



IN THE SUPREME COURT OF JUDICIATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 1329 OF 2006

BETWEEN	BRENTON HENRY	1 <sup>ST</sup> CLAIMANT
AND	SARAH (BUTT) HENRY	2 <sup>ND</sup> CLAIMANT
AND	DESMOND ROBINSON	1 <sup>ST</sup> DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2 <sup>ND</sup> DEFENDANT

Mr. Garth Lyttle and Miss Michelle Clarke instructed by Garth Lyttle & Co. for the Claimants.

Mr. Curtis Cochrane Miss Tamara Dickens, Miss Eureka Stewart and Miss Charmaine Newsome instructed by the Director of State Proceedings for the Defendants.

**Seizure of motor vehicle pursuant to Section 210 of the Customs Act – Detinue  
and Conversion -Section 31G of the Evidence Act – Computer generated evidence  
– whether motor vehicle unlawfully seized**

**HEARD: December 4, 5, 2008, February 16, 17, 2009 & November 24, 2009**

**THOMPSON-JAMES, J (Ag.)**

**INTRODUCTION**

Sometime in December 2004 the 1<sup>st</sup> Claimant Mr. Brenton Henry imported into the Island of Jamaica a BMW motor car in the name of the 2<sup>nd</sup> Claimant, Miss Sarah (Butt) Henry.

This motor car was off loaded at the Kingston Wharves and custom duties, assessed in the sum of \$1,188,153.37, were duly paid. The vehicle was taken from the Wharf. Mr Henry contends that repairs were carried out on the vehicle.

On or about the 31<sup>st</sup> January 2006 Mr. Henry attended at the Montego Bay's branch of the Inland Revenue Department with a view to license the said BMW motor car where it was promptly seized by Mr. Gifton Palmer acting on the instructions of Mr. Desmond Robinson of the Ministry of Finance.

The seizure and subsequent detention of the motor vehicle were on the basis that the custom duties paid were inadequate, as the duties imposed were in relation to a vehicle bearing a lower CC rating. That is to say that the CC rating declared was 1995 instead of 3200.

### **The Claim**

By way of Amended Claim Form dated and filed on the 29<sup>th</sup> June 2006 the Claimants Mr. Brenton Henry and Mrs. Sarah (Butt) Henry claim against the Defendants inter alia that;

On or about the 16<sup>th</sup> December 2004 the Claimants imported into Jamaica a damaged BMW 1.8 litre motor car which was originally bought by them in England, extensively damaged and written off by the Insurers and purchased back for £10,000.

The Claimant made the usual custom declarations and custom duties and general consumption tax were assessed by the Custom Officer amounting to \$1,188,158.37 and the vehicle released to the Claimants.

The Claimants had the vehicle repaired and the cost of the vehicle after restoration is \$3M Jamaican.

The Claimants made numerous demands on the Defendants for the return of the said vehicle to no avail.

**The Claimants further Claim;**

1. A declaration that no further custom duty than \$1,188,158.37 is payable to the Government of Jamaica by the Claimants.
2. The return of the said BMW motor car.
3. Damages in detinue and conversion in lieu of the said motor car.
4. Damages for inconvenience, hardship and embarrassment suffered by the Claimants as a result of the unlawful seizure of their motor car.
5. Interest and costs and Attorney's cost.

**The Defence and Counter-Claim**

The Defendants contend that the BMW motor car was imported in the name of the 2<sup>nd</sup> Claimant Sarah (Butt) Henry. The assessed custom duties and general consumption tax in the sum of \$1,188,158.37 were calculated and assessed on the basis of false declarations made by the Claimants to the Jamaican Customs Department.

The Defendants further contend that Black Horse Ltd of England on August 6, 2004 received a proposal for finance from Specialist Car Limited, England. This proposal was in the name of the Claimant Brenton Henry for a non-regulated loan agreement to purchase a BMW convertible motor car.

The Claimant, Brenton Henry (at the time of filing the defence) was still making payments towards the financing of the purchase of the said BMW motor car to Black Horse Ltd. Checks revealed that this BMW motor car was manufactured on November 21, 2002 which classified it as a 2003 motor car. This motor car was sold on December 30, 2002. The type is a S54 which is a 3.2 litre engine.

The Defendants therefore counterclaim against the Claimants to recover the sum of \$7,576,491.99 being outstanding duties payable on the BMW motor car, on the basis that the amount of \$1,188,158.37 paid by the Claimants were paid on the basis of false declaration made by the Claimants to the Jamaica Custom Department.

The Defendants further claim interest on the amount.

### **The Claimants Accounts**

**Mrs. Sarah (Butt) Henry** in essence testifies that in 2004, her husband purchased a silver grey BMW M3 motor car from a dealer in Specialist Car in Luton, England. Both of them were insured to drive this car. Mr. Henry's business partner Alex Rose borrowed the car, he was involved in an accident in May 2005 as a result of which the car was extensively damaged. Damages to the roof and body, fire damage to the bonnet among other things.

When she looked at the car it was at German Salvage Company at Bow, some brake parts were missing. The car was partially stripped down.

The car was purchased from the Insurance Company as salvage and shipped to Jamaica in her name and was declared as salvage.

Mr. Henry engaged the services of a custom broker to clear the car from the Wharf. She received information that the vehicle was deemed salvage and \$1,188,158.37 paid as duty. \$953,000 Jamaican was spent to repair the vehicle.

In January 2006 whilst Mr. Henry was in the process of licensing the car it was seized.

They are joint owners of the vehicle who have been denied its use and benefit.

### **In Cross-Examination**

She testifies that she drove the car. She cannot recall when the car was involved in the accident. She does not know which Insurance Company the car is insured with but she has her own insurance, fully comprehensive, that covers her to drive the BMW or any car.

Mr. Henry paid £10,000 for the salvage but she does not know the details of the accident the car was involved in. There were severe damages to the salvage, no wheel, body damaged and dirt all over the body. She cannot remember the details as it was a long time ago. Mr. Henry dealt with the car and she did nothing in relation to it. The last place she saw it was at the salvage.

She does not know if financing was obtained for the car. She does not know if Mr. Henry was paying for the car at the time of the accident. When she met Mr. Henry he did not have the car. She cannot remember where it was purchased and she does not know who was driving the car at the time of the accident.

When the car was initially purchased it was not her own and when the salvage was purchased she cannot remember if it was her own.

She cannot remember if she saw the car in Jamaica and she has not driven the car in Jamaica.

She gave Mr. Henry permission to ship the car into Jamaica in her name but she cannot recall if she signed any paper for its export.

The following documents were tendered and admitted in evidence as exhibit '1' through her:

1. C78 Custom Form – Import Entry
2. Form headed 'German Salvage'
3. Pro Forma Invoice
4. Bill of Lading
5. Order and Clearance Permit
6. Import License
7. Document headed BMW dated September 9, 2003 signed by Phil Horton
8. Declaration of Particulars relating to Custom Value Form C84.

She does not know where the car was repaired.

At the time of the purchase of the vehicle she was not living with Mr. Henry and she does not remember if at the time of the purchase of the salvage they were living together.

**Mr. Brenton Henry** in brief testifies that sometime in the year 2004 he and Mrs. Henry purchased a silver grey BMW from "Specialist Car" in London. The vehicle is a convertible and they were both insured to drive the vehicle. He loaned the vehicle to his business partner, Alex Rose. It was involved in an accident. The car was extensively damaged.

The electrical system was burnt the interior was damaged by fire-burn, extensive body damage and water damage to the interior.

