NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 113/98

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

BETWEEN	**WORKERS SAVINGS & LOAN BANK**	**1ST DEFENDANT/ APPELLANT**
A N D	**HOWARD WRIGHT**	**2ND DEFENDANT/ APPELLANT**
A N D	**ANTHONY MAGNUS**	**3RD DEFENDANT/ APPELLANT**
A N D	**HORACE SHIELDS**	**PLAINTIFF/ RESPONDENT**

Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher and Gordon for the appellants

Miss Tana'ania Small instructed by D.O. Kelly & Asociates for the respondent

June 29, 30 and December 20, 1999

FORTE, P:

Having read in draft the judgment of Harrison J.A., I agree with his reasoning and conclusion and there is nothing further I wish to add.

HARRISON, J.A.:

This is an appeal from the judgment of Marsh, J., on July 29, 1998, ordering that the defendants/appellants pay to the plaintiff/respondent the

amount of $819,030 as special damages, with interest at 10% per annum from May 5, 1985, to the date of judgment, and general damages of $1,350,000 with interest at 10% from the date of service of the writ to the date of judgment.

The facts relevant to this appeal are that the respondent, a businessman and owner of a marl quarry in Mandeville in the parish of Manchester, took a loan from the first appellant and as security for the said loan signed a bill of sale in the presence of the second appellant, the managing director of the first appellant, on August 13, 1984. The bill of sale created a lien by the first appellant over items of road construction equipment of the respondent, namely, a grader, a stone crusher, a pick-up, two trucks and a bulldozer. The said bill of sale was recorded at the Island Record Office, Spanish Town on August 16, 1984.

On May 5, 1985, the third appellant, bailiff for the first appellant, acting on the instructions of the second appellant, wrongfully seized the respondent's Terex Rubber Wheel Front-end Loader Model No. 7231 AA and Serial No. 56606, and detained it at the first appellant's premises in purported execution of the said bill of sale. Objecting to the said seizure, the respondent claimed the said front-end loader from the first appellant, but the second appellant, initially denying any knowledge of the seizure, thereafter maintained that it was seized under the bill of sale dated August 13, 1984. The second appellant presented to the respondent such a bill of sale, exhibiting the said "Terex Rubber Wheel Front-end Loader No. 7231 AA and

Serial No. 56606" included among the items listed thereon. Consequently, the respondent obtained from the Island Record Office a certified copy of the bill of sale dated August 13, 1984, and, as the respondent had correctly maintained the said front-end loader was not recorded on the latter document. The respondent made several demands on the second appellant to return his front-end loader without success. On May 21, 1985, the second appellant, the employee and agent of the first appellant, sold the respondent's said front-end loader to one Harry Shields, thereby committing the tort of conversion. The respondent reported the said sale to the police. The second appellant was arrested and charged for the offence of forgery, uttering and other offences, and convicted on April 4, 1989. The said front-end loader, an exhibit in the criminal case, was not returned to the respondent until June 9, 1989. It was then in an unusable condition, needing repairs, estimated then to cost $200,000.

When the front-end loader was seized on May 5, 1985, it was then engaged in working at a site at Leas Flat, St. Andrew. Because of the seizure and detention, the respondent was, in addition, deprived of its use in the performance of contracts with Alpart, Silver Seas, Ocho Rios and the quarrying and supplying of marl under a government contract.

By his writ and statement of claim dated August 15, 1989, the respondent claimed for damages against the appellants for detinue and conversion of the said front-end loader. By consent, interlocutory judgment was signed on November 11, 1992, with damages to be assessed and costs.

This resulted in the judgment of Marsh, J., on July 29, 1998. In his findings, he made an award for exemplary damages of $125,000. He then set out his award in detail:

"Damages are therefore awarded as hereunder:

Special Damages:-

Cost of repair of loader	$200,000.00
Hireage of Loader for Leas Flat job	26,240.00
Hireage of Loader for Silver Seas Contract	172,800.00
Hireage of Loader for Alpart contract	168,000.00
Hireage of loader for Government contract (quarry)	252,000.00
	$819,040.00

Interest thereon of 10% per annum from 5th May 1985 to today.

