kingston, Jamaica, the "authorized local BMW Dealer at the time" as regards the specifics of the car, quoting the chassis number to them. According to him, the information received revealed that the year of manufacture was different from that on the documents produced by the respondents. There was also a difference in the cubic capacity. Of course, it should not be ignored that this information from Sterling Motors, given by Mr Robinson, was hearsay.

[15] During cross-examination, Mr Robinson confirmed that, unlike Ms Foster, he had "no knowledge of the state the vehicle was in when it was on the wharf". Exhibit 12 was admitted in evidence during the cross-examination of Mr Robinson. It shows the

condition of the vehicle at the time of sale to the first respondent. This is how it is described in the document:

> "WATER DAMAGE- NEEDS REWIRING AND COMPLETE ELECTRICAL SYSTEM, GEARBOX REBUILD, ENGINE OVERALL INTERIA VALENTING TO REMOVE MUD AND DIRT FROM INSIDE, SLIGHT BODY DAMAGE TO BOTH SIDES OF THE CAR."

Exhibit 12 also gives 2001 as the year of manufacture of the car.

[16] Mr Robinson said that in the normal course of things, the customs officer is deemed to have inspected the motor vehicle before imposing customs duties. He further stated that by his "approach and calculation", the customs officer was wrong. He said that he rejected the calculation of the customs officer although he (Mr Robinson) did not see the vehicle at the point and time of entry. He regarded the vehicle as uncustomed if the cubic capacity rating was incorrect. It did not matter whether the vehicle was damaged or not. A customs officer, he said, has no power to abate or reduce the customs duty on an item when it is damaged. Customs officers are given discretionary powers in relation to duties on imported items but this discretion did not extend to motor cars, Mr Robinson said. Although he suspected fraud in the matter, it was not for his department "to deal with the fraud", he said.

[17] The following extract from Mr Robinson's evidence under cross-examination gives his understanding of the process and the rules:

> "If the engine block is changed what is required is that an import entry or a certificate of fitness for the new engine block to be fitted is provided to the examination

> depot to have the changes made on the registration documents. The registration number that is appearing on the certificate of fitness and on the registration document would not be the old number for the old engine but the new number after the amendment. The engine number in respect of the original make of the vehicle. I cannot find it. I have never looked it up. … If the engine block had been changed a new engine number would be needed. In my entire witness statement I have not mentioned the engine number on the vehicle. It is not relevant.
>
> Even if the engine had been changed it would not affect the duty rate applicable. Half of a vehicle would not be considered as a vehicle … If a vehicle came into the country without an engine the applicable duty rate would be based on the manufacturer's specification of the cc rating. Therefore even if the engine was changed the new engine would not affect the duty rate. It would be the manufacturer's specification that would be. The shell would be a different value from the complete car. And a different license would be required to bring in the shell.
>
> It was not the salvage that was brought into the country but it was not brand new. The custom's officer who saw it was wrong to have imposed that duty."

The judge's findings

[18] The learned judge found that she could not rely on the evidence of Mr Naylor, given the fact that he was quoting from computer generated information which had not been verified as required by law. Nor could she accept Mr Robinson's evidence given his lack of expertise in the area that he sought to give evidence on – fraud and forgery. She preferred Miss Foster's evidence to the first respondent's as to the condition of the vehicle when it arrived on the wharf. The learned judge said this:

> "I find as a fact based on my examination of exhibit '8' which I accept that the vehicle may well not have arrived in the Island as the salvage that Mr. Henry sought to say that it was, but it was not a new car that was imported. I prefer Miss Foster's evidence in this respect to that of Mr. Henry as Mr. Henry testified that he did not check the vehicle himself and he did not see it when it came into the Island. He saw it on the Wharf."

She did not find it possible to accept Mr Robinson's evidence "without more", that the customs officer "was wrong in imposing the duty that was imposed". In her judgment, the seizure of the vehicle was ordered and carried out on what was mere suspicion on the part of Mr Robinson.

[19] Thompson-James J (Ag) said that the evidence did not allow her to impute fraud to the respondents. "There must be good and substantial evidence to support the allegation of fraud", she said. Based on her assessment of the evidence presented, she concluded that there was no cause or basis for the seizure of the car, and that the seizure was therefore unlawful.

The submissions and decision thereon

Ground (a) – The learned judge erred by failing to apply sections 13 and 33 of the Constabulary Force Act to the evidence led in the case by finding the first appellant liable for detinue.