He purchased the salvage and brought it back to Jamaica for repair. He replaced the engine block in Jamaica. The vehicle was sold to him minus the engine block so he purchased a used 1995 CC engine from the salvage company. This was placed in the engine bay. The engine was not in a working condition. The engine block of the original engine was in the car with other bits of car.

This vehicle was shipped to Jamaica in the state that it was purchased and on arrival it was classified by the Jamaican Custom as salvage.

He obtained the services of a custom broker to clear the vehicle from the Wharf and paid the sum of \$1,188,158.37 in full as custom duties. He transferred the vehicle from the Wharf by wrecker as it could not be driven and took it to a garage in Highgate where it was repaired. It took one year and four months to complete the repairs and new and second hand parts had to be sourced. Electrical work had to be done as well as upholstering and ducoing of the vehicle.

He went to the Collector of Taxes, Montego Bay branch to license the vehicle when Mr. Palmer informed him that he had instructions to seize the vehicle.

A telephone conversation with one Desmond Robinson resulted in the seizure of his vehicle. Mr Palmer advised him that the vehicle was seized as custom duties were not paid and despite his vigorous protests that no custom duty was owing he was told to remove his personal belongings from the car and the car was seized.

On February 27, 2006 his attorney-at-law made a formal demand for the return of the vehicle. There was no response and on June 29, 2006 action was commenced.

A defence was filed stating that he owed the custom's department \$7,579,491.99 as custom duties as no duty was paid on the vehicle.

On June 14, 2007 the Revenue Protection Department (RPD) indicated that they would be prepared to accept \$2m by way of compensation and return the vehicle to him. He refused the offer.

The BMW motor car bearing English registration PO530FY and Jamaican registration 7546EK was tendered and admitted in evidence as exhibit '2'(This vehicle was examined by the court).

He testifies that he purchased the interior door handles from the salvage company. Other items were purchased. Watt Co. on Lyndhurst Road dealt mainly with the interior. Kongs Auto, Highgate St. Mary did repairs as well as Marc Wong on Mountain View.

The whole interior of the car was repaired and refurbished with second hand parts. The interior was damaged by fire and water. The headlights had mud in it as the car had ended up in a river after the crash. The trunk of the car was full of dirt and mud from being submerged in the water.

The electrical wires as well as the roof were replaced. Ancillary parts to the engine block were purchased in America. The wiring and ancillary block came from the salvage co. in England. It was necessary to fit a new engine as the car had hit bearings and the engine failed, a catastrophic failure. He does not know if the engine number can be revealed by a computer reading the statistic.

Unclaimed registered letter #5174667 addressed to Mr. Brenton Henry 35 Lyndhurst Road, Kingston from the New Ministry of Finance and Housing and



Unclaimed registered letter # 5174661 addressed to Mrs. Sarah Butt from the Ministry of Finance and Planning and diagnosis report dated May 12, 2006 were tendered and admitted in evidence as exhibit '3'.

The vehicle was seized on January 31, 2006. He made three attempts to value the vehicle whilst it was in the custody of the RPD but he was turned away. He hired a Mercedes motor car from Mr. Michael Simpson. The daily charge for the first 7 months was \$3,000 per day from February 1, 2006 now it is \$5,000 per day.

He has attended court six times in this matter and he is claiming £600.00 per flight which amounts to \$130,000.00.

The BMW is still with the Government

#### **In Cross-examination**

He testifies that Alex Rose who was driving the BMW at the time of the accident was a business partner. This car was purchased for £35,000. The funds to purchase the car were accessed from Trustee Savings Merchant Bank. It was insured with Admiral Co. Mrs. Henry drove the car. He remembers damages to the engine, gear box, body and electrical damages as well.

The vehicle could not be driven after the accident.

The car was shipped in Mrs. Henry's name to Jamaica as he had already shipped two cars to Jamaica in his name. His wife visited Jamaica about three times after the car was shipped. She drove the car in Jamaica. He was with her in the car when she drove. He reported the accident to his insurance company and he gave a question and answer statement.

He testified that he is not familiar with Black Horse Ltd but when shown exhibit '4', entitled Black Horse Ltd, he admitted that this document is an agreement between himself and Lloyd's Bank which is Trustee's Savings Bank.

He testifies that there is a relationship between specialist Car Luton (BMW purchased from Specialist car) and Black Horse Ltd but he does not know the relationship.

He does not recall the exact agreement between himself and the Financing Company neither can he recall the monthly payments. When the car was exported to Jamaica the monthly payments were completed.

He advised Black Horse Ltd, Lloyd's Bank and Trustee Savings Bank which is the same as Lloyd's Bank of the exportation of the car to Jamaica. This was done by way of telephone.

He does not know when the car was exported to Jamaica as the exportation was done by the Salvage Company.

He saw the car on the Wharf in Jamaica about five (5) weeks after it was exported. He did not clear the car and he was not at the Wharf when the car was cleared. It could not be driven from the Wharf. He saw the car at the Lyndhurst Road Garage. He paid £25,000 for labour, parts, material and spraying. He paid different garages for the services. Parts were sourced in Kingston and Miami Florida. When the car was seized it was in a better condition than when it was viewed at Court

He hired a car from Mr. Richard Simpson. He spends eight months of the year in Jamaica and 4 months in England. He has never sold a car in his life. When they get old he gives them away.

He said he sold the last car. He then said "when I said sold I mean in exchange for work done on my house".

He maintained that the BMW had crashed in England and he had completed his payments to Black Horse Ltd before he exported the BMW to Jamaica.

He did not claim from his Insurance Company for the vehicle but he was paid as it was the prerogative of the driver, at the time of the accident, to claim from the Insurance Company.

He denied that when the car arrived in Jamaica it was in the condition that it was in when viewed.

He agreed that the declarations that he made at Customs were incorrect. He does not involve his wife in his business. He did not discuss the initial purchase of the BMW motor car with her nor the purchase of the Salvage.

It is possible that he and his wife were apart when he purchased the car.

### **In Re-Examination**

He testifies that Lloyd's Bank is the name of a conglomerate Bank. Trustee's Savings Bank is a subsidiary and the Emblem or Logo is Black Horse.

He did not interface with the custom officer.

He had made eight or nine payments towards the rental vehicle.

**Richard Simpson** in brief testifies that he rented a Mercedes Benz E 300 to Mr. Henry from July 2006 to January 31, 2009. Initially at \$3000 per day and then at \$5000 per day.

He had received some payments from Mr. Henry but the payments slowed down towards the latter part of 2007.

He issued receipts as well as letters of demand for payments. (Seven receipts were tendered as exhibit '6').

Some monies were paid to him evidenced by the receipts that he issued.

### **In Cross-examination**

He testifies that he is a car restorer and a watchmaker. He knows Mr. Henry for ten years. He got to know him through motor cars. Mr. Henry would buy the car from England and he would order parts for the car from England. Mr. Henry would take the parts to Jamaica. He restores cars as a hobby, mostly European cars, Jaguars, BMW, Mercedes Benz, Austin and Ford Escort.

He entered into the arrangement with Mr. Henry in January 2006.

The receipt exhibit 6'a' dated February 1, 2006 for \$270,000.00 represents one month's deposit and two months rental at \$90,000.00, representing the months of February and March. Exhibit 6'b' dated May 8, 2006 represents the month of May. April receipt is not shown.

With reference to exhibits 6"c"b" and "e", he testifies that Mr. Henry had the car for the entire year 2007 and he did pay.

The receipt for March 8, 2008, exhibit 6"f", in the amount of \$600,000.00 represents four months (January – April) for the year 2008.

Receipts exhibit 6'g" in the amount of \$600,000.00 represents payments for the months May, June, July and August 2008.

Mr. Henry did not pay for September, October and November 2008.

