THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 732 OF 2018

CEDRIC FLOWERS	**CLAIMANT**
AND	
ARTURO VASQUEZ **Receiver and Manager of** **PORT OF BELIZE LIMITED**	**1st DEFENDANT/ANCILLARY CLAIMANT**
KEVIN A. CASTILLO **Auctioneer**	**2nd DEFENDANT**
ERNESTO FRANCO	**3rd DEFENDANT**
ELMER HERRERA **Receiver and Manager of** **INDECO ENTERPRISES LMITED**	**ANCILLARY DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Decision:
27th January, 2021

Appearances:

Ms. Velda Flowers, Counsel for the Claimant.
Mr. Jose Alpuche, Counsel for the 1st Defendant.

KEYWORDS: Tort – Conversion – Negligence – Bailee – Gratuitous Bailee – Involuntary Bailee – Reasonable Care – Damages

DECISION

1. This matter began as a claim in conversion of a container and its contents owned by the Claimant as well as the Claimant's goods stored in another container not owned by the Claimant. The Claimant made no claim for this other container but sought the return of the container he owned or a replacement, a full account or inventory of the contents of both containers, the replacement value of all unrecovered items, damages, costs and interests.

2. The Claimant alleges that the containers had been left on the Port of Belize Ltd (PBL) compound. When PBL went into receivership, the Claimant said he spoke with the 1st Defendant, as Receiver, to retrieve his property but was given what I term the proverbial runaround and was never allowed to access his property. Eventually, his container was auctioned off. His goods were reported to him as stolen and he has suffered loss.

3. The 1st Defendant says the Claimant did indicate that he had a container with goods on the PBL compound but he never proved ownership, identified it or provided a list of contents. In fact, he never made any further inquiry about the container until a year later when the containers in a particular location on the compound had been auctioned by a third party for whom the Ancillary Defendant was the Receiver. Although the 1st Defendant vehemently denies the claim, he seeks an indemnity from the third party for any wrong he may be found liable for.

Conversion

4. The case has evolved into one of pure negligence in bailment. I say this because the Claimant, in his submissions, only once referred to conversion

and the only case provided in support dealt entirely with the duty of a Bailee and the standard of care of a gratuitous bailment. The Court is of the view that the Claimant realized, as stated in Winfield and Jolowitz on Tort 17th Edition paragraph 17-6 that *"(a)t common law there must be some deliberate act depriving the claimant of his rights; if this element was lacking there was no conversion. Thus if a bailee negligently allowed goods in his charge to be destroyed the claimant's loss is just the same as if the bailee had wrongfully sold them to a third party but there was no conversion."*

5. The Claim in conversion is therefore dismissed without any further consideration and the Court now turns its attention to the issue of bailment.

Bailment

6. Counsel for the Claimant drew a definition of bailment from Chitty on Contracts, 3rd Ed, vol II, 33-003, 197 which restated Pollock and Wright as follows, *"Any person is to be considered as a Bailee who, otherwise than as a servant, either receives possession of a thing for another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or to deliver to him the specific thing or to convey and apply the specific thing according to the directions antecedent or future of the person."*

7. Counsel for the Defendant relied on Halsbury Laws of England (Vol 4 (2020) para. 101:- *"Under modern law, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding. The element common to all types of bailment is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods.*

A claim against a bailee can be regarded as a claim on its own, sui generis, arising out of the possession had by the bailee of the goods."

Possession Prior to Receivership

8. The Claimant urged the Court to find that a bailment existed prior to Mr. Vasquez's appointment. I am unable to do so. In the Claimant's statement of case, he does not even allude to the manner in or the process by which the goods were placed there. In this witness statement, he simply said *"Mr. Espat informed me that the container would have to be relocated. At the same time, he offered to transport them to the Port of Belize Ltd. Compound (Port compound) where he indicated he was relocating his own container and heavy equipment. He assured me that my belongings would be safe and accessible."*

9. Mr. Espat was stated to be the majority owner (99%) and chairman of PBL. In his submissions, the Claimant offered that as chairman and majority shareholder Mr. Espat could authorize the storage on behalf of the company. He provides no evidence to support this. The Claimant was well aware, as a director of PBL, (not a stranger to PBL) that if his property was being stored formally under arrangements with PBL it could not simply be done through the Chairman's informal offer to assist.

10. To my mind, the arrangements were made between Mr. Espat personally and the Claimant. The containers were being stored on Mr. Espat's property originally and they were moved by Mr. Espat to another location which happened to be the PBL compound. The Claimant paid no storage fees, he signed no storage agreement and by his own admission he could be turned away by a security guard with impunity. This does not demonstrate any arrangement whatsoever with PBL.

