IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: G - 032 OF 2001

BETWEEN	VINCENT GARRICK	PLAINTIFF
AND	THE TRANSPORT AUTHORITY	DEFENDANT

Matter heard on April 30, and May 10, 2001; Judgment delivered June 20, 2001
Don. O. Foote, Esq., Attorney-at-Law, for the Plaintiff
Curtis Cochrane, Esq, Attorney-at-Law for the Defendant

JUDGMENT

This matter comes before the Court by way of a Summons filed on behalf of the Plaintiff seeking relief in the following terms:

a) An Order that the Defendant do forthwith deliver to the Plaintiff his 1990 Toyota Hiace motor vehicle registration number 4091 BY.

b) The defence filed herein be struck out as disclosing no reasonable defence and judgment entered for the Plaintiff damages to be agreed or assessed.

I shall deal firstly with the first order sought.

The facts as set out in the plaintiff's affidavit supporting his summons, are that on November 2nd, 1999, servants or agents of the defendant detained the plaintiff's motor vehicle, licence number 4091 BY, and despite several requests by the plaintiff and his attorney-at-law, the defendant or its agent, continues to detain the said vehicle. The plaintiff states that charges under the Road Traffic Act were preferred against him by the Defendant on November 17, 2000. After several court appearances, all charges were dismissed by the presiding Resident Magistrate, Leighton Pusey, on January 5, 2001. This fact was communicated to the defendant and a further demand made for the return of the vehicle, but the defendant has demanded that the plaintiff pay storage fees for a period in excess of one year before the vehicle would be released.

In response to the plaintiff's affidavit, the company secretary of the defendant, who is also an attorney at law, admits that the plaintiff's vehicle was seized on the day in question by inspectors employed to the defendant. She further averred on information

and belief, that the said vehicle "was being operated as a public passenger vehicle without the requisite road licence". She further states that the plaintiff "failed to visit the defendant's office to address the issues of the seizure and the charges involved". Further, the affidavit states that, since the plaintiff failed to visit the defendant's offices, "charges could not be laid or the motor truck released on the paying of the relevant storage fee".

I pause here to make two (2) observations. First, on the affidavit evidence before me, the "charges" were not laid against the plaintiff until after he had instituted proceedings in the magistrate's court, against the defendant, for the recovery of his vehicle. The summons in that case was served on the defendant on July 20, 2000. Within a few days of the seizure of the vehicle, the plaintiff's attorney had written to the defendant to protest the seizure. I can find no sensible basis for concluding that although the defendant knew that the plaintiff had an attorney, they could not have communicated any information through him, including the question of storage fees, if that was their interest, and assuming they have any such right to levy such fees. Secondly, and more importantly, I am not aware of any principle of law, and no authority was cited, that says that a person who is about to be or may be charged with an offence under the Road Traffic or any other law, should go to his accusers to "discuss the charges", indeed, before the "charges" have been laid.

Echoing an assertion which is again made in the defendant's submission of skeleton arguments, the defendant's company secretary asserts in her affidavit that the reason for the plaintiff's failure to recover his vehicle is all his own fault because he has not come in to pay the defendant the fees which they claim are now owed. The plaintiff makes the point in his affidavit in reply to that of the defendant's company secretary, and I accept his evidence, that the first indication that the defendant gave of any willingness to release the vehicle was its letter of January 9, 2001, but then asserting a right to be paid storage fees.

In its skeleton submissions the attorney for the defendant, Mr. Cochrane, prays in aid for the defence against the application, section 13 of the Transport Authority Act and section 61 of the Road Traffic Act These sections, in relevant part, are set out below. He also

refers to section (sic) 137A (1) of the Road Traffic (Amendment) Regulations, as amended in the Jamaica Gazette of February 28, 2000, prescribing the fees payable for storage under the relevant legislation. Section 13 of the Transport Authority Act is in the following terms:-