He testifies that he would see the car on an average of three months each year. He does not know where the car is kept when Mr. Henry is off the Island.

Mr. Henry pays the rental for the car even when he is not around. The agreement does not stop when Mr. Henry is not on the Island. He has about 25 other cars.

The agreement between Mr. Henry and himself is a business one.

### **The Defendant's Account**

Mr. **Anthony Naylor** testifies that he is employed to Blackhorse Ltd as an Area Fraud Manager for the past six years. Blackhorse Ltd is a company within the Lloyd's TBS Groups and has accounts administering responsibility on behalf of the other groups in the company. Blackhorse principally provides credit facilities in relation to financing motor vehicles.

The documents that he refers to in his statement form part of the records relating to Black Horse.

The computer records or documents exhibited were created, compiled or recorded by persons within the company but due to time lapse these persons are not expected to have recollection of the matters dealt with. The records are used by the company for every day business purposes. Some of the records have been obtained from computers.

To the best of his knowledge and belief during the relevant period the computer was used regularly to store and process information for company purposes. At all times the computer was operating correctly but if not or out of operation this did not affect the accuracy of the information.

Black Horse carries out business with approved motor dealers or brokers offering finance to prospective customers.

Specialist car Luton is one of them. Specialist car was proposed for finance on August 6, 2004 in the name of Brenton Henry in relation to a BMW M3 coupe registration PO530FY VIN WBSBR92060 EH78060.

The total price of the vehicle inclusive of VAT was £41,115.00. The hire purchase repayment schedule is over 48 months. Forty-eight (48) payments of £531.05 with a final balance payment of £14,403.50 to complete the agreement.

Mr. Henry is still paying for the vehicle and has not missed a payment. An express condition of the terms of the agreement was that the vehicle remains the property of the company until all payments are made. The Jamaican Financial Investigating Department is indicating that the vehicle is in Jamaica.

Mr. Henry never requested Black Horse's permission to take the vehicle from the United Kingdom. Black Horse is the titled owner of the vehicle. Exhibit '4' is a hire purchase agreement between Black Horse Ltd and Mr. Henry.

Exhibit '7' is titled "used non qualifying vehicle invoice".

### **In Cross-examination**

He testifies that Exhibit '7' is captioned used non-qualifying invoice. He is competent but not qualified in computers. He had nothing to do with the computation of the records, all the figures, statement of accounts and all of these were put into the computer by someone else. He does not know the person who input the information into Mr. Henry's whole account. Several computers are at the company. He does not know which computer generates the figures that he is relying on.

He does not know specifically about the input into the system. As it relates to his use of "but if not or out of operation this did not affect the accuracy of the information", is a term that is used in the UK and accepted in court.

He does not know who provides and supply the information that he speaks of. He is not an IT person although he is competent to retrieve information from a computer.

All the evidence that he gives in court in is based upon figures written by some one else and stored away in a computer. All the figures in his statement are in relation to the company's computer system. He does not know what model/kind of computer they have at the Black Horse Co.

In relation to the information that he gives by way of figures he can only go by what is on the computer.

### **In Re-examination**

He testifies that he is computer literate.

### **On being recalled**

He testifies that the company Black Horse still possesses the financial title to the BMW.

When he attended the premises of German Salvage the place was empty. There is a data base in England called Company's House. He checked and could not find German Salvage.

In answer to Mr. Lyttle, attorney-at-law for the Claimant he testifies that he cannot remember the address that he went to. He explains that although he thought the location important it was a long time ago that he had made the check.

He checked with Company's House but he did not get a document from them. He checked online. He stoutly maintains that he made the checks in relation to the Salvage Company. He believes that amongst the documents submitted there is one stating that German Salvage does not exist.

**Miss Sidonne Foster** testifies that she is employed to an organization that provides security services for Kingston Wharves Ltd. As a part of her duties she conducts detailed examination of all motor vehicles being off loaded from certain ships. Upon examination the findings are recorded on a standard form known as Kingston Wharves Ltd mobile unit check list. It is a detailed record of the condition in which a particular vehicle was discharged from a ship along with its contents.

On November 21, 2004 she examined a BMW motor vehicle serial #WBSR92060 EH78060 off loaded from the ship Pilgrim and at the time she recorded her observations on a mobile check list #246057 (exhibit '8')

The condition of the vehicle as described in the quality column was exactly what she observed upon examination. She recorded exactly the contents that she found in the vehicle. From the check list she can say that the vehicle was in good condition had it not been so she would have noted it. Exhibit '2', the car that the court viewed is the car that she examined. After completing her examination the vehicle drove from the ship side to the holding area.

She further testifies that she saw the said motor vehicle at Shalimar Avenue and when she checked the serial number on November 21, 2004 she had recorded it as WBSR92060 EH78060 instead of WBSR92060 EH78060



### **In Cross-examination**

She testifies that the vehicle did not come in by way of container. It is a two door BMW, which had on all four wheels, a navigator system, a 6 disc CD changer and in fairly good condition. She stated that on the check list (exhibit '8') she listed that the vehicle had two headlamps, two fog lamps and there was nothing unusual about the headlamps.

She had no recollection if she went inside the vehicle to inspect but then she went on to say "I said I went inside because I went inside of it."

She had to make notations of things like radio, tape deck, floor mats. Having gone inside the vehicle she made no notation. The only reason she would have made reference to headrest was if it was damaged. She does not remember seeing a battery in the vehicle. There were other items in the vehicle such as a screen showing a computer but she does not know if they belong to the vehicle.

The vehicle was not looking like a brand new vehicle. It looked like it was already used or had been used although it was in good condition. A new vehicle would have had plastic on the bumper or on the headlights. The vehicle was indeed a used vehicle.

She did not make reference to a damaged fender, if the fender was damaged she would have recorded it. There was nothing significant in relation to a damaged fender to the rear hence no reference to it.

**Mr. Gregory Dalton-Brown** in brief testifies that he is a mechanic engineer. He studied at Bolton Street Technical Institute Dublin, Ireland He has worked with

BMW for over 11 years. He is also a technical trainer for BMW. He has vast experience with all motor vehicles manufactured by BMW.

On May 12, 2006 he was asked by the police to inspect a silver BMW, registration 7546 EK. He physically inspected the car and it was a M3 body and engine.

It appeared as if it was in the same condition as was manufactured and not altered.

He hooked up the car to a GTL diagnostic machine and the following information was recorded;

1. Chassis number - WBSR 902060 EH 78060
2. M3 – S54 convertible
3. Manufactured 2002 after September.

He also made checks on the PUMA system by in-putting the chassis number. This system is a specific BMW workshop assistance mechanism which provides information on all BMW motor vehicles. It is an online system that is accessed right out of BMW Germany. All the information supplied by this system is accurate and can only be accessed by specific persons employed to BMW dealership all over the world.

His checks revealed that this vehicle was manufactured on November 21, 2002 which classifies it as a 2003 BMW and sold in December 30, 2002. He did not state to which dealer this was sold as in order to do so he would have had to apply online to BMW Germany using the dealer's code.

The engine number is 60692897 and the type is S54 which is a 3.2 litre engine.

He produced a copy of the diagnosis report as well the PUMA system report generated.

He testifies that exhibit '2' is the car and Exhibit 3'a' the diagnosis report indicates that the vehicle had travelled 64, 489KM.

The engine inside the vehicle is not a 1995 CC. It is a 3.2,M3 engine. The engine in the car appears to be the original engine.

### **In Cross-examination**

He testifies that he is the holder of a driver's licence for about 24 years. As far as he knows there is no average mileage for a motor car. Each customer drives a car differently. He cannot answer the suggestion that the average car drives 10,000 miles per year.