11. In fact, the Claimant himself stated *"I had no formal storage arrangement for my belongings at the Port of Belize. I believe such was as a consequence of my relationship with Espat and the Port of Belize that I was able to store my belongings on the Port compound."* There is simply no evidence whatsoever to convince this Court that arrangements were made between PBL and the Claimant for storage or that PBL assumed any responsibility for the Claimant's property. But this is not determinative of the matter.

Possession After Receivership

12. The question which now arises is whether the 1st Defendant became a bailee of the Claimant's goods. While the Claimant does not address the possibility that there may not have been a bailment in existence with PBL prior to the appointment of the 1st Defendant, he does submit that steps were taken by the 1st Defendant to reinforce possession. Firstly, when the containers were broken into and the inventory made. This Court agrees that if it is proven that the 1st Defendant, in his capacity as sued, did break into and inventory the containers that would certainly be proof positive of possession or show of dominion.

The Inventory

13. So we consider the evidence. In his witness statement the Claimant avers that at his meeting with Mr. Vasquez in March, 2012 Mr. Vasquez interrupted his conversation on the items in the containers and informed that he had already broken in and inventoried their contents. However, in his letter to Mr. Vasquez dated April 30, 2013 he recounts the details of that meeting without once stating that Mr. Vasquez had admitted to

making such an inventory. One would expect such a pertinent or vital bit of information to be included. Moreover, unless Mr. Vasquez somehow knew the Claimant's container personally his ability to recall the contents would be utterly unbelievable.

14. In that same letter, when the Claimant speaks of a telephone conversation with Mr. Vasquez held after he noticed the auction advert in the newspaper (found as a fact to be around December of 2012) he says quite clearly: *"During that conversation….. you further stated that you had broken the locks of the containers and done a complete inventory upon assuming the receivership….."*

15. The Court notes that the auction was being done by INDECO Enterprises Ltd. (INDECO) and that the Claimant accepts this because he exhibits the auctioneer's return for such an auction as CF8.1. The Court also accepts the Claimant's versions of events in the letter to Mr. Vasquez which was written in 2013 when the details would have been fresher and clearer in his mind. The Court is comfortable doing this particularly because the 1st Defendant has always denied the Claimant's version contained in his witness statement. Considering the time and nature of the inquiry, 'the receivership' more likely than not would have referred to INDECO.

16. There is also an email addressed to one Lyndon Giuseppi from the Claimant written on the 13th December but which states that it was in July or August that the 1st Defendant had informed the Claimant that a full inventory had been done. Again, this contradicts what the Claimant has said in his witness statement and renders it unreliable.

17. The Court finds as a fact that if the containers had been broken open and inventoried it was under the receivership of INDECO and had nothing whatsoever to do with PBL.

Refusal to Return Goods

18. The Court considers, secondly, the submission that the 1st Defendant refused to allow the Claimant to take possession of his property. The Court again turns to the letter written to the 1st Defendant. In that letter, the Claimant states that from the first meeting he presented his original purchase receipt for the container. He has held steadfast to that and this Court can find no reason to doubt him, especially since the 1st Defendant admitted receiving the letter but never responded to it to refute these serious allegations as would have been expected.

19. To my mind, there ought to have been no difficulty in determining the existence and location of the container, conducting any further investigations deemed necessary and handing over the container if that was found to be appropriate. The Court also notes how easily the 1st Defendant accepted that the container had been vandalized. He says all the containers had been vandalized. How was he so certain that the Claimant's container was among those defiled if he did not know which one it was or where it was.

20. The Court formed the impression that he was sure because the containers were all housed in one area. So it would not have been of any great difficulty to locate the Claimant's. Instead, the container remained on PBL's compound and the 1st Defendant continued to claim ignorance. Mr. Vasquez says the container was never identified, nor was he provided with any

information as to ownership (which I do not believe) or the contents of the container, he was, however, aware that a claim had been made. And he did nothing.

21. It cannot be overlooked that the Port is not freely accessible to all. The Claimant speaks of the security arrangements to enter the facility. There is no evidence that arrangements were made to allow the Claimant access to the compound to identify his container or ascertain its contents. In fact, the 1st Defendant seemed to be saying that the Claimant could enter the compound and remove items from the containers at will but could not remove the container without his consent. That just seems contradictory and wholly unbelievable.

22. This Court finds that the request for the return of the items was in fact denied and this denial is accepted as a clear show of possession by the 1st Defendant.