General Damages $1,350,000

with interest thereon of 10% per annum from date of service of writ to today (sic).

Costs to plaintiff to be agreed or taxed."

Mrs. Phillips for the appellants, arguing that the amount of the award should be reduced, advanced the following grounds of appeal which, when summarised, read:

(1) The amendment of the statement of claim, during the addresses was prejudicial to the appellants who had consented to the entry

of interlocutory judgment on the basis of the contents of the original statement of claim.

(2) The learned trial judge erred in categorising the awards as special and general damages.

(3) Because of the "forced sale" of the front-end loader for $25,000 on May 21, 1985, no award for $200,000 for its repairs should have been made because from then it was no longer the property of the respondent.

(4) No awards of $172,800 for the Silver Seas contract or $168,000 for the Alpart contract, should have been made because it was Shields' Construction Company and not the respondent which was the party to those contracts.

(5) The learned trial judge erred in making an award of $1,350,000 for general damages instead of an award of the actual loss of use of the loader to the plaintiff for the period September 1986 to December 1991.

(6) No award of interest should have been made because it was not pleaded and furthermore, such an award is in lieu of loss of use.

(7) No award for exemplary damages should have been made because it was not pleaded and there were no facts of fraudulent conduct pleaded, on which it could be based.

A person who is deprived of his chattel is ordinarily entitled to sue for its full value, together with any special loss that he may have suffered during the period of the unlawful detention, or he may sue in conversion or both, depending on the circumstances. If the said property detained is a profit-

earning one, the loss to the plaintiff is the normal market rate at which the said property could have been hired out.

Referring to the tort of detinue, the author in ***Mayne & McGregor on Damages***, 12th edition, said at paragraph 715:

> "The normal measure of damages is made up of two parts. First, it is the market value of the goods where they are not ordered to be returned to the plaintiff. Secondly, whether the goods are or are not returned, it is such sum as represents the normal loss through the detention of the goods, which sum should be the market rate at which the goods could have been hired during the period of detention."

In ***Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*** [1952] 1 All E.R. 796, the Court of Appeal held that the owner of goods detained by another was entitled to a reasonable charge for the hire of the goods from the date of their detention to the date of their return. In that case, the defendants refused to return on demand, and detained in their theatre, certain switchboards to control the lighting, the property of the plaintiffs, which the plaintiffs were accustomed to hire out as a part of their business. In dealing with the argument that the plaintiff was not entitled to the full amount of hireage because the equipment may not have been taken on hire, Romer, L.J., said at page 802:

> "In my judgment, however, a defendant who has wrongfully detained and profited from the property of someone else cannot avail himself of a hypothesis such as this. It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer, for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that

> he himself would have preferred to become the hirer rather than not have had the use of it at all."

In the instant case, the respondent, as the owner of the front-end loader, was deprived of its use, from the date of its seizure on May 5, 1985, while being actually operated at Leas Flat, until sometime after June 9, 1989, when it was returned to him. He in fact suffered losses due to his inability to employ its use on hireage for the said period, and also because of its state of disrepair for a further period up to 1992. Only then was he able to acquire another front-end loader. The appellants, having prevented him from fulfilling his contracts, cannot complain that he seeks to recover such losses for which they are clearly responsible.

The amendment to the last two items of the particulars of the statement of claim granted by the learned trial judge read:

> "September 28th, 1986 to June 30th, 1989
>
> 86100 hours at J$160.00 per hour $1,377,600
>
> Quarrying of Marl (Second Shift)
>
> 57400 cubic yards of marl at
>
> J$28.00 per cubic yard $1,607,200."

