IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1992/D-010

BETWEEN	DERYCK A. GIBSON LIMITED	PLAINTIFF
A N D	GIBSON GREVE COMPANY LIMITED	DEFENDANT

R. Braham instructed by Livingston, Alexander and Levy for Plaintiff.

David A. Johnson instructed by Levy, Gordon, Palomino and Company for Defendant.

Heard: 1st, 2nd, 3rd, 4th and 10th July, 1996 and 11th April, 1997.

ELLIS, J.

By a Statement of Claim the plaintiff a limited liability company, claims in detinue for Coventry Climax Forklift Truck Numbered 15610048. The plaintiff also claims inter alia, damages for the detention of the Forklift.

The defendant defends the claims by saying, inter alia, that:

(i) the Forklift the subject matter formed part of its assets; and

(ii) if, which is not admitted, the Forklift is an entitlement of the plaintiff, the plaintiff is estopped by its conduct from asserting that entitlement.

(iii) there was no agreement oral or written between himself and the plaintiff for rendering accounts of rentals for the Forklift Truck.

(iv) the plaintiff is not entitled to the return of the Forklift Truck.

The plaintiff's witness Olive Gibson, who is its financial director, gave a history of the formation and operation of the defendant and plaintiff companies. Her evidence indicated that plaintiff and defendant shared accommodation at 5, 7 and 7½ Haining Road. There was a commonalty of staff and the accounting and secretarial departments were shared until 1991.

In that year the defendant commenced to operate from premises at Hagley Park Road and the plaintiff remained at 7½ Haining Road.

In 1988, the plaintiff bought 5 forklifts from Lambourne and Company in London. Two of the five arrived in 1988 of which one is still held by the plaintiff's company. The remaining 3 arrived in

January, 1989. One of the 3 was sold, one was retained by the plaintiff and the other is the subject of this suit, being held by the defendant. These forklifts were duly paid for by the plaintiff's company. That payment is evidenced by Exhibits 4, 7, 8 and 9.

For reasons which have not been fully explained, but which fact has no bearing in the case, three of the forklifts were transferred to the defendant (See Exhibits 5a, b and c). The machines were returned to the plaintiff by a credit note Exhibit 6.

The witness Olive Gibson denied the receipt from defendant of an amount of $125,483.00 as the purchase price for the forklift.

In October, 1990 at a meeting at which Earl Crooks, head of the defendant's company was present, the plaintiff placed the forklifts into a rental fleet of machines which was operated by the defendant. The defendant, by the agreement should make a return of 70% of rental fees to plaintiff and retain 30%. No return vide the agreement has been made to date. Several letters (Exhibits 10, 11, 12 and 13) were written to the defendant requesting the return of the forklifts and they have not been returned.

The cross examination of the witness revealed that the defendant and plaintiff companies separated. The vehicles and equipment in the rental fleet operated by the defendant were marked in the name of the defendant. The witness identified the equipment in issue to be a Coventry Climax Forklift No. 15610048. She was aware that a Mr. Delfosse prepared a list of assets according to location of items.

The plaintiff to date bears the insurance cost of the forklift. It is of note that it was not put to the witness that the defendant purchased the forklift for $125,483.00.

Ian Gibson called, for the plaintiff, said that in October, 1990 he was the Operations Manager of the defendant. He recalled the meeting at which the forklift was placed in the defendant's rental fleet. The forklift was rented on several occasions and he was responsible for marking it "Gibson-Greve Rental."

He gave evidence as to the daily rate of rental for the forklift up to 1995 and that at time of hearing forklift valued between $500,000.00 and $600,000.00.

Mr. Johnson in cross examination of the witness challenged his expertise in the valuation of equipment such as forklifts. The witness admitted that he did not study that form of valuation. In answer to question from Mr. Johnson he said that the forklifts was not painted in the name of "Gibson-Greve" prior to it being placed in the defendant's rental fleet. He could not say how often the fork-lift was rented. He said in cross examination that the forklift was insured by the defendnt when it was out on rental. The plaintiff as owner also insured the forklift. Mr. Deryck Gibson the managing director of the plaintiff gave evidence in keeping with that of Olive Gibson.