23. Having considered the evidence, the Court finds that Mr. Arturo Vasquez, as the Receiver of PBL, assumed gratuitous possession of the Claimant's goods from the moment he refused the request for their return. The bailment was certainly gratuitous as no consideration whatsoever was given by the Claimant and he admits this although his submissions state otherwise. The Court finds no reason to discuss the submissions made in this regard. Suffice it to say they were without merit.

Proof of Loss

24. The Court accepts that an inventory was made of the contents of the containers which indicate that there was some content. That content, whatever it might be, has not been returned to the Claimant. The container was returned but the Claimant maintains there was associated loss. There is no doubt that the Claimant has suffered some loss, the precise quantum of which must be proven in the usual way.

25. The correspondence between the parties but exhibited only by the Claimant demonstrates that the Defendant was Receiver of PBL, was well aware that the containers had been vandalized, the contents were gone and eventually that the Claimant's container had been auctioned by a third party.

Standard and Burden of Proof:

26. **Bullen v Swan Electric Engraving Company (1907) 23 TLR 258** states that the gratuitous bailee must show that the loss occurred through no want of reasonable care on his part. The burden of proof often works in the owner's favour. Once the owner can prove that he has lost or had his goods damaged whilst they were in the possession of a third party, the onus then falls to the third party to prove that he did not breach his duty in taking care of the goods. If they cannot do this to requisite civil standard then they must be held liable.

Involuntary Gratuitous Bailee

27. The First Defendant asserts that at best he may only be considered an involuntary, gratuitous bailee who was under no duty to take reasonable care. He again relies on Halsbury's Vol. 4 (2020) para 120 which explains

that *"(w)here a chattel is sent without request or arrangement, by one person to another who does not hold himself out as willing to receive it, the person to whom it is sent is deemed to be an involuntary bailee and will ordinarily owe no responsibility to the sender to exercise reasonable care for its safe custody or protection."*

28. That paragraph continues *"(i)t has, however, been suggested that an involuntary bailee may owe a duty of care, the standard varying according to what is reasonable in the particular circumstances. In most cases the standard would be low because of the involuntary nature of the transaction, but in some a higher standard would apply."*

29. In **Da Rocha-Afodo and Anor v Mortgage Express Ltd and Anor [2014] EWCA Civ 454** the duty was stated as doing what was right and reasonable and depended on the circumstances of the case.

30. There is no doubt that there is a sparsity of authorities on involuntary bailment. In an article entitled Some Aspects of the Liability of Bailees in Tort by R. W. Baker, B.O.L. (Oxon.), B.Litt. (Oxon). LL.B. (Tas.) Professor of Law in the University of Tasmania, the author discussed gratuitous and non-gratuitous bailment then stated: *"To these two main subdivisions can be added a third, those known as involuntary bailments. Strictly speaking, such a phrase is a contradiction in terms because, as has already been stated, to constitute a bailment the legal possession of a chattel must pass from the bailor to the bailee and legal possession does not generally pass to a person who is either indifferent to or opposed to the transfer of physical possession.*

The first point is this - the involuntary bailee is under no liability for the safe custody of the unsolicited chattel. If it is lost or damaged accidentally or even through negligence he cannot be held responsible to the sender. So in Howard v. Harris, a theatrical producer who lost the manuscript of a play which had been sent to him without his request was held not liable when sued by the playwright. Likewise in Lethbridge v. Phillips, the

defendant to whose house a valuable miniature was sent without any previous communication was held not responsible when it was damaged through being placed on a mantelpiece near a large stove. This rule means that an involuntary bailee cannot be sued for the loss of the chattel either in negligence or in detinue, not in negligence because being not strictly a bailee he owes the sender no duty of care for its safe custody, not in detinue because "detinue does not lie against him who never had possession" and as explained above the involuntary bailee does not have legal possession of the chattel provided he exercises no dominion over it. In other words, if he simply does nothing, the law places on him no responsibility. But, of course, if he willfully damages or destroys the chattel he will be liable. He cannot, for example, throw it out into the street.

So far we have been considering the position of the receiver of unsolicited goods who takes no action at all with respect to them. The situation changes radically as soon as there is any assumption of control over the goods, for then the receiver becomes a depositary with all the responsibilities of a gratuitous bailee, including liability for negligent loss or damage. This proposition is well exemplified by the case of Newman v. Bourne and Hollingsworth. The plaintiff, visiting the defendants' shop to buy a coat, took off her own coat which was fastened by a diamond brooch and put it on a glass case with the brooch beside it. When leaving the shop she forgot the brooch. Had the brooch been left where it was the defendants might well have been absolved from any responsibility, but because the defendants' servants took possession of it, the defendants were held liable for negligence when it was lost."