This did create an increase in the total amount claimed. However, it represented a portion of the loss to the respondent due to the seizure of the front-end loader, for the period from "September 28th, 1986 (sic)...2768 hours at J$160.00 per hour." This recital in the original statement of claim was sufficient indication to the appellants that the respondent was claiming for a period of loss in excess of two years beyond September 1986. In

addition, when the statement of claim was filed on August 15, 1988, the appellants were well aware that the respondent's said property had not yet been returned to him. Furthermore, the evidence led before the learned trial judge clearly indicated that the respondent was making this further claim. The respondent said, in examination-in-chief:

> "After Government contract ended, after September 1986, my loader was still not returned.
>
> Going rate of hiring of my loader after September 1986, if I had had it then, would be $160 per hour. On average, my equipment would be hired out about 10 hours per day. Loader would work for six days. There was still marl to be quarried at my quarry after September 1986.
>
> Between and after September 1986 and June 1989, what (sic) my loader returned to me, nothing was happening at my quarry."

The power of the court in granting amendments is provided for in section 259 of the Judicature (Civil Procedure Code) Law, which reads:

> "**259.** The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsements or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Although counsel for the appellants objected to the amendments being made, he did not request that they be made upon terms, neither did he seek an adjournment, nor attempt to show that prejudice would result. I agree with Miss Small for the respondent that the appellants' consent to the interlocutory judgment related to the question of liability only and did not

preclude the learned trial judge making the said amendment to reflect the continuing loss to the respondent. There was no prejudice to the appellants. The amendments were properly made.

The learned trial judge made awards of special and general damages, the former comprising the cost of repairs and the hireage contracts up to September, 1986, and the latter being, presumably, the amount which the respondent would have earned but for the detention of his profit-earning equipment from September 1986 to 1989, plus the amount awarded for exemplary damages. "Special damages", for example, in personal injury cases is damage that is capable of exact calculation and must be pleaded and proven strictly. "General damages",

> "... do not permit of precise calculation, like pain and suffering and even pecuniary loss such as impairment of future earnings... Such 'general' damage need not, because it cannot, be specially pleaded and is therefore said to be implied by law." (Fleming, The Law of Torts, 4th edition, page 203).

In respect of the said classification, in personal injuries, as to special and general damages, Lord Goddard in ***British Transport Commission v. Gourley*** [1956] A.C. 185 said, at page 206:

> "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This included compensation for pain and suffering and the like,

> and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

The measure of damages in detinue is the market value of the goods or their return, and any normal loss through their detention, that is, the market rate at which the goods could have been hired. In conversion, it is the market value of the goods converted plus any consequential loss incurred by the plaintiff having been deprived of their use, which loss is not too remote (***Mayne and McGregor*** (supra) paragraphs 681 and 715).

It seems to me that the damages recoverable in the instant case being the value of the repairs to the front-end loader and the additional loss due to the respondent's inability to use his interest-bearing chattel, it serves no useful or practical purpose to categorise the damages as special and general. I agree with counsel for the appellants in this regard although the quantum remains to be considered.

The principle of the measure of damages in tort is that there should be restitutio in integrum. Therefore, the damage to the loader must contemplate a sum of money to restore the loader and so place the respondent as near as possible in the position that he would have been had the seizure not taken place. The respondent said in examination-in-chief:

> "Front end loader then in bad condition - it had no brakes, no battery - it had broken glass, bent frames, door not intact; both head lamps were missing. Front end loader could not be operated again. It could not be operated again without extensive repairs and I could not afford that.

> I obtained an estimate of the cost of repairs. I think estimated cost of repairs, if I can clearly recall was $200,000.00. In June 1989, if I had to purchase a Terex front end loader was $200,000."

On its return, the loader was badly in need of repairs. I do not agree with counsel for the appellants that the sale of the loader on May 21, 1985, by the second appellant divested the respondent of its ownership, thereby making the "forced sale...of (for)...$25,000", valid. It was a fraudulent act of the second appellant which was incapable of passing any title in the loader. The award of $200,000 by the learned trial judge for the repairs to the loader to restore it to a working condition was proper, in the circumstances.

Counsel for the appellants concedes that the said front end loader was owned by the respondent. The respondent said:

> "I was owner of a Terex rubber wheel front end loader model no. 7231 AA bearing serial number 56606."

He also said:

> "I am owner of Shields Construction and Equipment (Co.)."

