Hilary Term
[2024] UKPC 7
Privy Council Appeal No 0044 of 2021

JUDGMENT

Caribbean Welding Supplies Ltd (Appellant) *v* Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Hamblen
Lord Leggatt
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
28 March 2024

Heard on 6 February 2024

Appellant
Tom Richards KC
Gerald Ramdeen
(Instructed by Dayadai Harripaul (Trinidad))

Respondent
Rowan Pennington-Benton
(Instructed by Charles Russell Speechlys LLP (London))

LORD STEPHENS:

1. Introduction

1. The Trinidad and Tobago Police Service ("the police") unlawfully detained a Case 210 B excavator ("the excavator") owned by Caribbean Welding Supplies Limited ("the appellant") for a period of two years, three months, and 17 days from 4 November 2015 until they returned it to the appellant on 21 February 2018. During that period the police did not take any steps to maintain the excavator, but rather stored it in an open area where it was exposed to the weather. Consequently, the condition of the excavator deteriorated, and there was a substantial depreciation in its value.

2. In these proceedings against the Attorney General of Trinidad and Tobago ("the Attorney General") Madam Justice Quinlan-Williams ("the judge") by judgment and order dated 1 June 2018 awarded the appellant TT$1,328,320.00 as damages in detinue for unlawful detention of the excavator. The judge calculated those damages on the basis that the market value of the excavator at the start of the period of unlawful detention was TT$1,328,320.00 and by the time it was returned to the appellant on 21 February 2018 it either had no value or a nominal value. Accordingly, she assessed the depreciation in value as being the difference between TT$1,328,320.00 and no value or a nominal value. In addition, the judge awarded the appellant TT$150,000.00 as aggravated damages. The judge dismissed a claim made on behalf of the appellant for loss of rental income during the period of unlawful detention. The judge also ordered the Attorney General to pay the appellant's costs quantified in accordance with the scale of prescribed costs on the value of the claim being TT$1,328,320.00.

3. The appellant appealed to the Court of Appeal (Bereaux, Mohammed and Pemberton JJA) against the failure of the judge to award damages for loss of rental income during the period of unlawful detention. On 9 September 2020 the Court of Appeal, in a judgment delivered by Mohammed JA, with whom the other justices agreed, dismissed the appellant's appeal, and ordered it to pay the Attorney General's costs of the appeal in the sum of two thirds of the costs below. However, in addition to considering the appellant's grounds of appeal, the Court of Appeal raised the issue "as to whether the appellant was entitled to have the excavator returned to it in circumstances in which it was awarded the value of the excavator as special damages." No notice of appeal or respondent's notice (referred to as "a counter-notice" in rule 64.7 of the Civil Proceedings Rules 1998) had been given by the Attorney General raising this issue. However, the Court of Appeal considered that it had jurisdiction under section 39 of the Supreme Court of Judicature Act Chapter 4:01 of 1962 (as amended) ("the SCJA") to order the appellant to return the excavator to the Attorney General. In the event and in addition to dismissing the appellant's appeal the Court of Appeal ordered the appellant to return the excavator "to the State, whatever its current condition."

4. The issues on this appeal are:

(a) Whether the Court of Appeal had jurisdiction under section 39 of the SCJA to order the appellant to return the excavator to the Attorney General.

(b) If there was jurisdiction, whether the Court of Appeal erred in ordering the return of the excavator to the Attorney General.

(c) Whether the Court of Appeal erred in ordering the appellant to pay the Attorney General's costs of the appeal in the sum of two-thirds of the costs in the High Court, in circumstances where the appeal only concerned one of several issues which had arisen in the High Court, namely the issue of loss of rental payments.

2. The factual background, the procedural history, and the judgments of the lower courts

(a) Factual background

5. The appellant carries on business including, amongst other matters, buying, selling, and renting out heavy construction and agricultural equipment such as excavators.

6. By invoice issued on 17 December 2014, the appellant purchased the excavator for the sum of US$124,527.

7. On 21 October 2015, in relation to a criminal investigation into unlawful quarrying, the police seized the excavator. The judge held that two weeks was a reasonable period for the police to conduct and complete their investigation so that the excavator ought to have been, but was not, returned to the appellant by 4 November 2015. There has been no challenge to that finding so that for the purposes of this appeal it is accepted by the Attorney General that the excavator was unlawfully detained by the police for a period of 27 months and 17 days from 4 November 2015 to 21 February 2018.

8. As the Board has indicated, during the period of unlawful detention the police did not take any steps to maintain the excavator. Consequently, the condition of the excavator deteriorated, and there was a substantial depreciation in its value.