31. An important element in establishing bailment is that the party who takes possession must have some awareness that he is in possession of the goods. While possession is usually transferred voluntarily, it can also arise accidentally, or be implied through conduct. For example where the bailee fails to reasonably check whether they are in possession or not. This means that a person who initially refuses to take possession of goods voluntarily, but decides to keep hold of them, could be found to have taken possession voluntarily by inaction.

32. The 1st Defendant having refused to release the goods to the Claimant or to even check to determine whether he had the goods or not, in circumstances where he could reasonably and easily have done so will be considered a gratuitous bailee.

Gratuitous Bailee

33. As a gratuitous bailee, he is liable, according to Lord Holt in **Coggs v Bernard (1708) 2 Ld Raymond 909** for gross negligence which is akin to dishonesty. He is also liable for lack of reasonable care such as a prudent person would use in his own affairs using the facilities that he has at his disposal. Halsbury says he is to take the same care of the property as a reasonable prudent and careful man may fairly be expected to take of his own property of a like description.

34. But one cannot simply determine that a certain standard ought to be met without considering all of the circumstances of the case **Houghland v Low (Luxury Coaches) Ltd (1962) 1QB 694.**

Delay and Abandonment

35. The 1st Defendant asked the Court to consider the Claimant's behavior throughout. He said that after his initial call and meeting with the 1st Defendant in March, 2012 he never communicated again until April of 2013. This was clearly not a person serious about retrieving his goods.

36. The Claimant, on the other hand, said that in January 2012 he learnt of the 1st Defendant's appointment. He made two attempts to contact him and eventually spoke to and had a meeting with him in March. The 1st

Defendant promised to release his goods. He did not. He said he wrote no formal letter nor made any attempt to retrieve his items from PBL's compound as he completely believed what he had been told and in any event he was in no great need for the contents.

37. He again spoke by telephone with the 1st Defendant in July or August of 2012 and December and was informed that the containers had been broken into and the contents stolen but he would be compensated. Again, he did not insist on seeing his container although he testified as to the important and often sensitive nature of the documents, the family heirlooms and the much needed equipment which were stored there. But he did nothing. After being assured that his container would not be auctioned he waits until April, 2013 to take any action.

38. This sequence of events seems so bizarre it is almost unbelievable. This Claimant, also a receiver in his own right, a company director and businessman asks the Court to accept that he waited an entire year without his container and contents because the 1st Defendant assured him it would be released or he would be compensated. He informs of an illness which delayed his actions as well as being otherwise engaged.

39. But even waiting a day after your container had been vandalized and not insisting on seeing the aftermath to determine whether there was anything salvageable leaves me baffled. Asserting that you expected the container to be secured by the 1st Defendant after it had been inventoried or vandalized while also raising issues that there was some malicious intent by the 1st Defendant to ensure that you would not get your items is unconvincing.

Waiting four months after an auction which concerned you sufficient to call and enquire makes no sense. The Claimant's reaction is not at all what would be expected in the circumstances.

40. Counsel for the 1st Defendant presented the case of **Carl De Freitas v R&R Investments Ltd SVGHCV 2010/0138** and stated, *"...the Claimant was the owner of a property that was foreclosed on and subsequently sold to the Defendant. The Claimant alleged there were 22 steel piles on the property that were disposed of by the Defendant.*

The Court found that the Claimant was notified that construction would start on the property and had one year to remove his items and failed to do so. The Defendants subsequently cleared the site for construction, which included burying the steel piles in rubble. The Defendants were held to have acted reasonably in the circumstances and were not found liable for conversion of the piles. At paragraphs 74 and 75 of his judgement, Henry J states:

> *'[74] If I am to act on Mr. De Freitas' testimony and that of his witness Mr. Mc Kenzie, I must find that the request was made for the steel piles as early as 2006. Mr. Mc Kenzie claimed that he went to the site on two occasions but met no one. I accept Mr. Adams' account that construction started in 2007. It means that Mr. De Freitas had about one year from 2006 to 2007 to recover his belongings (if any) from the site at Ratho Mill. He made only two attempts to do so.*
>
> *[75] I find that R & R gave him more than adequate opportunity to make arrangements to locate and extricate any steel piles from the "dump site", at Ratho Mill before they flattened the rubble in preparation for construction. I am satisfied that they did what a reasonable person would be expected to do, short of placing them on a trailer and carting them to Mr. De Freitas' premises. R & R cannot be held responsible for Mr. De Freitas' slothfulness in retrieving from the property any belongings which he considered to be valuable.*

In all circumstances, his inaction and delay can only be viewed as abandonment. R & R cannot be held liable in conversion. I find that they are not.'"