It is true that the contracts were between Shields Construction and Equipment and Silver Seas Hotel and Alpart, respectively. However, the respondent signed the contract with Silver Seas and his wife signed that with Alpart, in each case, on behalf of the said company (see exhibits 4 and 5). The respondent was accustomed to hire the loader to the company and therefore suffered damages due to the loss of hireage. The respondent was, therefore, properly entitled to the awards of $172,800 and $168,000 for the

said contracts. The fact that the learned trial judge failed to make an award in respect of the additional Alpart contract in no way detracts from the validity of the said two awards.

Accepting that, on the ***Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*** case (supra) principle, the owner of the profit-earning chattel which is detained is entitled to a reasonable hire charge for the period of such detention, the respondent in the instant case is so entitled. The learned trial judge in his judgment referred to the ***Strand Electric*** case (supra) and ***Hillesden Securities Ltd. v. Ryjak Ltd. and another*** [1983] 2 All E.R. 184, in recognising that the hiring charge was recoverable during the period of the wrongful detention. He specifically found that:

> "The fact that the front end loader remained in police custody as an exhibit must be attributable to second defendants criminal activity The loader, having been seized fraudulently, was also later sold.
>
> It seems doubtful that even if plaintiff had sought to recover it from the police, then the police would have returned it to plaintiff. Defendant is therefore responsible for it being in police custody."

In recognizing the right of the respondent to recover for the latter loss and in granting the amendment sought at the trial, the learned trial judge made the following award:

> "General damages $1,350,000
>
> with interest thereon of 10% per annum from date of service of writ to today.
>
> Costs to plaintiff to be agreed or taxed."

What the learned trial judge was presumably here awarding, although he omitted to say so, were the damages for the reasonable hireage of the respondent's loader during the period of its detention by the appellants. This further demonstrates, as stated earlier, that the classification of "general and special damages" is inappropriate in the award of damages in detinue.

This Court has to determine what was a reasonable rate of hireage for the period between September 1986, when the job of quarrying of marl for the Government ended, and June 1989, when the loader was returned to the respondent. The respondent's evidence-in-chief stated that the hireage rate "...would be $160 per hour... 10 hours per day... for six days..." per week. This rate is the approximate rate reflected in the Alpart and Silver Seas contracts. In respect of the Leas Flat contract, however, which was actually being performed at the date of seizure, the claim is for:

> "Loss of Hours of Work May 5th
> to June 31st (sic) 1985 390 Hours
> at J$160 per hour $62,400."

This discloses that there were 49 working days (56 days less 7 Sundays) producing 390 hours, making it an average of 7.9 hours per day. It is, therefore, reasonable to assume that the average number of hours per day for which the loader worked was eight.

The period from the end of September 1986 to June 1989, when the loader was returned, is forty weeks, or 980 days. Omitting Sundays only, the loss would amount to an approximate average of 940 working days at 8 hours per day at a rate of $160 per day, totalling $1,203,200. Realistically,

this represents what would have been the respondent's gross earnings for the period, for the hireage of the loader. These earnings would, had they been received by the respondent at the proper time, have been subject to tax, being income (see ***British Transport Commission v. Gourley*** [supra]). Additionally, maintenance costs and other similar contingencies would attach to the operation of the loader. Consequently, the gross sum of $1,203,200 reduced by 25% to cover tax and maintenance would produce the net recoverable amount of $902,400 for the loss of income to the respondent due to the seizure by the appellants of the income-earning chattel, the loader.

The appellants also complain that interest should not have been awarded, both because it was not pleaded, as is required, and also because in respect of the award for loss of use, interest is only awarded in lieu thereof.

Section 3 of the Law Reform (Miscellaneous Provisions) Act provides:

> "**3.** In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

This statutory provision, of which this court must take judicial notice, empowers the court, in clear terms, to grant interest on damages. This is a discretionary power possessed by a judge and it may be exercised without

the necessity of a prior pleading. Carey, J.A., following ***Riches v. Westminster Bank Ltd.*** [1982] 3 All E.R. 1151, so held in ***Long Yong (Pte) Ltd. v. Forbes Manufacturing & Marketing Ltd.*** [1986] 40 W.I.R. 229. He said at page 235:

> "So far as we are concerned in this jurisdiction, ***Riches v. Westminster Bank Ltd.*** is of persuasive authority and consequently, I would incline to the view that in point of law, a claim for an award of interest under the Law Reform (Miscellaneous Provisions) Act 1955 need not be pleaded."