The diagnosis machine is comparable to a calculator in a computer. This machine is linked to the manufacturers in Germany. When he zooms into the data base in Germany the numbers that come up is what he relies on when the car is connected to the diagnosis equipment. The diagnosis equipment reveals the information for the vehicle's computer which in turn will give information in relation to the vehicles error, chassis number, mileage and the vehicle data. There is no direct zoom to BMW Germany. It goes by way of some connection to BMW.

The BMW motor car, Exhibit '2' is a 2002 and not a 2001 and 64, 489KM travelled by a car in one year is not a lot of mileage. A one year old vehicle carrying that mileage does not mean that the speedometer has been damaged.

When the computer was attached to the engine it did not give faulty description of the engine. It is not the engine number that he puts in along with the chassis number. When the computer is attached to the vehicle that gives him the reading.

When the computer is attached to the vehicle it is not the original factory number that would come up.

He checked the engine block and the number that he has in his statement as the number of the engine block is incorrect.

The chassis number of a vehicle does not change and the engine number 60692897 is from the diagnosis report. This comes from Puma, the BMW direct link.

The engine number that is on the vehicle is different from that put out by the factory. He never checked the engine number, it is just by looking at it that he can say that it is a M3.

He saw dust in the headlamps. It is unusual for dust to accumulate in the headlamps of a BMW. He cannot recall if he saw both arm rests in the vehicle or whether they were old or new. He cannot recall if the battery area and case were quite rusty. At the time of inspection he cannot recall if the upholstery was looking brand new or whether the roof was looking old. When shown exhibit 3'a", the diagnosis report he still maintained that the vehicle is a 2002 series.

He testifies that it is not every five years that BMW brings out a new series or changes the shape. The changes are to the headlight, taillight and bonnet.

He cannot recall whether the motor car was hooked up to the diagnosis machine on the same day that he made checks with the Puma System.

He testifies that based on this diagnosis report the production date, that is the manufacture date of the BMW was November 21, 2002 and it was first registered on December 30, 2002.

It was not his objective to physically find the engine number.

He could not comment on exhibit '4' (The agreement between the Claimants and Black Horse Ltd)

A BMW M3 coupe, he testifies, is not the same as BMW 318. They are different vehicles. He maintains that the car is a 2002 series.

He further testifies to the court that the engine number cannot be brought up when the vehicle is hooked up. It is the chassis number itself that is brought up. From the chassis number the information in relation to the vehicle would be gleaned; that is chassis number, engine number and date of sale. This would be the original information. Even if the engine number is changed it would be the original engine number that would still be brought up.

**Mr. Desmond Robinson** testifies that he is the Regional Director of Special Investigations at the Financial Investigation Division of the Ministry of Finance. He outlined that his main responsibilities which include conducting investigations into suspected breaches of the Customs Act, primarily in cases involving fraud against the Revenue.

In September 2005 he received a case file from the Intelligence Unit of the FID for investigation. This case relates to a silver BMW M3 convertible coupe motor car with the number Vin – WBSNR 92060 EH 78060 imported by Sarah Butt as salvage with declared FOB of £10,000. The cylinder capacity of the vehicles declared as 1995. Intelligence revealed that one Brenton Henry purchased this vehicle in England a few months before exportation at a price of £41,115.00 FOB and he was the shipper as well.

The documents used to effect clearance were essentially those listed as exhibit '1'.

He examined the UK registration documents V5 – (exhibit “13”) and observed that the document appeared to be tampered with in three areas.

He indicated that in relation to the model/type the number 318 does not appear to be the original print, the date of registration referring to the year 2001 does not appear to be the original print and the document appeared to have suffered some erasure.

This document was the primary document relied on by the Customs Department.

The date of registration was shown as September 2001. Then using his experience as an investigator he concluded that the designated model year of the vehicle would be 2002 as it is the manufacturers’ policy that the vehicle manufactured in September or later takes the model year designation of the succeeding year.

During the course of his investigations he sought the assistance of the authorised local BMW dealers, then Sterling Motors, with regards to specifics of the BMW chassis number.

He testifies that the model year of the vehicle is 2003 and the CC rating of the vehicle is 3.2 and not 1995 as declared. He made checks with Kingston Wharf Ltd and received further information.

He concludes that the vehicle was fraudulently imported and that proper duties were not paid Act. The duties paid on a CC rating of 1995 was \$1,188,158.37 and the duties to be paid on a CC rating of 3200 would amount to £8,764,650.037. Further under-invoicing and false declaration of CC capacity would result in the duty owing to be \$7,576,491.94.

On July 31, 2006 he received information and gave instruction to the FID Investigating Office, Montego Bay.

The BMW motor car was subsequently transported to 1 Shalimar Avenue Kingston 3 for safe keeping and on Wednesday February 1, 2006 Mr. Henry attended the office of the FID. He was interviewed under caution and a question and answer was administered (exhibit '10'). He advised that Mrs. Henry attends on the office to confirm her ownership of the vehicle as a pre-condition to further discussions. Between February 21, 2006 and February 24, 2006 he and Mr. Henry exchanged correspondence. On February 27, 2006 he sent correspondence to Mrs. Henry relating to the seizure of the BMW motor car, accompanied by a notice of seizure to that effect (exhibit '9'). Mrs. Henry did not attend the office. She was the registered owner of the vehicle and Mr. Henry the shipper.

He needed Mrs. Henry to attend at the office so he could proceed with the matter. Her name having appeared on the import entry form (C78).

### **In Cross-examination**

He testifies that the first time he saw the BMW was in early 2006. This was after it was taken into Kingston from Montego Bay. He has no knowledge of the state that the vehicle was in when it was taken off the Wharf. He agreed that Ms. Foster testified that a clock was missing but not four fenders.

Referring to exhibit '12' (the document from Germany Salvage) showing the year 2001. He testifies that this document refers to the car in question. It has the same chassis number as the vehicle in question and when he received the case file it was apart of it. Despite the document bearing the year 2001 he is still saying that there

is fraud detected in the vehicle registration number. This document has not been produced to the court.

In the normal course of things it is the custom officer who inspects the vehicle before imposing the custom duties. By his approach and calculation the custom officer was wrong.

He did not calculate whether the 2001 -2002 motor car assessed below the figure that it was purchased for, transportation and GCT would amount to \$13,580,353.24. His calculation was 180% of £41,000.00.

He outlined how he arrived at his calculation and concluded that the custom duty payable would amount to \$8,764,650.36 taking into account the amount of \$1,188,158.37 imposed and paid .

It was not necessary for him to see the vehicle on the Wharf for him to determine the duty to be imposed and he rejected the calculation of the custom officer despite not seeing the vehicle.

He could not say anything about the arm rests of the vehicle or dust in the headlamps or whether they were significant

He could not say whether the exterior of the roof was looking old.

It would be uncustomed if the CC rating was incorrect. The damaged state of the vehicle is irrelevant to the duty imposed. Damage would affect the rate but not the rate applicable. It is provided for under the Customs Act for customs officers to assess duties based on the damaged item. It is not correct that the custom officer has the power to abate or to reduce the customs duty on an item when it is damaged.



When he saw the vehicle it did not have the damages as exhibited on the German Salvage. He saw a BMW, a nice vehicle. He looked at the engine block.

He said that he suspected fraud in this matter. He did not charge the custom officer who made the assessment neither did he hand over the matter to the police. It was his department that dealt with the fraud.

He does not know who prepared the German Salvage Form.

He posits that if an engine block in a vehicle is damaged an import entry or a certificate of fitness for the new engine block has to be taken to the examination depott so that the changes can be recorded on the vehicle registration.

