**THE SUPREME COURT OF BELIZE, A.D. 2018**

**CLAIM NO. 732 OF 2018**

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

**BEFORE the Honourable Madam Justice Sonya Young**

Decision:
13th April, 2021

**Appearances:**
Ms. Velda Flowers, Counsel for the Claimant.
Mr. Jose Alpuche, Counsel for the First Defendant.

**KEYWORDS: Tort – Conversion – Negligence – Bailee – Gratuitous Bailee – Involuntary Bailee – Assessment of Damages - Proof of Loss - Mitigating Loss - Nominal Damages**

## DECISION

1. The Court in an earlier written judgment found the first Defendant liable in negligence and ordered that damages be assessed. This is the assessment.

2. The Claimant's evidence as accepted by the Court was that the contents of two (2) containers were lost while they were in the possession of the first Defendant as a gratuitous bailee.

**The Evidence:**

3. In his witness statement, the Claimant listed a number of items which he said he could recall. There was no evidence of a value per item but there was an overall value of $109,154.00 offered for those items which he testified had a replacement value. There were other items which he said had no replacement value as they were no longer on the market or had only sentimental value.

4. He also sought damages for the reconstruction of lost client files - $138,150.00, rental of storage space $2,700.00, loss of rental through reduction of rent for use of space he rented to tenants $7,200.00, repair to the recovered container $249.00, depreciation of container $6,500.00, trips to Belmopan to locate the container $1,200.00 and delivery of the container from Belmopan $1,250.

**Claimant's Submissions:**

5. Counsel for the Claimant in her submissions collated the items which the Claimant recollected were in the containers. She asked the Court to quantify damages at their market value of $109,145.00. No evidence was provided as to how this value had been calculated.

6. Similarly, she created a list of items which he also recalled but which could not be replaced on the market simply because they were either unavailable or had sentimental significance only. She asked the Court to assess their replacement value or make an award on a general basis. She also asked that a general sum be awarded for the items which the Claimant could simply not recall but which would have appeared on the inventory if it had been provided by the first Defendant.

7. Counsel also sought damages for consequential loss which, she submitted, flowed directly from the deprivation of the use of the lost property and *"for expenses incurred in replacing loss items such as client's records which had to be reconstructed at the Claimant's expense, repairs to the container returned and cost of alternative storage arrangement."* This the Claimant valued at $157,249.00.

8. Finally, she asked for damages for inconvenience and hardship suffered through the loss of use of his property. This included *"inability for him to maintain his lawn and garden, inconveniences in not being able to use his garage which had to be used as alternate storage while his container was detained and hardship in securing the many properties he owns owing to the loss of his scaffolding sets."*

9. Counsel seemingly accepted that the evidence provided, on which the assessment was to be done, was scant. She submitted that notwithstanding the absence of receipts or evaluation reports the Court must still make an assessment which was fair and just in the circumstances.

10. She relied on ***Usher v Moody Claim No.116/2004*** where a bailee was unable to deliver up a caterpillar (heavy equipment) when required to do so. The Judge awarded the claimed $75,000.00 as a reasonable replacement value

although no receipt proving the purchase price and no valuation report was produced in evidence.

11. She also sought support from ***Armory v Delamirie [1722] 1 EWHC KB J94***. Here a chimney sweep found a ring and took it to a goldsmith's (the Defendant) shop to be valued. The jeweler's assistant removed and stole the stones. The jeweler then offered a small sum for the ring sans the jewels. The chimney sweep demanded the ring back but refused to take it when it was produced in its altered state.

12. The Court, finding the Defendant liable in trover, directed the jury that *"unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did."*
13. Counsel then urged this Court to give the Claimant the value of the best replacement as his fair deserves. As stated in McGregor on Damages 19th ed at paragraph 10-006, the court ought to *"resolve uncertainties by making assumptions generous to the claimant where it is the defendant's wrongdoing which has created those uncertainties."*

**First Defendant's submissions:**

14. The first Defendant launched an attack at the pleadings which, he submitted, did not show the nature and extent of damages being claimed. He referred to Lord Donovan's statement in ***Perestrello E Companhia Limitada v United Paint Co., Ltd [1969] 3 ALL ER 479 at 485***:

> *"Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court.*

*The limits of this requirement are not dictated by any preconceived notions of what is general or special damages but by the circumstances of the particular case. 'The question to be decided does not depend on words, but is one of substance' (per Bowen, L.J., in Ratcliffe v. Evans (4)).*

*The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.*

*The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible.*

*The matter is clearly stated in MAYNE AND MACGREGOR ON DAMAGES (12th Edn., 1961) in para. 970, where the learned editors write:*

*'Special damage consists in all items of loss which must be specified by [the plaintiff] before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial.'*

*The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed. As VISCOUNT DUNEDIN said in Admiralty Comrs. V. Susquehanna (Owners), The Susquehanna (5):*

*"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."*

*What amounts to a sufficient averment for this purpose will depend on the facts of the particular case, but a mere statement that the plaintiffs claim "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant are entitled to fair warning."*

15. He also attacked the state of the Claimant's case which, he said, suffered from a lack of evidence. He did eventually accept that most of what the Claimant's Counsel had collated as lost items were in fact accounted for in the

Claimant's testimony. He highlighted only two (2) items stating that the evidence spoke only to scaffolding sets and not two (2) scaffolding sets and there was no reference to a heavy duty tiller in paragraph 24 of the Claimant's witness statement. He was correct about both. But could there really be an issue between sets and two sets!

16. He maintained that there was no evidence whatsoever to support a Claim of $266,403.00 (the total cost attributed by the Claimant). There was no inventory list for either container; there were no photographs of the goods. He could not say with certainty when he had last removed or placed items in the containers or what items were in fact in the container when the first Defendant became Receiver.

17. No evidence was provided as to the value of the lost items or even comparable items. There was no evidence of the condition of the items in the containers or their age so that some proper allowance for depreciation could be made. He felt that reliance on memory alone was *"grossly insufficient to justify compensation..."* and "*wholly unreliable evidence for the purpose of determining what was in the containers."*

18. Counsel then turned his attention to the document reconstruction costs. He submitted that the details of the reconstruction exercise were vague and there was no proof of which, if any documents, had in fact been reconstructed. The evidence provided was wholly self-serving, speculative, unsubstantiated and uncorroborated.

19. He also felt that the loss itself was too remote and could not have been reasonably foreseen by the first Defendant. Moreover, it may have been an

unnecessary exercise since the first Defendant never proved that it was necessary for him to reconstruct them and the clients themselves may have had copies which had been produced for them.

20. The Claimant actually admitted that he only reconstructed the files in case they were needed so that he had done work no client had required him to do. No actual loss flowing from the loss of the files had been proven.

21. He reminded the Court that the Claimant was under a duty to mitigate his loss. He drew the Court's attention to the Claim for damages for the reduction of rental income which he had to use as storage, rental for office storage space, the hardship and inconvenience from the inability to mow his lawn and do gardening, use his garage and securing his property through lack of the availability of the scaffolding sets.

22. He relied on ***McGregor (ibid)*** paragraph 9-014 which cited ***Viscount Haldane LC in British Westinghouse Co v Underground Ry [1912] AC 673 at 689***:

> *"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."*

23. Counsel appreciated that this statement related to contract, but was sure that it was equally applicable to non-pecuniary loss and tort (see ***McGregor (ibid)*** at paragraph 9-015).

24. He felt that the Claimant could have secured another container as it had taken him almost six (6) years to bring the instant Claim. Moreover, he had offered

no evidence to show that the containers would have had the capacity to store these additional items. He also offered no evidence to show he had tried to replace his gardening items or even to hire someone to do the gardening. So too, he could perhaps have rented scaffolding or hired someone to secure his property. This, he submitted, would have been the reasonable thing to do.

25. Counsel then went on to briefly discuss the Claimant's own contributory negligence in waiting for a year to pass after his meeting with Mr. Vasquez before he took any further action.