[20] Mr Curtis Cochrane, Director of State Proceedings, submitted that the first appellant had a duty to investigate and to take the necessary steps to recover the outstanding revenue. This is on the basis that the declared cubic capacity of the vehicle was incorrect. A breach of section 210 of the Customs Act had been committed by the respondents, he said. The Crown, instead of prosecuting the respondents, was seeking

to recover the outstanding duties by way of suing. That is an option given by section 240 (1) of the Customs Act, he said. Mr Cochrane referred to the learned judge's acceptance of Miss Foster's evidence and her finding that the vehicle may well not have arrived as salvage. On that basis, he submitted that the first appellant had reasonable and probable cause to seize the motor car, and to pursue the recovery of outstanding duties.

[21] In reply, Mr Lyttle pointed to the fact that exhibit 12 shows the vehicle as having been purchased in England as salvage. The document, he said, is notarized and there is no allegation that the notary's signature and seal have been fraudulently obtained. The only thing advanced by Mr Robinson as evidence was his suspicion of fraud. Mr Lyttle said that it is strange that counsel for the appellants should be urging this court to find that there was fraud when there wasn't such evidence to convince the lower court. He said further that it was inaccurate to say that the Crown was suing for customs duties when it was the respondents who had actually commenced the suit against the appellants in detinue and conversion. Exhibits 4 and 12, he said, were obtained from England by the appellants themselves, and were not seen by the respondents until the time of trial. Careful inspection of the documents, Mr Lyttle said, shows that the car was not purchased as new.

[22] Mr Lyttle submitted that Mr Robinson had erred in seizing the motor car and was scrambling around thereafter for evidence to justify the seizure. Mr Robinson, he said, "did not do his homework" in order to discover the state of the vehicle at the time of its

importation, and to obtain the relevant documents for analysis before coming to a conclusion.

[23] It seems to me that Mr Lyttle's submissions are valid. It is a very serious matter to accuse someone of attempting to defraud the revenue. The documents were processed by a customs officer who, no doubt, would have also examined the vehicle as Miss Foster did. There has not even been evidence from say a supervisor of the relevant customs officer to indicate that there was a flaw in the process employed by the subordinate officer. The integrity of not only the respondents but also of the customs officer and his supervisor, assuming there was a supervisor, is being impugned. In the case of the customs officer and the supervisor, they have not had an opportunity to make an input. A challenge of such magnitude required more cogent evidence. It would have been necessary to prove that all the documentary exhibits were false. That has not happened. Hence, I am of the view that the learned judge was quite correct in finding that what has been presented was mere suspicion.

Ground (b) – The learned judge erred by misinterpreting section 31G of the Evidence Act and by extension, misapplied the said section to the evidence of Anthony Naylor and Gregory Dalton Brown and in the process unreasonably rejected their evidence.

[24] Section 31G of the Evidence Act forbids the admission in any proceedings as evidence of a fact, any statement contained in a document produced by a computer which constitutes hearsay, unless certain conditions are fulfilled. Mr Cochrane submitted that there was no evidence that any document produced by a computer was admitted into evidence through Mr Naylor. So, he argued, the learned judge erred in

rejecting Mr Naylor's evidence on that basis. As regards the evidence of Mr Gregory Dalton-Brown, Mr Cochrane said that there was no connection with section 31G. The diagnostic report, he said, was in evidence as part of exhibit 3 when Mr Dalton-Brown gave evidence. In the circumstances, the learned judge had misapplied section 31G of the Evidence Act and had not given appropriate consideration to the evidence of Mr Dalton-Brown, he being someone with knowledge of BMW vehicles. Mr Dalton-Brown should be viewed as a witness of truth, said Mr Cochrane.

[25] In his oral response, Mr Lyttle said that the learned judge may have been in error in respect of section 31G. However, he submitted that the judge was correct in rejecting the evidence. As regards Mr Dalton-Brown's evidence, he pointed to the fact that Mr Dalton-Brown said that the engine number on the vehicle was different from that put out by the factory. This, said, Mr Lyttle, corroborated the respondents' case as they were contending that it was a 1995cc BMW engine. In relation to Mr Naylor, the respondents contended that he gave evidence of information gleaned from a computer in England that neither the court nor counsel for the respondents was privy to. Such evidence was rightly rejected, he said.

[26] As stated earlier, section 31G of the Evidence Act prescribes that a hearsay statement contained in a document is inadmissible as evidence of a fact unless certain conditions are fulfilled. The conditions include the following:

a. the computer must be properly programmed;

b. the computer must be operating properly, and there must have been no alteration to its mechanism or processes

that might reasonably be expected to have affected the validity or accuracy of the contents of the document; and

c. there is to be no reasonable cause to believe that there was any error in the preparation of the data from which the document was produced.

In his witness statement, Mr Naylor clearly stated that he had no personal knowledge of the information that he was producing from the computer records of Black Horse Limited. He also said that if the computer was not operating correctly or was out of operation at any time, such default "was not such to affect the accuracy of the information". I am unable to understand how he could have made such a statement. Furthermore, under cross-examination, he confirmed that the figures and statement of accounts to which he had made reference were put in the computer by someone whose identity he does not know.