> 13. (1) An Inspector or a Constable may at any time-
>
> (a) stop and inspect any public passenger vehicle to ensure compliance with the terms of the road licence and any relevant road traffic enactments;
>
> (b) stop and inspect any vehicle which he reasonably suspects is operating as a public [passenger vehicle contrary to relevant road traffic enactments;
>
> (c) monitor the frequency of public passenger vehicles on any route;
>
> (d) carry out an inspection of conductors and drivers of public passenger vehicles and the licences held by these conductors and drivers;
>
> (e) carry out such powers or duties in relation to relevant road traffic enactments as may be prescribed.
>
> (2) An Inspector or constable shall have the power-
>
> (a) to seize any vehicle where the owner, driver or operator of such vehicle operates or uses the vehicle as a public passenger vehicle without a road licence being issued in respect of that vehicle to be so operated or used;
>
> (b) to take or cause to be taken to the nearest police station or to the nearest convenient place authorized by the police pursuant to subsection (3) (a) any vehicle which is seized under paragraph (a);
>
> (c) to prosecute any person for any contravention of a relevant road traffic enactment and to serve on any person or document relating to such prosecution or contravention;.

The relevant parts of Section 61, subsections (5) and (7) respectively, provide as follows:

If any person uses or causes or permits a vehicle to be used in contravention of this section, he shall be guilty of an offence and shall be liable on conviction thereof to a penalty not exceeding five hundred dollars and the vehicle shall be liable to be seized and kept in the possession of the Police until the licence required by this Part has been obtained and produced".

Where a vehicle is seized pursuant to this section-

(a) storage fees shall become payable to such persons at such rates and in accordance with such conditions as may be prescribed; and

(b) if the vehicle remains in the possession of the Policefor more than six months the vehicle may, subject to such conditions as may be prescribed, be sols by the Police to recover the cost of storage.

It seems to me that the right to seize under the Transport Authority Act section 13(2)(a) and (b), exists where the "owner, driver or operator of such vehicle *operates or uses the vehicle as a public passenger vehicle without a road licence being issued in respect of that vehicle to be so operated or used"*. The section does not in terms, authorize or exonerate seizure which is based upon a "reasonable belief" that this is the case. Nonetheless, it would appear to be implicit in the language of the section, that the seizure may take place where there is "reasonable suspicion" that the vehicle is being operated contrary to the relevant legislation. There is nothing in either statute which states that seizure should not be "malicious". I make this observation only because the affidavit of the defendant's company secretary avers that it was not done "maliciously". I would merely add that if malice were a requirement to prove the seizure invalid, I would have been prepared to hold that the failure to actively pursue the return after the acquittal of the plaintiff of the charges brought by the defendant, would have supplied such malice. I need hardly add, except for emphasis, that the provision in section 61(5) of the Road Traffic Act also seems quite clear.

> If any person uses or causes or permits a vehicle to be used in contravention of this section, he shall be guilty of an offence and shall be liable on conviction thereof to a penalty not exceeding five hundred dollars *and the vehicle shall be liable to be seized and kept in the possession of the Police until the licence required by this Part has been obtained and produced"*. (My emphasis)

It seems to me that even assuming that there could be justification for holding the plaintiff's vehicle up to the date of his trial for the offences for which he was charged under the relevant legislation, once he was acquitted, the right to hold the vehicle would cease. Both sections provide, (section 13 (3) of the Transport Authority Act and section 61(7) of the Road Traffic Act) provide for the payment of fees for storage. The former Act states "Where under this section a vehicle is seized" while the latter says, "Where a vehicle is seized pursuant to this section". The relevant part of section 13 of the Transport Authority Act is set out above.

The events pursuant to which the seizure would have generated a right to storage fees are "the use or operation, or causing or permitting the use or operation" of the said vehicle in contravention of either of the statutes. It seems, that an acquittal is *ex hypothesi,* a recognition that the vehicle has not been so operated and the offence has not been committed. If no offence has been committed, then the right to storage fees, does not, in my view, arise. Indeed, the relevant part of the regulations to which the defendant adverts, would seem to defeat its own case.

Regulation 137A to which reference was made by the defendant states:

> "Where a vehicle is operated without a road licence being issued in respect thereof, *and* is seized by the police, the operator shall pay to the police storage fees as follows."