I do not, therefore, agree with counsel for the appellants that the award of interest granted should have been pleaded. Additionally, the argument of counsel for the appellants that interest should only be granted in lieu of loss of use may have been based on the view expressed by the authors of ***McGregor on Damages***, 15th edition. He said at paragraph 585:

> "...it should be clear that if the plaintiff were claiming as special damage the value of the use of the goods from the time of the conversion, he ought not to be given interest as well. Where the claim was formerly in detinue ***Strand Electric Co. v. Brisford Entertainments*** [1952] 2 Q.B. 246 (C.A.) made it clear that the value of the use of the goods is recoverable and the same result has since been reached in ***Hillesden Securities v. Ryjack*** [1983] 1 W.L.R. 959, an action necessarily in conversion since the abolition of detinue. To such a head of recovery interest must surely be only alternative."

In the ***Strand Electric Company*** case (supra), the report does not disclose that any interest was claimed and therefore none was awarded. However, in ***Hillesden Securities Ltd. v. Ryjak Ltd. et al*** (supra), a claim in

conversion where an award was made of commercial hire charges for the loss to the plaintiff by the defendant's unlawful detention of a profit-earning chattel, interest was given to run from the date of the demand for the return of the car. The rationale for not granting interest must be based on a view that the award of a reasonable sum for loss of use of the chattel was equivalent to the sum the owner would actually have earned but for the detention. However, the award of interest is based upon the principle that the plaintiff was being kept out of his money by the defendant. See ***Jefford v. Gee*** [1970] 2 Q.B. 130 with reference to claims for personal injuries. The Law Reform (Miscellaneous Provisions) Act gives to the court a discretionary power to award interest in cases of tort. In the instant case, the appellants detained the respondent's loader on May 5, 1985, and by sale committed the tort of conversion in 1986. The loader was not returned to the respondent until June 9, 1989, but because of its state of disrepair and his impecuniosity it was not then possible to recommence its functioning. Unlike a debt due and payable or a payment for damages generally or damages in a personal injury claim, earnings awarded in respect of a profit-earning chattel do not qualify as immediate payment due, in order to attract interest, in addition. Such latter earnings are continuous, subject to contingencies. In fact, when the suit was filed by the respondent on August 15, 1988, the loader had not yet been returned to him, and even after its return he was not able to acquire another loader until 1992. In the circumstances of this case, the court, in its discretion, should award to the respondent interest on the sum recovered

from the date of the return of the loader, that is, on June 9, 1989, until the date of judgment on July 29, 1998. I see no reason, in these circumstances, why the award of interest should be varied from 10%, a not excessive commercial rate.

The learned trial judge made an award of $125,000 for exemplary damages, on the basis of the evidence before him satisfying the appellants' second category conduct in ***Rookes v. Barnard*** [1964] A.C. 1129, as approved in ***Cassell v. Broome*** [1972] A.C. 1027. It is sufficient to say that counsel for the appellants was correct to argue that this was never pleaded, and therefore no award should have been made.

For the above reasons, the appeal is allowed in part.

The award of the court below inclusive of the award of $ 1,350,000 as general damages, is set aside. The undermentioned awards are substituted:

(a)	Repairs to loader	$200,000
(b)	Leas Flat contract	26,240
(c)	Silver Seas contract	172,800
(d)	Alpart contract	168,000
(e)	Quarrying of marl for Government contract	252,000
(f)	Loss of earnings of loader	902,400
		$1,721,440

The judgment therefore, is: damages to the plaintiff/respondent of $1,721,440 with interest at 10% from June 9, 1989 to

the date of judgment, July 24, 1998, and costs of this appeal and the costs in the court below to the plaintiff/respondent to be agreed or taxed.

PANTON,J.A.:

I agree.