Mr. Earl Crooks in his evidence for the defendant, said that the plaintiff placed no equipment or forklift in the defendant's rental fleet. He denied the existence of any agreement between plain-tiff and defendant as to rental of forklift in a ration of 70%-30%.

Mr. Crooks admitted that a request was made for the return of the forklift in December, 1991. However, since the forklift was the defendant's property he replied in terms of letter Exhibit 15.

To emphasize the defendant's proprietary right to the forklift a policy of insurance in relation thereto was effected. That policy was not exhibited.

He said the decision was taken against the return of the forklift since the defendant was allowed to move with it to new premises.

Mr. Braham cross examined Mr. Crooks. He in answer to questions about exhibit 5a, b and c said he saw those documents only since the action was instituted. He admitted that the plaintiff imported, paid for and had ownership of the forklift. He could not recall that in answer to interrogatories he stated that defendant owned the forklift by way of purchase in an amount of $125,483.00. However when shown the document he admitted the statement to be true.

Oneil Walker an employee of the defendant gave evidence. He supervised the removal of equipment owned by the defendant. Those equipment included two forklifts of which one was painted red and the other yellow. The yellow painted one was returned to the plaintiff but the one painted red was retained by the defendant. That forklift

he stated was unreliable and frequently broke down. It was rented in November, 1991 for a period of 10 days but it broke down after the first day. It was repaired but has not worked for one year.

On cross examination by Mr. Braham he said he had no knowledge of what equipment was owned by plaintiff or defendant.

I have set out the evidence led for each party for the purpose of determining ownership of the forklift.

On my examination of the plaintiff's evidence I must conclude that it was clear, well supported by documents and stood the test of extensive cross examination.

Mr. Crooks the alter ego of the defendant was a poor witness and Mr. Oneil Walker had no knowledge of who owned what equipment.

Mr. Crooks, I find, did not stand up to cross examination. I make bold to say that his answers showed him to be a witness who handled truth carelessly. How else could he have said that he purchased the forklift for $125,483.00 in the light of his admission that the plaintiff had imported and paid for the forklift?

I find that he was an unreliable witness who did not support the defendant's claim to ownership of the forklift. I am therefore constrained to hold that ownership of the forklift resides in the plaintiff.

In so holding, I am not unmindful of Mr. Johnson's submission at page 3 of his written submission. I quote "It is submitted that for there to have been a legal and effective transfer of the forklift from the defendant to the plaintiff it would have been necessary for the defendant to have executed the relevant instrument of transfer which would have had the effect of transferring its assets to the plaintiff. The plaintiff could not therefore have transferred the forklift truck back to itself by preparing the credit note in issue."

That submission is ingenious but in my opinion cannot stand the force of the facts. I have no doubt that the 'transfer' to the defendant was one of mere convenience. There was no intention on the part of the plaintiff to permanently divest itself of its property.

A fortiori, the then existing good relationship between the defendant and the plaintiff and Mr. Crooks' close connection with

the parties show clearly that no such intention to permanently divest the forklift was present and could not have been reasonably held to be present.

I do not find that the fact that the Credit Note (Exhibit 6) speaks to user of diesel fuel whereas the forklift in issue uses Liquid Propane Gas does any violence to plaintiff's claim to ownership.

Is there an equitable estoppel which defeats the plaintiff's claim of ownership?

The defendant contends for such an estoppel and so pleads at paragraph 9 of his defence. There he sets out the circumstances which estop the plaintiff's assertion of claim to the ownership of the forklift. It is apprehended from those stated circumstances that the defendant alleges estoppel by conduct.

Where a party relies on estoppel he has to satisfy two conditions before his reliance maybe assured.

First he must show that the conduct or representation of the other party unequivocably led him to believe that he had relinquished his right to property. Also that as a consequence of that unequivocal conduct he was prejudiced.

Secondly he must show circumstances which would render it inequitable for the plaintiff to seek enforcement of his right.