(b) Procedural history

9. By a claim form dated 20 October 2017, the appellant commenced these proceedings against the Attorney General being the appropriate defendant in proceedings against the police: see Section 76 of the Constitution of the Republic of Trinidad and Tobago and section 19 of the State Liability and Proceedings Act Chapter 8:02. The Attorney General is the respondent to this appeal.

10. In the appellant's statement of case, filed on 20 October 2017, the appellant sought a declaration that it was entitled to possession of the excavator, an order that the excavator be delivered by the Attorney General to it, damages for the excavator's unlawful detention including special damages in the sum of TT$3,500.00 per day in respect of loss of rental payments, and in the sum of TT$1,328,320.00 in respect of depreciation, together with aggravated damages, and other relief.

11. On 21 February 2018, and prior to service of the Attorney General's defence, the police returned the excavator to the appellant so that its unlawful detention came to an end. Thereafter, having achieved the return of its property without any court order having been made, the appellant's objective in continuing the proceedings was to obtain damages in detinue for unlawful detention of the excavator between 4 November 2015 and 21 February 2018. There was no longer any need for a declaration that it was entitled to possession of the excavator or for an order that the excavator be delivered to it by the Attorney General.

12. On 27 February 2018, after the excavator had been returned to the appellant, the Attorney General filed a defence. In the defence, at paras 1 and 3, the Attorney General neither admitted nor denied that the appellant was the owner of or was entitled to possession of the excavator. The central allegation in the defence was that the excavator had been "lawfully detained due to the belief of the Police based on reasonable grounds that there was illegal quarrying on State Lands and the [excavator] was being used in the undertaking of illegal quarrying activities ….".

13. By a Notice of Application dated 22 March 2018 the appellant applied for an order striking out the Attorney General's defence and for an order "[that] permission be granted to the [appellant] to enter judgment against the Claimant (sic) [by which was meant against Attorney General] for the reliefs sought in the Claim Form and Statement of Case filed 20th October 2017." At para 7 of the appellant's application, it was stated that the excavator had been voluntarily returned by the State since proceedings were commenced (although the date indicated in the application as the date on which the excavator was returned was incorrectly stated to be 21 March 2018; in fact, it was returned on 21 February 2018 - see para 11 above).

14. By an order dated 22 March 2018, the judge struck out the Attorney General's defence. In her order the judge did not grant any declaration, nor did she order that the excavator be delivered to the appellant by the Attorney General. Rather, the order granted permission "to the [appellant] to enter judgment against the [Attorney General]." As in its statement of case filed on 20 October 2017 the appellant sought "[a] Declaration that the [appellant] is entitled to possession of [the excavator]" together with "[an] Order for the delivery up by the [Attorney General] to the [appellant] of [the excavator]" the appellant could have entered judgment for such a declaration and for an order for delivery up. However, the appellant did not in fact do so. There was simply no need to do so given that the police were not disputing the appellant's entitlement to possession of the excavator by virtue of the fact that they had already returned it to the appellant on 21 February 2018.

15. By her order dated 22 March 2018, the judge fixed a hearing for the assessment of damages and gave directions as to the filing of affidavit evidence in relation to the assessment of damages. The appellant's affidavit evidence was to be filed on or before 13 April 2018 and the Attorney General's evidence was to be filed on or before 20 April 2018.

16. The judge had intended to order that all matters in relation to the assessment of damages were to be determined at the assessment of damages hearing, including the date upon which the period of unlawful detention of the excavator commenced and the date upon which it ended. However, para 4 of the order erroneously identified 21 October 2015 as the commencement date of the unlawful detention and erroneously ordered the payment of damages to the appellant assessed at TT$3,500.00 per day from the commencement date until the return of the equipment. On 19 November 2018 the judge, pursuant to Part 43.10 of the Civil Proceedings Rules, corrected the order dated 22 March 2018 by deleting these two errors from para 4.

17. The Attorney General did not appeal against the judge's order dated 22 March 2018.

18. After the judge's order dated 22 March 2018 the only remaining issues in the proceedings were the determination of the period of unlawful detention and the assessment of damages in detinue for the unlawful detention of the excavator by the police. There was no remaining issue as to the appellant's ownership of or right to possession of the excavator.

19. The appellant's formulation of its claim for damages in its submissions in relation to the assessment of damages dated 10 April 2018 differed from that contained in the statement of case: see para 10 above. First, the claimant submitted that the police ought reasonably to have completed their investigations within a period of two weeks

after the seizure of the excavator on 21 October 2015 so that its detention was unlawful from 4 November 2015 to the date of its return on 21 February 2018. Secondly, the appellant's claim for loss in value of the excavator during the period of unlawful detention was not in the amount of TT$1,328,320.00 but rather was for the lesser amount of TT$724,345.01 being the estimated cost of repairs. Third, the appellant claimed loss of rental payments in the total amount of TT$2,971,500.00 based on TT$3,500.00 per day for each of the 849 days between 4 November 2015 and 21 February 2018. Accordingly, the appellant's total claim for diminution in value and loss of rental payments was for TT$3,695,845.01.