He cannot find the engine number in respect of the original make up of the vehicle and he has never looked it up.

When exhibit '3' (the diagnosis report) was shown to him he agreed that the engine number shown is 60692897 and if this engine block had been changed a new engine number would be needed. However he still maintains that not having the engine number of the vehicle in his statement is not relevant and even if the engine number had been changed it would not affect the applicable duty rate.

Import duty is based on the manufacturers' specification of the CC rating.

He said he did not investigate a 318 coupe as shown in exhibit '12'.

In re-examination when exhibit '13' the vehicle registration document was shown to him he testified that this is a vehicle registration document in the name of Brenton Henry, showing a BMW 318 coupe bearing the date September, 01 with 1995 CC and the year 2001 appears on the document.

**Mr. Gifton Palmer** in essence testifies that he is an officer of the FID and on January 31, 2006 he received information as a result of which he went to the Montego Bay collectorate and seized a Gray BMW motor car registration number 7546EK from Mr. Henry and a note of seizure was issued to him. The said motor car was transferred by wrecker to the FID, 1 Shalimar Avenue, Kingston 3 where it was handed over for safe-keeping. This notice of seizure is exhibit '14'.

### **In Cross-examination**

He testifies that he cannot recall taking the title of the motor car. He cannot recall if he was aware of the fact that the title was in the motor car neither can he recall whether he inspected the title.

### **Inconsistencies and Discrepancies**

#### **Inconsistencies on Mrs. Sarah Henry's Testimony**

In cross examination at first Mrs. Henry testified that she does not know when the car was purchased then she recanted and states that she knows when the car was bought.

In examination in chief she testifies that Mr. Henry's friend Alex Rose was driving the vehicle. In cross examination she testified that she did know who was driving the vehicle then changed this to say that at the time of the accident Mr Henry's friend was driving the vehicle.

In-cross-examination she testified that she did nothing in relation to the car when it was at the salvage, her husband dealt with it. She then testified that she helped her husband with the exportation of the car.

She further testified that when the car was purchased initially it was not her car. She then testified that when the salvage was purchased she cannot remember if it was her car. At first she testifies that she cannot recall signing the documents then later testified that she signed the documents.

#### **Inconsistencies on Brenton Henry's Testimony**

In cross examination he testified that he is not familiar with Black Horse Ltd yet when he was shown exhibit '4' which is a Hire Purchase agreement he admitted that the signature on the document was his and it was in fact an agreement between himself and Lloyds Bank Ltd. He went on further to testify that there is a relationship between Specialist Car Luton and Black Horse Ltd.

He testified that he had sold the two cars that he had imported into the country that year, prior to the importation of the BMW. He then went on to testify that he had never sold a car in his life. He further went on to explain that when he said sold in relation to the last car he meant in exchange for work done on his house and he does not know where the first car is.

#### **Inconsistencies on Mr. Herbert Simpson's Testimony**

In relation to the receipt exhibit '6' dated January 3, 2008 in the amount of \$600,000, at first he testified that this represents payment from April to August 2008. He then went on to correct this to say that this would represent payment for May, July and August. This seems to be a genuine mistake on his part and I do not find this material.

### **Inconsistencies on Miss Sidonne Foster's Testimony**

In cross-examination she testified that she had no recollection as to whether when she inspected the vehicle she went into it. She then testified that she said "she went inside because she went inside of it".

She testified that she has to make notations of things like radio, tape deck, floor mat. However she made no notations having gone inside.

### **Inconsistencies on Mr. Gregory Dalton-Brown's Testimony**

In cross examination he first testified that he checked the engine block. He later retracted this and said he never checked the engine block. He also testified that the number that he has in his statement as the number of the engine block is incorrect.

### **Discrepancies on the Claimants' Account**

Mrs. Henry testified that when the car was initially purchased it was not her car. Mr. Henry testified that sometime in the year 2004 he and his wife purchased the car.

Mr. Henry testified that both were insured to drive the vehicle. Mrs. Henry testified that she had her own insurance to cover her driving the BMW.

Mrs. Henry testified that she did not drive the car in Jamaica. Mr. Henry testified that Mrs. Henry drove the car in Jamaica and he was in the car with her when she drove in St. Mary and Montego Bay.

Mrs. Henry testified that the accident involving Mr. Alex Rose was in 2006. The general consensus is that the vehicle was imported into Jamaica in 2004.

Mr. Henry testified that he hired the Mercedes Benz in February 2005, Mr. Simpson testified that he rented the car to Mr. Henry from January 2006.

**I find that the following areas are not in issue**

1. That the Claimants imported into the Island, a BMW motor car.
2. That the custom duties assessed on the motor car was \$1,188,158.37
3. That this BMW motor was taken from the Wharf.
4. That Mr. Brenton Henry attended on the offices of the Montego Bay Inland Revenue Department to have the car licensed where it was seized by Mr. Gifton Palmer on the instruction of Mr. Desmond Robinson.
5. That notice of the seizure of the motor vehicle were sent to both Mrs. & Mrs. Henry.
6. That Mr. Henry made a request for the return of the motor vehicle.
7. The motor vehicle is still in the custody of the Financial Investigation Division.
8. That the motor vehicle is available and can be returned to the Claimants if the court finds that the Claimants are entitled to it.

**I find that the following areas are in issue:-**

1. The CC rating of the BMW motor vehicle. Mr. Henry contends that the CC is rating is 1995. The contention on the part of the FID is that the CC rating is 3200.
2. The Defendant contends that the assessment arrived at was a fraudulent assessment based on the submission to the custom officer of fraudulent documents particularly a vehicle registration document V5 (exhibit 13).
3. Whether the vehicle was imported as salvage as the Claimants contend or as a used vehicle not brand new but not salvage as the Defendants contend

4. Whether the seizure of the car was malicious or without reasonable and probable cause.

### **The Claimants Submission**

After reviewing in detail the evidence of each witness and analyzing the documents admitted in evidence, Learned Counsel for the Claimants Mr. Garth Lyttle submits that in relation to exhibit 12 dated August 27, 2004 (German Salvage). The document was notarized as shown by the seal at the bottom left hand corner. Further the Defendants proffered no reason or evidence to the contrary to impugn the integrity and character of the notary public, Mr. Allen Labor at German Salvage. This document listed 10 distinct damaged areas which are consistent with the description of damages and repairs as given in evidence by Mr. Henry.

Neither Mr. Desmond Robinson nor Mr. Gregory Dalton-Brown saw the vehicle whilst it was in England or Jamaica prior to repair. Therefore neither can speak to the state and condition of the vehicle as it was two years prior to January 2006.

He therefore submits that this document brings to the court irrefutable evidence as to the state the motor vehicle was in when it was shipped to Jamaica.

With reference to the vehicle's registration form (exhibit'13') he submits that it is the document that Mr. Robinson said that he suspected the numbers were tampered with and consequently he is alleging fraud but apart from his suspicions he proffered no further evidence to support this allegation.

Further Mr. Robinson stated no special qualification and training which shows that he was competent to detect fraudulent document and that this document was tampered with. No hand writing expert was called to support this suspicions.

Apart from saying that he was suspicious that the numbers were tampered with, he went no further and this amounts to mere speculation.

The main thrust and premise of the Defence is that the motor vehicle was a 2003 car yet the vehicle registration form tendered into evidence by Mr. Cochrane shows that it is a 2001 vehicle and this is certified by the financing agency shown in the first column of the top right hand side of the form 8998734 (exhibit '13') date of registration September 1, 2001.