[27] In the circumstances, I do not think that the learned judge can be faulted for applying section 31G to Mr Naylor's evidence. As regards the evidence of Mr Dalton-Brown, it is obvious that the learned judge was not convinced that the diagnostic report was authentic and reliable. The fact that the parties may have agreed to the admission of the report as an exhibit does not mean that the learned judge was obliged to accept its contents, hook, line and sinker. It is the duty of a party producing evidence to show its authenticity and reliability. In any event, I am not surprised that the judge did not lay great store on Mr Dalton-Brown's evidence seeing that there were apparently important matters that he either did not notice or did not remember. He did not generate confidence.

Ground (c) – The learned judge erred by failing to correctly interpret and apply sections 6, 19(2), 19(8) and 28 of the Customs Act to the facts of the case.

[28] Section 19(1) provides that the value of imported goods is to be determined in accordance with the provisions of the schedule. Subsection (2) however gives the commissioner the right to question the truth or accuracy of a document or of any information presented to him for customs valuation purposes. Subsection (8) allows the commissioner, within two years of importation, to adjust the value that may have been placed on the goods at the time of importation.

[29] The appellants have complained that the learned judge ignored the provisions of section 19 by rejecting Mr Robinson's evidence. This complaint is allied to that in ground (a). My understanding of the reasoning of the judge does not lead me to that conclusion. Mr Robinson's right to investigate is not questioned. His method of investigation and the result of his investigation are the matters under scrutiny. There is no duty on a judge to automatically accept the evidence of an expert. So, even if it is accepted that Mr Robinson has the necessary skill and expertise in the area of fraud investigation, the judge was not bound to accept his evidence. The expert still has to show that his evidence ought to be accepted. In the instant case, there was no proper demonstrable reason why the sworn documents should have been shredded and replaced with Mr Robinson's opinion.

Ground (d) – The learned judge erred by deliberating on the misconception that there was contention that the relevant car, the subject of the claim, was new, and similarly rejected the description of the motor car given by the respondents, as imported and accepted the description of the motor car as given by the appellants, as the motor car that was imported, but at the end of the day unreasonably dismissed the appellants'/defendants' counterclaim.

[30] The appellants rested on their written submissions in respect of this ground. The contention is that the learned judge having found that the car may not have been salvage, erred by not accepting the evidence proffered by the appellants' witnesses. This contention ignores the fact that, in any event, the judge found that the car was not new. This was in keeping with the respondents' case – that is, that the car had been bought from a used car dealer. In addition, it ought not to be ignored that the learned judge accepted that repairs were done to the car in Jamaica. Those repairs were such that they led Mr Dalton-Brown to say that when he examined the car in May 2006, it appeared that "it was in the same condition as was manufactured and not altered". Of course, this statement by Mr Dalton-Brown was made against the background of not having seen the car at the time it was manufactured. In the circumstances, I cannot agree that the learned trial judge was wrong to have dismissed the counterclaim.

Ground (e) – The learned judge erred by awarding interest of 6% from the 31st January 2006 to 24th November 2009 on $1,093,333.00 (special damages).

[31] The complaint in respect of this ground is that the interest rate is too high. The appellants submitted that the rate of 6% contradicted the ruling in a judgment of this court: ***The Attorney-General of Jamaica v Arthur Baugh*** (SCCA No 101/2006 – delivered on 24 June 2008). It seems to me that counsel for the appellants is laboring

under a misconception. In delivering the judgment in the case mentioned above, the court referred to the reported case of ***Central Soya of Jamaica Limited v Junior Freeman*** (1985) 22 JLR 152 at 167 (c) and (d). The simple principle that was there clearly laid down was that interest on general damages for pain, suffering and loss of amenities should not exceed one half of the rate applicable to judgment debts. The instant case is not one involving pain and suffering. I am of the view therefore that there is no basis for altering the rate that was ordered by the learned judge.

Conclusion

[32] The appellants having failed to show any meaningful error by the learned trial judge in her handling of this case, I am of the view that the appeal should be dismissed, the judgment of Thompson-James J (Ag) affirmed, and the respondents awarded costs to be agreed or taxed. During the hearing of the appeal, counsel for the respondents stated that although there had been no order for a stay of execution of the judgment, the appellants have failed to return the car as instructed by the court below. It is now expected that the order of the court will be executed without further delay.

DUKHARAN JA

[33] I have read in draft the judgment of Panton P. I agree with his reasoning and conclusion and have nothing to add.

HIBBERT JA (AG)

[34] I fully agree with the judgment of Panton P and have nothing to add.

PANTON P

ORDER

The appeal is dismissed. The judgment of Thompson-James J (Ag) is affirmed and her order is to be executed without further delay. The respondents are to have the costs of the appeal agreed or taxed.