It seems clear that both the seizure and the operation without the appropriate licence are pre-requisites for the computation and payment of the fees. Further, it would appear that any other conclusion must be flawed. Suppose that I am driving my minivan to the National Stadium with a group of football fans and I am stopped by the police. They then seize my van. One year later at a trial of the charges brought against me, I am thoroughly vindicated. Am I still liable to pay them fees for storage for a year because the case did not come up for disposal during that time, although I was cleared? I think not.

The only real issue in relation to the first order sought is whether a mandatory injunction is an appropriate remedy in these circumstances. Mr Foote has submitted that it is appropriate here. It is trite law that equitable relief is not normally granted where damages would be an adequate remedy. Mr. Foote cited the case of Jaggard v Sawyer [1995] 2 AER 189, referred to with approval in "Sourcebook on Obligations and legal Remedies" Second Edition by Geoffrey Samuel, in which the case is discussed. In that case, Sir Thomas Bingham, Master of the Rolls, noted obiter, in discussing the case before him: "The judge recognized that a plaintiff who can show that his legal right will be violated by the defendant's conduct is prima facie entitled to the grant of an injunction. He accepted that the court will only rarely and reluctantly permit such a violation to occur or continue". Bingham M.R. then alluded to four (4) tests laid down by A.L. Smith, LJ in *Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287,* which would provide the basis for the situation where injunctive relief would not be given in the circumstances of the defendant's continuing violation of the plaintiff's rights.

a) Injury to the plaintiff is small
b) The value of the injury to the plaintiff's right is capable of being estimated in money
c) Injury to the plaintiff's legal right is one which could be adequately compensated by a small money payment
d) It would be oppressive to the defendant in all the circumstances to grant the injunction.

The plaintiff in the Jaggard v Sawyers case, found that the above principles were applicable and operated to bring the case within the exception to the principle set out above. I am of the view that the instant case is outside of that class of cases that Bingham M.R. would consider to be within the exception to the principle he expressed obiter, above.

In support of its submission that neither the injunction nor the application to strike out should be given, the defendant has referred to the following cases: *Esso Standard Oil S.A. Ltd v Lloyd Chan (1988) 25 J.L.R. 110, David Rudd v Crowne Fire Extinguisher Services Ltd. Et al, (1989) 26 J.L.R. 564* and *Victor Beek v The Jamaica Record Ltd., (1992) 29 J.L.R. 135.* In the first of the cases cited, according to the headnote, the respondent was the tenant of the appellant in respect of premises situate at 60 Gilmour Drive, St. Andrew. Under an agreement entered into on the 21st October 1981, the respondent covenanted under clause 2(m) of the aforesaid agreement only to sell products supplied to him by the appellants unless the latter could not supply an adequate quantity. The appellant notified the respondent on December 22, 1987, that under the authority of clause 4 (c)(10) it had summarily determined the lease and the respondent's rights thereunder for breach of clause 2(m). The respondent claimed damages for breach of contract and an injunction restraining the appellant from arbitrarily "closing down" operations at the leased premises. An ex parte injunction was granted. On January 19, 1988 the respondent by "inter partes" summons sought an interlocutory injunction which was granted. The appellant appealed this order on the ground that the trial judge failed to appreciate that the interlocutory injunction was mandatory and so a different test was to be applied than was applied on the grant of a prohibitive injunction.

The Court allowed the appeal. It was held that the principle applicable to the grant of a mandatory interlocutory injunction which is comparable in nature and function to a mandamus, is that it "will ordinarily be granted only where the injury is immediate, pressing, irreparable and clearly established and also the relief sought to be protected is clear". The defendant submits that the application for the mandatory injunction should be denied on the basis of the Esso case.

It is my view that the finding in that case by the Court of Appeal that had the judge at first instance been fully apprised of all the facts, the injunction would not have been granted, distinguishes the instant case from the Esso case.