He further submits that there is now an irreconcilable conflict between the documents tendered into evidence by the defence and Mr. Robinson's imagination as to the year the car was manufactured and the year 2001 as shown by the documents, should stand. With reference to exhibit '3' (the diagnosis report) he submits that this document was created by Mr. Dalton Brown who works with Sterling motor which was the dealers and agent at the time for BMW in Jamaica. Mr. Dalton-Brown's occupation is a mechanic engineer and he used the chassis number to trace the vehicle. No evidence was given as to the quality, competence and reliability of the computer he relied on. No name of computer was given.

The computer generated document was generated or created by Mr. Dalton-Brown some five years after the motor vehicle was manufactured and no reliance should be placed on it by the court.

Mr. Dalton-Brown admitted in cross examination that if the engine block which is at the bottom of the engine was changed, the computer could not pick it up and therefore by the process of elimination the computer upon which he was relying could not give any accurate reading as to the engine block and age or performance

of the vehicle. Therefore he was not in a position to refute the Claimants contention that the CC rating of the engine that was in the motor vehicle was 1995 and not 3200 as claimed by Mr. Robinson. The engine number he referred to then would not be the engine number for the substitute engine that Mr. Henry said that he had installed before the vehicle was shipped to Jamaica.

That the original engine being a 3.2 litre and the substitute engine a 1.9 litre remains undisputed by Mr. Dalton-Brown or Mr. Robinson.

He further submits that based on Miss Sidonne Foster's evidence that she examined the vehicle and found the damages and made records of every thing except the four fenders, no front bumper, no rear bumper as well as reference to the navigation system, the CD player and no disc port (exhibit '8'). It could not be the new vehicle that Mr. Robinson saw over two years after it was landed in Jamaica and fully repaired.

He submits that based on the two documents put forward by the defence i.e. (a) the German Salvage (exhibit '12') and (b) the Kingston Wharfs Ltd (exhibit '8') produced by Mrs. Foster this set up an irrefutable conflict with Mr. Robinson's evidence that the vehicle should attract the duty of 180% put forward by Mr. Robinson as per a new vehicle.

He further submits that all the documents put forward by the defence shows the vehicle as a 2001 vehicle and it should therefore be treated as such by the court.

Referring to section 4 of the Customs Act he submits that this is a deeming position and the discretion of the Custom officer on the Wharf who inspected the car and



imposed the duty on the salvage of \$1,188,158.37 cannot be over turned by Mr. Robinson and his action must be considered ultra vires.

Mr. Robinson is alleging fraud without a foundation which impugns the character of the Custom officer and the Custom Department.

Mr. Robinson was by his action acting unilaterally and usurping the power of the Minister as laid down in Section 6 of the Customs Act whereby he took it upon himself to increase the custom duty on goods by 700% of that which the custom officer, who inspected the goods and classified it as salvage, imposed.

Further Section 19(8) of the Act creates its own statutory limitation wherein the Commissioner of Custom may within two years from the date of entry of the imported goods adjust the value of the goods. Two years and 16 days had passed since the vehicle arrived in Jamaica and the custom duty was imposed and paid by Mr. Henry.

Further Section 28 of the Customs Act allows a custom officer to assess duties on goods that are damaged once it is proven to the satisfaction of the Commissioner(custom officer) that such damage was suffered before the delivery of the goods and out of the care of the Commissioner. In this case the vehicle was a 2001 vehicle needing extensive repairs and sold as a used vehicle not new as Mr. Robinson would have the court believed.

Further with reference to the diagnosis report (exhibit 3) if this vehicle was sold in 2002 when first built in September 2002 it could not have completed 64,489KM in a few short months.

Where fraud is pleaded then it is not good enough to plead fraud alone. Fraud must be specially pleaded and particularized. To simply say that it appears as if the '1' on the year of the vehicle on the V5 form (exhibit 13) was tampered with was not good enough. There must be good and substantial evidence to support the allegation of fraud for the Defendant to succeed on his claim.

Referring to Mr. Naylor's evidence Mr. Lyttle submitted that the computer print out was not submitted to the court for its scrutiny and Mr. Naylor gave evidence on it. Neither was this printout submitted to the Claimants nor the defence.

Mr. Naylor admitted that he was not the person who placed the information in the computer and he did not know who was responsible for such information. Therefore Mr. Naylor's evidence must be rejected and expunged from the record as it has breached the hearsay rule.

Mr. Robinson made no report to the Custom's Department of a Custom Officer being guilty of collusion, conspiracy or fraud.

Under Section 19(2) of the Customs Act the Commissioner of Customs has the power to question any document presented to him for custom valuation. Mr. Robinson was not even trained as a Custom Officer and holds no peculiar competence to make valuation of goods imported into Jamaica.

He is therefore asking the court to say that it is satisfied that the Claimants' vehicle was seized and detained by Mr. Robinson 216 days after the law allows the Commissioner to recover the duty payable.

Therefore judgment should be entered for the Claimant and the counter claim of the Defendant be dismissed.

### **The Defendants Submission**

After reviewing the claim the defence and the counter-claim and the evidence in relation to the BMW the subject matter of the Claimants claim, the possession of the motor car, the clearance and eventual seizure as well as the applicable law, in essence the Defendants in the filed submission propose that the Claimant cannot recover damages for the tort of detinue as they do not have the right to immediate possession of the BMW.

The relevant motor car was hired by Black Horse Ltd to the Claimant Brenton Henry. There is no dispute as to this evidence.

This is based on Mr. Naylor's evidence that the hire purchase agreement between Brenton Henry and Black Horse Ltd is incomplete and Black Horse Ltd still has a Financial Interest.

The motor car was seized because fraudulent means were used to arrive at the duties, imposed.

The duties imposed have been paid based on the year, cubic capacity and FOB of the motor vehicle.

The claim for conversion is a non-issue as the motor car exists and is available for return to the Claimants if the evidence shows them to be entitled to it.

The submission further propose that there is evidence on the Claimants case and on the Defendants case that the Claimants dealt with the car with intent to defraud Her Majesty of duties due.

Section 210 of the Customs Act is therefore applicable and the Defendants are duty bound to recover the outstanding duties. It is further proposed that the main issue

to be determined by the court is the Defendant's Counter-claim for outstanding duties of \$7,576,491.99.

The Defendants complied with Section 215 of the Customs Act by issuing notices of seizures to the Claimants on the seizure of the motor vehicle.

Sections 2 and 3 of the Customs Act authorize Mr. Gifton Palmer to seize the motor car. This is bolstered by Section 13 of the Constabulary Force Act.

The Claimants' case should be dismissed and judgment entered for the Defendant on the claim and counter claim.

Further the court should infer that the original engine is in the car and a different number on the Jamaican documents for the car are merely an extension of the Fraud, by the Claimants, which commenced in England.

The engine number that was downloadable by Mr. Dalton-Brown from the PUMA system should be accepted by the court as the original and present number as Mr. Henry testified in cross-examination that the engine and its number are not critical to the Claimants claim and the Defendants counter-claim.

The Claimants claim for the cost of air fare from London to Kingston was not legitimate. They should not benefit from their own wrong doing.

The Claimant Brenton Henry testified that he is in Jamaica for about four months of the year if the court so finds they should recover \$1,080,000. He however did not amend his particulars of claim to reflect the new amount but they should not be allowed to benefit from their own wrong doing.

They have claimed an amount for special damages and Mrs. Henry speaks to spending \$953,500 for repairs of the car. No receipt was produced or witness

called to prove the items. Likewise Brenton Henry produced no receipts or called no witnesses to prove the item.

Referring to the claim for the cost of one trip from London to Kingston, this was not legitimate and the Claimants should not benefit from their own wrong doing.