41. He also relied on **Robot Arenas Ltd and Another v Wakefield and Another [2010] EWHC 115 (QB)** where the new owners of a building complained to the Claimant about certain equipment remaining on the premises which belonged to them. When nothing was done after five weeks the Defendants disposed of the equipment. The Court held this to be reasonable in the circumstances since the Defendants were entitled to conclude that there was no interest where there had been no indication from the Claimants.

42. Both these cases are distinguishable from the claim at bar. The 1st Defendant himself admitted that he never gave the Claimant any permission to remove the container as he did not know which belonged to him. He also admitted that he never gave any permission to remove any items from the container. He added that Mr. Flowers could have removed items from the containers without his permission but not the container itself. I could find no logic here and knew this to be untrue.

43. I am unable to hold that where the possessor refuses to relinquish possession that the owner has abandoned the property. That is not what the cases presented say at all. In those cases the possessors always stood ready and willing to hand the property over and were confronted by inactivity or delay on the part of the owner.

44. In this case, the party in possession of the goods says he was not aware whether he had them or not. I do agree that there was delay and often inactivity by this Claimant which may have been proof of some contributory negligence. But equally so, the 1st Defendant could reasonably have found out or checked whether he had the goods and he did not. For this reason he has failed to prove any abandonment by the Claimant.

Breach of Duty of Care

45. The issue still remains whether the 1st Defendant breached his duty of care. If property is lost or destroyed whilst in the possession of the bailee, but the loss cannot be linked to the Bailee's breach of duty to the owner, then there is no cause of action in bailment. Again we consider the circumstances.

46. The 1st Defendant says the Claimant's container was on a semi open lot among old decrepit equipment. It was accessible to all and could so easily be broken into that reporting such an incident made no sense. On the other hand, the Claimant says he was content to store his items at the port because of the existent security. He described the inquiries he himself endured to get past the security guards to visit his container. I am minded to believe him. He admits that the container was not stored with containers under customs supervision but maintained that it was afforded no lower level of security. The furthest he ventured was that it was kept in a different fenced area which housed other containers but no derelict equipment.

47. While I do not believe that the 1st Defendant was under a duty to store the container as he would containers which form part of the business of the Port,

he should at least have found the container and ensured that it was not sold off. Particularly when there was to have been an auction of containers from that general area. That is what a prudent man would have done even if he was just taking ordinary care.

48. I cannot say that there was not any negligence on his part where the container had been broken into. His only evidence is that all the containers in that area had been broken into. That alone does not indicate that he had discharged his duty. More importantly that break-in was never reported to the police and no action was taken to try to recover the stolen items or even to inform the Claimant so he could possibly make his own report.

49. This does not indicate thoughtfulness or vigilance. There was, in my estimation, a total disregard for the Claimant's property. I do not believe a reasonable person would treat their own property in this manner. This Court considers it a breach of duty and will find for the Claimant in this regard.

Determination:

1. The claim for conversion is dismissed.
2. Judgement for the Claimant in negligence with damages to be assessed.
3. Prescribed costs as agreed.

The Ancillary Claim

50. The 1st Defendant claimed:

    (i) A full indemnity in respect of any liability and expense which may accrue herein to the 1st Defendant as a result of this claim

including all liabilities and expenses resulting from any award of damages, interest and cost against the 1st Defendant and/ or any other liability and/ or expenses whatsoever.

(ii) Alternatively, contribution in respect of any liability and expense which may accrue herein to the 1st Defendant as a result of this claim including all liabilities and expenses resulting from any award of damages, interest and costs against the 1st Defendant and/or any other liability and/or expenses whatsoever; with interests and costs.

51. No Defence was filed and has been deemed to admit the claim.

52. Where no Defence is filed to an Ancillary Claim, the Ancillary Defendant is deemed to have admitted the claim and is bound by the decision in the main proceedings. Rule 18.12 states:

> (1) This Rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time
>
> (2) The party against whom the ancillary claim is made - (a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim;

53. In the main proceedings, the third party was found to have sold a container which belonged to Cedric Flowers. The inventory which the auctioneer returned showed none of the contents of the Claimant's container or the

other container. The Ancillary Claimant himself admitted that none of the Claimant's items had been sold in the auction as they did not appear on that inventory. He also admitted that the containers had all been broken into and the items stolen. The ancillary Defendant can therefore only be held liable to indemnify the ancillary claimant for any damages assessed in relation to the Claimant's container and nothing more.

Determination:

1. The Ancillary Defendant is to indemnify the Ancillary Defendant for any damages assessed in relation to the Claimant's container but not its contents.

SONYA YOUNG
SUPREME COURT JUDGE