In the David Rudd case, the Court of Appeal, in considering the applicability of both mandatory injunction and an application to strike out, held that "the principle on which a mandatory injunction should be granted is that there should be a strong case". In fact as Morgan J.A. said in that case, "mandatory injunctions are granted only where the case is (un)usually (sic) strong and clear". I believe that the applicant for injunction in this case does have a strong case in relation to his claim in detinue.

In Victor Beek, it was held that a mandatory injunction being more drastic than a prohibitory injunction, the standard of proof required was higher. "At the interlocutory stage of a case where the final result cannot be known, the case has to be unusually strong and clear before a mandatory injunction will be granted even if sought to enforce a contractual obligation". The court found that even if the mandatory injunction was granted, the defendants had no assets with which to secure such an order. It is useful to note *en passant* that the injunction is an equitable relief and, after all, "Equity does not act in vain". I have no doubt that that case is also distinguishable from the instant case.

I can see no basis for allowing the defendant to continue to violate the rights of the plaintiff and, accordingly, grant an order in terms of paragraph one (1) of this summons.

The second part of the prayer of the plaintiff seeks the striking out of the defendant's defence as disclosing no reasonable defence. It is trite law that particular considerations apply to applications to strike pleadings, and especially where the effect would be to determine the issue which is the subject matter of the suit in a summary manner. Striking out of pleadings is dealt with in sections 191 and 238 of the Judicature (Civil Procedure Code) Act. Section 191 of the Judicature (Civil Procedure Code) Act provides:

> The Court or a Judge may, at any stage of proceedings, order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in any case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client.

Section 238 of the said Act is in the following terms:

> "The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

The applicant's written submissions in regard to this question, I have not found particularly helpful. Indeed, but for an assertion that the defence is "frivolous or vexatious or tend to delay the fair trial of the matter", and a reference to Bullen & Leake, little assistance has been presented. On the other hand, a case which has been cited by the Defendant/Respondent is *Overton C. Hutchinson v Ellis Victor Shepherd (Executor of the Estate of Julia Burgher, Deceased), (1991) 28 J.L.R. 192*, in support of a submission that where a trial judge is of the view that pleadings are redeemable by amendment he ought not to strike out the pleadings. This case, a decision of the Court of Appeal is indeed authority for the proposition that a judge does have the discretion to grant liberty to a party to file an amended pleading even where no application for leave is before the court. More significantly, it is a clear support for the proposition that where a defence does not disclose a reasonable defence, the defence should be struck out. In light of the view I have of the defence, I do no believe that this case helps the defendant.

The defendant has also referred the court, in addition to the authorities noted above, to the 1999 Supreme Court Practice, Volume 1, Order 29 paragraph 29/L/4. In relation to this section of the White Book, the defendant submits that "That on the evidence of the defendant, the plaintiff does not have a serious question to be tried". I am a little confused by this submission. It seems that the submission, in the circumstances of this case is ill conceived, and would only be appropriate where it is the defendant that is applying for the plaintiff's statement of claim to be struck out. I do not find this submission helpful.

The Rudd case (above) cited by the defendant is also apposite. In that case it was held that where there is an arguable case disclosed on the pleading it should not be struck out. Attorney for the defence has submitted that a pleading should only be struck out in "plain and obvious cases". He cites with approval in this regard, a passage taken from "Commonwealth Caribbean Civil Procedure" by Gilbert and Vanessa Kodilinye, which states that "A pleading will be struck out only in plain and obvious cases, and where the defect cannot be cured by amendment". In the instant case, the defendant has acknowledged that it has detained the plaintiff's motor vehicle after demand has been made for its return. In view of my findings above as to the wrongfulness of the defendant's position on its right to retain possession, I believe that this disposes of the matter. I cannot see how any amendment will be able to cure the detinue complained of by the plaintiff, and apparently admitted by the defendant.

In the circumstances, I would grant an Order in terms of paragraph 2 of the plaintiff's summons, that the defence filed herein be struck out as disclosing no reasonable defence and judgment be entered for the plaintiff, damages to be agreed or assessed.

Costs of this summons to be the plaintiff's, to be agreed or taxed. Leave to appeal granted.

Roy K. Anderson
Justice, Supreme Court.
June 20, 2001