The Claimants are not credible witnesses. They had no locus standi to bring the claim and could have been criminally prosecuted by virtue of the Customs Act.

The court should find that the witnesses for the Defendant were credible. Their evidence clearly indicates that a conspiracy was hatched in England and completed in Jamaica.

That on a balance of probability the Defendants case is more acceptable than that of the Claimants.

### **Finding of Facts**

I find as a fact that the BMW motor vehicle, the subject matter of this action is available and if the court finds that the Claimants are entitled to it, can be returned to the Claimant. This is unchallenged.

I find as a fact that at the time of the seizure the Claimants were in immediate possession of the BMW motor vehicle and not Black Horse Ltd. There is no evidence to contradict this.

I find as a fact that the BMW motor vehicle was seized on January 31, 2006 when Mr. Henry attended at the Revenue Department in Montego Bay to have it licensed.

I find as a fact that this is unchallenged. I find as a fact that on July 27, 2006 a formal demand was made for the return of the BMW motor vehicle and that this demand was not met. This is also unchallenged.

I find that between February 2006 and November 2008 Mr. Henry hired a motor car from Mr. Richard Simpson. I accept Mr. Henry's evidence supported by that of Mr. Richard Simpson in this respect.

I find that exhibit '7' titled "used non qualifying vehicle invoice." indicates that on August 12, 2004 the BMW was a used vehicle and this is supported by the evidence of the interchanging officer Miss Sidonne Foster who testified that the vehicle is in fact a used vehicle and this is consistent with Mr. Henry's contention.

I find as a fact that I cannot place reliance on Mr. Naylor's evidence as it relates to the evidence brought up on the computer as he testified that all of the figures, statement of accounts, all of those that he made reference to were put into the computer by someone else. He does not know the person who fed the computer with the information. He does not know the persons who are inputting the information into Mr. Henry's whole account. There are several computers at the company and he does not know which computer produced the figures that he is relying on. He does not know specifically what was put into the system. He does not know who provides or supplies the information. All the evidence that he gives in amounts is based upon figures written by someone else and stored in a computer.

He does not know what model or kind of computers they have at Black Horse and he does not know if the computers are in good working condition.

As a matter of fact the court was never supplied with a computer print out of all that he referred to.

Further Mr. Naylor testified that he made checks and could not find the German Salvage Co. On a balance of probability he has not satisfied the court that the company does not exist. He cannot remember the address that he went to although he thought that the location was important and sought to justify this by saying that it was a long time ago.

He further made checks with Company's house in England but he did not get a document to say that the company does not exist.

I find it incomprehensible that he cannot remember which address he went to as this information must be vital.

Miss Sidonne Foster testified that she inspected a BMW bearing serial #WBS92060EH and based on her observation she prepared exhibit '8', a mobile check list number 24605. On examination of this check list I see no mention of an engine or a chassis number.

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.

I accept Miss Foster's evidence when she said that the vehicle was not a brand new vehicle but looked as if it was used already or had been used although in good condition.

Mr. Dalton Brown testified that when the computer is attached to the vehicle it is not the original factory number that would come up and the engine number that he has in his statement is different from the number on the engine block. He did not check the engine block but just by looking at the engine itself he can say it is an M3.

He then testified that even if the engine number is changed when the hook up is done it is the original engine number that would be brought up.

I find that based on his evidence the engine "size" must be important in relation to the CC rating of the vehicle and assessing the duties imposed and I reject his evidence when he sought to say that this is not so. Further he testified that if the engine block had been changed a new engine number would be there.

I find also that he is giving evidence in relation to computer generated information.

I find that I cannot in effect rely on Mr. Desmond Robinson's conclusion as it relates to exhibit 13 (the vehicle registration document V5). This is the document that he seeks to say is a forged document. A document that has been tampered with, the document on which reliance was placed in assessing the duties to be imposed on the BMW. He is seeking to say that the model type, the number 318 does not appear to be the original print. The date of registration referring to the year 2001 does not appear to be the original print, the number 1995 does not appear to be the original print and the document appeared to have suffered some erasure.

To my mind Mr. Robinson seem to be giving evidence in relation to what I would deem a "questioned document" and from the evidence I do not find that he has the



necessary experience or expertise to give this type of evidence and as such I cannot properly place reliance on his opinions that this document appears to be a forged document. I must extend this finding also to his opinion of exhibit 12 being a forged document.

I find that I cannot without more accept his evidence that by his approach and calculation the custom officer was wrong in imposing the duty that was imposed.

I find that Mr. Desmond Robinson's evidence that he suspects fraud in this matter really sums up the total position. The seizure was ordered and carried out based on what I find to be mere suspicion on the part of Mr. Robinson.

I appreciate that there are inconsistencies and discrepancies on the Claimants case but these, I find, do not in any way affect the findings as to the unlawful seizure of the motor car.

### **The Applicable Law**

Clerk & Lindsell on Tort 19<sup>th</sup> Edition page 1005:

**Detinue** lay at the suit of a Claimant having a right to immediate possession for the wrongful detention of his chattel. The wrongful detention was normally, though not invariably evidenced by the Defendants refusal to deliver it up on demand, the redress to the Claimant was the return of the chattel or payment of its value together with damages for its detention.

**Conversion** arose as an action on the case to fill the gaps left by trespass and detinue. The essence of that wrong was the unauthorized dealing with the Claimants chattel so as to question or deny his title to it.

## The Customs Act

### **By Section 2**

Officer includes any person employed in the Department of Customs and exercise the Revenue Protection Division of the Ministry of Finance and all officers of the Constabulary Force---

### **By Section**

“3. For the purpose of carrying out the provisions of the customs laws all officers shall have the same powers, authorities and privileges as are given by law to officers of the Constabulary Force”.

### **By Section**

15. (1) Where by entry, bond, removal of goods or otherwise, any obligation has been incurred for the payment of duties of customs, such obligation shall be deemed to be an obligation to pay all duties of customs which may become legally payable, or which are made payable or recoverable under the customs law, and to pay the same as the same become payable.

### **By Section**

210 –(1) Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud Her Majesty of any duties due thereon or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal,

loading and exportation of goods, shall for each such offence incur a penalty of not less than treble the import duties payable on the goods nor more than treble the value of the goods; and all goods in respect of which any such offence shall be committed shall be forfeited.

### **The Constabulary Force Act Sections 13 & 33**

13. The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably.

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

### **Section 31G of the Evidence Act**

31G. A statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein unless-

(a) at all material times -

- (i) the computer was operating properly;
- (ii) the computer was not subject to any malfunctions;
- (iii) there was no alternations to its mechanism or processes that might reasonably be expected to have affected the validity or accuracy of the contents of the documents;

(b) there is no reasonable cause to believe that –

- (i) the accuracy or validity of the document has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer;

(ii) there was any error in the preparation of the data from which the document was produced;

(c ) the computer was properly programmed

(d) where two or more computers were involved in the production of the document or in the recording of the data from which the document was derived –

(i) the conditions specified in paragraphs (a) to (c) are satisfied in relation to each of the computers so used; and

(ii) it is established by or on behalf of the person tendering the document in evidence that the use of more than one computer did not introduce any factor that might reasonably be expected to have had any adverse effect on the validity or accuracy of the document.

### **The Application of the Law to the Findings of Fact**

The claim for conversion must fail as the motor vehicle exists and is available for return to the Claimants.

By Section 2 of the Customs Act

“Officer” includes any person employed in the Department of customs and Excise, the Revenue Protection Division of the Ministry of Finance and all officers of the Constabulary Force and by virtue of Section 3 of the Customs Act, all officers shall have the same powers, authorities and privileges as are given by law to the officers of the Constabulary Force.