26. He concluded that it was virtually impossible for the Court in the present circumstances (no evidence to prove loss) to assess damages and therefore only nominal damages should be awarded. He again relied on ***McGregor (ibid)*** at paragraph 12-004 which explains that *"Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss."*

27. He also presented the case of ***Da Rocha-Afodu and Anor v Mortgage Express Limited and Anor [2014] EWCA Civ 454*** where nominal damages of £5,000.00 had been awarded on a claim of £800,000.00 where there was no evidence of the goods converted by a mortgage company on foreclosure. The Court of Appeal stated:

> *"16. She then turned to consider the quantum of the Appellants' claim. In the claim form, damages of some £800,000 had been claimed. She accepted that a considerable amount of property had been lost. However, she held that there was insufficient evidence to substantiate the Claimants' claim. She accepted that there was no documentary evidence to support the cost prices given for the chattels that*

*were left in the property. She pointed out that there was no information as to when the items were purchased and as to their value at the date of the conversion. She described the photographs that had been taken on the day that the property was removed, but she held that it was impossible to form any view from them as to the value of the goods in the property.*

*17. She held that the burden of proof rested on the Claimants to prove their loss and to provide evidence as to the value of the items at the date of the alleged conversion and that they had discharged this burden. The judge referred to a second schedule showing the replacement costs of certain goods. This was furnished by receipts. However, there was no evidence as to the value of the goods at the date of conversion.*

*18. Thus, all the Court could, in her judgment, do was to award a fairly nominal sum, which she had fixed at £5,000. She was unable to form a view as to what items it would be reasonable to replace. She noted that the photographs did not cover any obviously new or valuable items. For reasons which she gave, she held that the evidence raised questions as to the reliability of the contents of the schedule as to the loss."*

28. In agreeing with the trial judge's approach, Lady Justice of Appeal Arden stated:

*"55. In my judgment, the judge was entitled to come to the conclusion that MX had discharged its duty as an involuntary bailee. It would, in my judgment, be wrong for this court to form a view as to whether some other course was more reasonable and that course was not properly investigated at trial. It would all depend on the facts. It is sufficient to say that there has been no investigation of what the costs of storage might have been for these chattels if that course had been taken. Nor was there any investigation into where the goods would have been stored or for how long.*

*56. That leaves the question of the judge's approach to quantum. However, in my judgment, if my Lord and my Lady agree, that point does not arise for decision in the light of the conclusions I had already reached. It suffices for me to say that the judge went into the matter of quantum in some detail. She was very critical of the evidence that had been provided.*

*57. Contrary to the submission of Mr. Paget, there is no rule of law which says the Court must find the value of the chattel by applying some discount to the cost of replacing items. As the judge pointed out, there was no evidence whatever on which she could rely about the value of the goods at the date of conversion. These were all matters of fact to be dealt with at trial. The judge was entitled to come to her conclusion and she did so in the course of a very thorough judgment."*

29. Counsel was swift to draw the Court's attention to the differences between ***the Da Rocha case (ibid)*** and the case at bar. In ***Da Rocha***, there were schedules and photographs and the Court still could only award nominal damages. In the case at bar, there were no schedules or photographs presented. The evidence which this Court is being asked to consider is far less, if at all existent.

30. He also sought to distinguish ***Usher v Moody (ibid)*** which considered a single item whereas this case dealt with multiple and varied items. In ***Amory v Delamirie (ibid)***, the value of several jewels were examined to prove what a jewel of the finest water that could fit the socket would be worth. In the present case, there was no evidence before the Court as to the value of each of the items lost.

31. Counsel also reminded the Court that the bailment was merely gratuitous and it remained uncertain what was in the containers at the time the first Defendant became aware of their existence.

**Discussion:**

32. The Claimant in this matter has claimed a substantial amount in damages. A Claimant bears the burden of proving his case. The authors of ***McGregor (ibid)*** make this clear for the award of substantial damages.