In this light, authority can be found in the cases of **China-Pacific S.A. v. Food Corporation of India [1980] 3 All E.R. 556** and **Scandinavian Tanker v. Flota Petrolea [1983] 1 All E.R. 304** (letter g-j). The submissions of the defendant on the defence of estoppel were eloquently stated by Mr. Johnson.

However, I find that they do not take the defendan't case within the conditions requisite for grounding an estoppel as were stated in **Scandinavian Tanker [1983] 1 All E.R. 304 (G-J)**. I so conclude since I hold that Mr. Crooks, the alter ego, of the defendant had full knowledge of the circumstances which led to the forklift being in the possession of the defendant. Moreover, the submitted evidence of conduct which would go to the estoppel of the plaintiff evinces no intention on the plaintiff's part to give away the forklift

and the alleged acts of the plaintiff cannot be said to be unequivocal.

The defence of estoppel therefore fails. The evidence of the plaintiff satisfies me as to the existence of the alleged agreement as to the rental of the forklift.

The plaintiff by letters (exhibit 10, 11 and 12) sought the return of the forklift. Those letters provide evidence of a valid demand for the return of the forklift. There has been no compliance with the demand. That non compliance with the demand I find to be unjustifiable and allowed plaintiff to sue in detinue or conversion.

On the above findings, I am in no doubt that the defendant is liable to the plaintiff on its claim.

What is the extent of that liability?

The plaintiff's claim sounds indetinue and is in law entitled to (a) a re-delivery of the forklift or (b) payment of its value and (c) damages for its detention.

What is the nature of the damages which the claim attracts?

Mr. Johnson for the defendant submits that they are special or consequential and as such demand to be specifically proved. For that submission he relies on **Murphy v. Mills [1976] 14 J.L.R. 119**. That decision is good law but it has no relevance to a determination of the damages in this case.

Damages in a claim in detinue are not special or consequential as were claimed in **Murphy v. Mills**. In detinue, damages are part of the basic claim for the period of wrongful detention. Such damages do not require strict proof but proof on the balance of probabilities.

I find support for that conclusion in the case of **Strand Electric Company v. Brisford Entertainments 1952 2 Q.B. 246**. That decision of The English Court of Appeal was over two decades prior to the passing of The Torts (Interference with Goods) Act 1977 which abolished claim in detinue. That Act does not run in Jamaica. Detinue is still a proper claim in our jurisdiction and therefore the English decisions prior to the 1977 Act remain persuasive authorities when a claim in detinue is made.

Mr. Braham's argument on the question of damages are well founded.

The damages claimed are made up of:

(i) 70% of rental for period 1/6/91-30/12/91 - $ 68,096.00

(ii) Loss of use for 1/1/92-30/9/94 - $1,469,840.00

$1,537.936.00

Ian Gibson for the defendant gave evidence in support of those figures and based his evidence on empiricism, he being involved in the rental of forklifts over the relevant period.

Mr. Oneil Walker in his evidence denied the rental of the fork-lift through-out the entire relevant period because it was in a state of disrepair. He did not make any challenge as to the daily rental rates given by Ian Gibson.

In the circumstances, I accept the evidence of Gibson and find the rental rates to have been properly evidenced and proven.

Re-delivery of the forklift or its market value

As stated hereinbefore, the essence of a claim in detinue is restitution which is a discretionary remedy.

I would not in this case, and in my discretion, make an order for restitution for the following reasons:

(a) the defendant on the evidence has without justification detained the plaintiff's property;

(b) when the forklift was placed in defendant's rental pool it was in working condition. No evidence has been led as to its condition now. It would not be equity to saddle the plaintiff with a fork-lift in astate of disrepair.

I therefore order that the plaintiff be paid an amount of $350,000.00 as the present market value of the forklift.

There will be judgment for the plaintiff in a total amount of $1,887,936.00 of which $1,537,936.00 is to bear interest of 3% as of 1/6/91 and $350,000.00 to bear interest of 3% as of date.

Costs to the plaintiff to be agreed or taxed.