Section 13 of the Constabulary Force Act outlines the duties of the officers of the Constabulary Force. This includes to appear and summon before a justice of the peace persons found committing an offence or whom they may reasonably suspect of having committed any offence.

Further by Section 33 of the Constabulary Force Act any action to be brought against a constable for any act done by him in the execution of his duty should be an action on the case as for a tort act and in the declaration it shall be expressly alleged that such act as done either maliciously or without reasonable or probable cause and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict given for the defendant.

Clearly the custom officers and the Officers of the Revenue Protection Division are clothed with the same powers as the officers of the Constabulary Force. It seems to me therefore that if a Revenue Protection Division officer in the execution of his duties acts maliciously or without reasonable and probable cause then the Claimant is entitled to judgment.

By Section 210 of the Customs Act – every person who shall import —any goods, - —or in any manner dealing with any goods with intent to defraud Her Majesty of any duties thereon — or shall be in any way knowingly concerned in any fraudulent exercise or attempt at evasion of any import or export duties of Custom shall for each such offence incur a penalty of not less than treble the amount of the goods nor more then treble the value of the goods.

The Defendants by way of counter-claim are claiming three times the amount imposed as custom duties alleging that the Claimants by fraudulent means caused the duty of \$1,188,158.27, to be imposed on the BMW motor car, by stating that the CC rating of the vehicle is 1995 whist the real rating is 3.2.

In attempting to prove this the Defendants relied on the evidence of Mr. Anthony Naylor, Mr. Gregory Dalton Brown, Mr. Desmond Robinson among others and to a

large extent on exhibit '13' a vehicle registration form in relation to the BMW. The Defendants are claiming that this vehicle registration number was tampered with.

**Mr. Anthony Naylor's Evidence**

He testified that the documents that he referred to in his statement form part of the records relating to Black Horse. The computer records or document exhibited are compiled or recorded by persons within the company but due to time lapse the persons are not expected to have recollection of the matter.

At all times the computer was operating accurately but if not or out of operation this did not affect the accuracy of the information, all the figures in the statement are in relation to the company's computer system. He does not know what model/kind of computer is at the Black Horse Limited.

Of course of even greater import no computer print outs were supplied.

In dealing with this aspect of the evidence I am guided by the procedures relating to admission of evidence in relation to computer print out as laid down by Dukaharan JA (Ag.) (as he was then) in the matter of **Suzette McNamee vs Regina RMCA # 18/207.**

I appreciate that McNamee's matter is a criminal matter but the application of Section 31(G) of the Evidence Act is the same, I find in a civil matter.

The learned judge of the Court of Appeal states at page 8 of the judgment:

"It is therefore clear that all subsections must be satisfied before a computer generated document is admissible in evidence. The requirements of the section have to be looked at conjunctively. Failure of the prosecution in satisfying all or any of the requisite conditions can pose a difficulty.

Continuing he said:

It is to be noted that Section 31G of the Evidence Act is similar to the English Legislation namely Section 69 of the Police and Criminal Evidence Act of 1984.

In **R. v Minors, R v. Harpar** 1982 2AER 208 in analyzing the law within the context of computer evidence.(Referring to the judgment of Steyn J at page 210)

“The law of evidence must be adapted to the realities of contemporary business practise. Mainframe computers, mini computers and micro computers play a pervasive role in society. Often the only record of a transaction which nobody can be expected to remember will be in the memory of the computer”.

The versatility, power and frequency of use of computers will increase.

Continuing he said:

“On the other hand computers are not infallible. They do occasionally malfunction. Software system often have bugs unauthorized alternative information stored in a computer is possible. The phenomenon of a virus attacking computer system is also well established. Realistically, therefore computers must be regarded as imperfect devices. The legislature no doubt had in mind such counter rally considerations when it enacted Sections 68 and 69 of the Police and Criminal Evidence Act 1984”

In relation to subsection title “c” of 31G that is in relation to the absence of evidence as to who wrote the programme or that the computer was properly programmed or error in the preparation of the data from which the document was printed, the learned judge of appeal pointed out that in **David Chin v Regina RMCA 101/2000** dated the 31<sup>st</sup> July 2001 at page 24 Panton J.A (as he was then) said

“These requisite also have to be satisfied for a statement to be admitted where it is contained in a document produced by a computer, even though that statement does not constitute hearsay - -

The Defendants are asking the court to accept Mr. Naylor’s evidence as real evidence. Although the court allowed Mr. Naylor to testify, his evidence cannot be

relied on as it does not satisfy the conditions specified in Section 31G of the Evidence Act further a computer print out was never supplied to the court.

**Mr. Gregory Dalton-Brown's Evidence**

Mr. Gregory-Dalton Brown produced a diagnosis report (exhibit 3a) this was generated by the computer at the BMW office in Kingston through some connection to BMW in Germany. I am afraid that I have to apply the same principles to his evidence as I applied to that of Mr. Anthony Naylor's.

Although Mr. Dalton Brown is testifying that the diagnosis machine is comparable to a calculator. I do not find that it was used as a calculator, a tool which did not contribute its own knowledge but merely did a sophisticated calculation which could have been done manually. It went beyond this. It produced a report.

The Defendant tendered into evidence exhibit 13 (the vehicle registration document form V5). Mr. Desmond Robinson is alleging that this document was tampered with and there are erasures. Having found that he has not established that he has the necessary expertise to determine that this document is a fraudulent one. I find on a balance of probability that I cannot impute fraud to the Claimants, the custom officer or anyone based on his suspicions in relation to this document.

I have to agree with learned counsel for the Claimant that simply to say that it appears as if the one (1) on the year of the vehicle on the registration form was tampered with is not good enough. There must be good and substantial evidence to support the allegation of fraud.

It is not sufficient I find to "cry fraud". It must be specially pleaded and proven.



Based on the foregoing I find that the order for the seizure of the BMW motor vehicle was carried out on what I find to be based on mere suspicions on the part of Mr. Desmond Robinson and as such he had no cause or basis on which to have ordered the seizure of the motor vehicle.

I find on a balance of probability that the seizure was therefore unlawful.

### **Damages**

The seizure and subsequent detention of the vehicle were unlawful.

The Claimants have not proven the amounts for repair, they have not supplied any voucher, any airline ticket in relation to the request for the Claimants' travelling expenses. These it is trite all fall under the heading of "Special Damages" which must be specially pleaded and strictly proven.

I find that their claim for travelling expense has not been proven hence it must fail.

In relation to the loss of use of the motor vehicle, 6 receipts were submitted - They are exhibits 6a – 6g totalling the sum of \$2,280,000. It is Mr. Henry's evidence that he is in the Island of Jamaica for about 8 months of each year. He has a duty to mitigate his loss. I can't conceive why he should be awarded an amount for the 4 months each year when he is not in the Island and does not use the vehicle for the period. I would allow him two-third's of the amount claimed which would amount to \$1,520,000.00.

### **Conclusion**

The seizure of the vehicle was without cause and had no basis. The reason for the seizure being mere suspicion. The seizure therefore is unlawful.

The vehicle is available for return to the Claimants.

It is therefore judgment for the Claimants.

**It is hereby ordered that:**

1. No further custom duties than the \$1,188,158.37 is payable.
2. The Claimants are entitled to the return of the vehicle.
3. The Defendants pay to the Claimant the sum of \$1,520,000.00 at 6% interest from the 31<sup>st</sup> January 2006 to the 24<sup>th</sup> November 2009.
4. The Defendants counter-claim is dismissed.
5. Costs to the Claimants to be agreed or taxed.