20. The evidence filed by the appellant for the purpose of the assessment of damages included an affidavit sworn on 5 April 2018 by Nigel Bennett, the managing director of the appellant. He stated in his affidavit that: (a) the appellant had ordered the excavator on 16 September 2014 from CNHI International; (b) the excavator was stored on the appellant's premises and was always kept in perfect working condition; (c) the excavator was seized by the police on 21 October 2015 and returned to the appellant on 21 February 2018; (d) during that period the excavator was stored by the police in open conditions and exposed to the elements; (e) he attended the premises at which the police had stored the excavator on 21 February 2018 in order to collect it; (f) he was shocked at the condition of the excavator and took photographs of its condition which he exhibited to his affidavit; (g) he found that grass had covered the tracks and vines had grown over parts of the excavator, that parts of the excavator were rusted, that the tracks and rollers were rusted, that parts of the engine were seized and the hoses were seriously corroded; (h) the exposure to the elements and the lack of work had caused serious depreciation in the value of the excavator; (i) as a result of the unlawful detention of the excavator the appellant had foregone a number of contracts for the rental of the excavator which had always been in demand to be rented; and (j) prior to its detention, the excavator was rented at the rate of between TT$3,000.00 and TT$4,000.00 per day.

21. There were several exhibits to Nigel Bennett's affidavit including a letter before action dated 17 July 2017 to the Attorney General from Mr Ramdeen, the appellant's attorney at law, which intimated that proceedings would be commenced by the appellant in relation to the unlawful detention of the excavator. Amongst other matters, the appellant's attorney stated in the letter that the appellant had entered into a sale agreement with Aldwin Edwards ("the buyer") for the sale to the buyer of the excavator at a price of TT$1,328,520.00. The date of the sale agreement was incorrectly stated as being 29 October 2015, but it is accepted that the correct date is 19 October 2015. It was also stated in the letter by the appellant's attorney that, at the buyer's direction, the excavator had been delivered to a site on Turure Road, Sangre Grande on 20 October 2015. The attorney enclosed with the letter the signed written agreement dated 19 October 2015 between the appellant and the buyer. The agreement recorded that the buyer had paid an initial deposit of TT$110,710 to the appellant. The balance of the purchase price was to be paid by 11 monthly instalments of TT$110,710 each, commencing on 19 November 2015. Whilst the sale agreement required the buyer to keep the excavator at all times in his possession, the appellant was to retain the property

in the excavator until payment by the buyer of the balance of the total purchase price to the appellant. The Board notes that the excavator was seized by the police two days after the date of the sale agreement and one day after the excavator was delivered by the appellant to the location specified by the buyer.

22. The appellant also filed an affidavit sworn on 13 April 2018 by Nicholas Mohammed, an employee of the appellant who is a heavy equipment service technician. In his affidavit he stated that on 22 March 2018 he inspected the excavator, at the request of the appellant's managing director, for "the purpose of determining any damages to the excavator and to diagnose what repairs were needed to be done in order to bring the excavator *to good working condition*." (Emphasis added.) He exhibited to his affidavit a document dated 26 March 2018 headed "Estimate: To *restore [the excavator]* which was improperly stored for the past two and a half years (2 ½), under poor weathering conditions, *to its original saleable condition*." (Emphasis added.) The total estimated cost of repairs was TT$724,345.01 made up of TT$35,000 for repainting, TT$88,856.12 for materials for track assembly repairs (seized not working), TT$550,488.89 cost of other parts and fluids requiring to be serviced/replaced, and TT$50,000 labour to carry necessary service and repairs.

23. The Attorney General did not file any evidence in relation to the assessment of damages. In particular, the Attorney General did not file any evidence as to the condition of the excavator or the estimated cost of repairs. Nor did the Attorney General file any evidence as to the value of the excavator on 4 November 2015 or as to its residual value on 21 February 2018. The failure of the Attorney General to file any evidence meant that the only evidence before the judge on the assessment of damages comprised the affidavits of Nigel Bennett and Nicholas Mohammed. Furthermore, the Board notes that the deponents of those affidavits were not cross examined.