> *"**10-001***
> *A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages. This will generally permit only an award of nominal; damages; this situation is illustrated by the old cases of Dixon v Deveridge and Twyman v Knowles.*
> ***10-002***

*On the other hand, where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in Chaplin v Hicks, the leading case on the issue of certainty: 'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.' Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss. Of course, as Devlin J, said in Biggin v Permanite: 'Where precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can.' Generally, therefore, although it remains true to say that 'difficulty of proof does not dispense with the necessity of proof', the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word 'reasonable' is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount. The clearest statement of the position is that of Bowen L.J. in Ratcliffe v Evans where he said:*

*'In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principle. To insist upon more would be the vainest pedantry.'"*

33. In ***Bonhamme Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177 at 178*** Lord Goddard stated that *"on the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and so to speak throw them at the head of the Court, saying: 'I ask you to give me these damages.' They have to prove it."*

34. In making the assessment the Court is reminded that the Claimant ought to be put back in the position he would have been in had the negligence not

occurred. His damages should, therefore, be the sums incurred but for the negligence of the first Defendant. And there must be some evidential basis on which the assessment can be carried out. He who asserts must prove. Proof comes through the presentation of real evidence not through particulars, summaries, estimations or general conclusions.

35. The Court is certain that the Claimant has incurred loss. As stated in the earlier judgment the first Defendant admitted making an inventory of the contents of the containers. That list was never in evidence. The Court is equally certain that had the Claimant acted with more diligence and less geniality, he may not have suffered as he has. But that is neither here nor there as the Court comes to assessing the damages. What is important and cannot be overlooked is the detrimental lack of evidence on which to make the assessment.

36. The containers were clearly not full since the Claimant insisted he had to hire storage space and use other spaces to store items which could have been stored in the containers.

37. The items which have been recalled and labeled by the Claimant as having a replacement value of $109,154.00 have no separate value. Therefore the Court is left to speculate as to the provenance of this figure. The Court must make its assessment on some evidential basis and a figure baldly stated is entirely insufficient and unacceptable.

38. The sums stated for document reconstruction costs, reduction of rental, rental of storage space, container repair, and transportation of container should have

been specifically pleaded. In any event, these are claims which could easily have been substantiated or corroborated.

39. Evidence from a staff member (staff hours were referred to) who had worked the many hours reconstructing files, the actual number of files reconstructed and any efforts made to restore those files other than through reconstruction would have been expected. The absence is glaring and unfortunate.

40. This Court agrees with Counsel for the first Defendant that it remains unclear why this most daunting exercise was undertaken, particularly, when its cost seemed fairly prohibitive. Why would you reconstruct files which were more than six years old when there was no demand for their contents? Documents which you say you were not required to keep for more than seven years. Why have you not attempted to mitigate your damages by asking clients to provide copies before undertaking this task?

41. Moreover, these are documents which had been left in hot containers for an extended period. Documents which the Claimant had been able to do without for that entire year while he waited on the first Defendant to act. This leads this Court to believe that the files were not as important as the Claimant would want this Court to accept and perhaps there really had been no such large scale reconstruction. These damages were certainly not kept at a minimal. Further, without proper supporting evidence this claim must fail.

42. The Claim for the depreciated life of the container is also something which the Court would need assistance with. How can the Court simply accept the Claimant's statement that the container had a particular value (stated as an

estimated value) and had lost half of that value through the first Defendant's own negligence. Bearing in mind that it had been repaired and a claim was also made for those repairs. How is the Claimant positioned to give this estimate or make this assessment? Is he making a mere assumption? Again, without more this claim too must fail.

43. The items which have no replacement value will now be considered. These are the items which probably caused the most pain to lose since their worth is immeasurable. However, the Court notes that many of the items listed there seem as if they could be valued. For example a mahogany bed, university certificates, surplus tiles, crib and high chair.

44. While these things may be difficult to value, perhaps because of age, they are not impossible to value as the handwritten notes from his father would be. That they have simply been thrown at the head of the Court as having no replacement value is again unfortunate. So too is asking the Court to put a value on items which have not even been listed. How fair or reasonable is this request?

45. The Claimant's loss is regrettable, particularly of those things that hold sentimental value personal to him and which are irreplaceable. But without the necessary evidence having been provided, this Court cannot conduct a proper assessment and can only award a nominal figure as has been submitted by the first Defendant.

46. The sum of $30,000.00 is awarded. The Claimant shall have his interest at the assessed rate of 6% from the 16th November, 2018, the filing date of the

Claim to the date of judgment herein and thereafter at the statutory rate of 6% until payment in full.

**SONYA YOUNG**
**SUPREME COURT JUDGE**