24. Even though the Attorney General had not filed any evidence he did file written submissions dated 1 May 2018. The submissions addressed two issues, as follows:

> "1. At what point the continued detention of the excavator became unlawful?
>
> 2. What measure/quantum of damages the [appellant] is entitled to for the unlawful detention of the excavator?"

In relation to the first issue the Attorney General submitted that the continued detention became unlawful after two months, rather than two weeks. In relation to the second issue the Attorney General addressed the appellant's claim for the estimated cost of repairs and the claim for loss of rental payments. In relation to the claim for the cost of repairs, the Attorney General challenged the appellant's evidence on the basis, for

instance, that Nicholas Mohammed was an employee of the appellant and that there was insufficient supporting evidence as to the cost of parts. In relation to the claim for loss of rental payments, the Attorney General submitted that the appellant had provided no evidence that the excavator would have been rented out on a daily basis so that the appellant's claim for loss of use had not been proven. However, the Attorney General submitted that if the court were to find in favour of the appellant in relation to the loss of use claim, then that "loss of use should be awarded at a rate of $3500 from 2 months after the date of seizure to the date of release of the excavator (788 days x 3500 in the sum of 2,758,000)." So, the alternative case put forward by the Attorney General could have led to an award of TT$2,758,000 for loss of rental payments plus, if the appellant's evidence as to the cost of repairs was accepted, an award of TT$724,345.01 for the cost of repairs, making a total potential award of TT$3,482,345.01.

(c) The judgment of Madam Justice Quinlan-Williams dated 1 June 2018 on damages for detinue

25. In her judgment dated 1 June 2018, the judge first dealt with the date upon which the continued detention of the excavator became unlawful. The judge held, at para 5, that "two weeks was a reasonable period for the [police] to conduct and complete their investigation" so that "[the] period of detinue was therefore from 4th November, 2015 to 21st February, 2018."

26. The judge, at para 8, addressed the issue as to the market value of the excavator at the time it was seized by the police. The judge concluded that the agreed sale price for the excavator in the sale agreement dated 19 October 2015 between the appellant and the buyer established on the balance of probabilities that the market value was then TT$1,328,320.00.

27. In relation to the appellant's claim for loss of rental payments the judge, at para 14, stated:

> "The [appellant's] evidence is that but for the detinue the excavator would have been sold. There is no evidence before the court to suggest that the sale of the excavator was anything else but a done deal. The excavator was already located at a place consistent with the sale to the … purchaser."

On this basis, the judge rejected the appellant's claim for loss of rental payments as being inconsistent with the sale agreement dated 19 October 2015 under which the excavator had been sold to and was in and was to remain in the possession of the buyer.

28. Having determined the market value of the excavator at the time it was seized by the police as being TT$1,328,320.00 the judge determined, at para 15, that when the excavator was returned to the appellant it had either no value or only a nominal value. Accordingly, the judge awarded TT$1,328,320.00 as the diminution in value of the excavator resulting from its unlawful detention.

29. The appellant in its statement of case had also claimed aggravated damages. The judge, at para 19, held that:

> "In this case the [appellant] was about to conclude an agreement for sale of the excavator. Instead the [police] seized it and kept [it] until the [appellant] made a claim and the court made its order. The [appellant] should be compensated for the aggravation of the injury they suffered. They clearly [lost] the sale and all the opportunities that were contingent upon that sale."

The judge awarded the appellant TT$150,000.00 as aggravated damages to be paid by the Attorney General.

30. The judge's total award was TT$1,478,320.00 made up of TT$1,328,320.00 damages for detinue and TT$150,000.00 aggravated damages.

31. The Board adds one further matter in relation to the judgment dated 1 June 2018. The judge, at para 15, stated:

> "The court notes that the [appellant] has had the excavator returned to him – *following the judgment of the court*." (Emphasis added.)

The judge, at para 19, stated:

> "… the [police] seized [the excavator] and *kept [it] until … the court made its order*." (Emphasis added.)

The judge plainly made an error of fact when she stated that the excavator was returned to the appellant following the judgment of the court. The excavator was returned to the appellant on 21 February 2018 approximately one month before the judge made the order dated 22 March 2018 and in that order the judge did not order that the excavator

be returned to the appellant. Furthermore, on foot of the permission to enter judgment, the appellant did not obtain an order for delivery up of the excavator: see para 14 above.

32. The judge's total award was substantially less than the amount of TT$3,695,845.01 claimed by the appellant in its written submissions dated 10 April 2018. Furthermore, the total award was substantially less than the amount of TT$3,482,345.01 which comprises (a) the sum which the Attorney General submitted, in the alternative to its primary case, was an appropriate award for loss of rental payments and (b) the cost of repairs: see para 24 above. So, on the one hand the amount of the award could be seen as a victory for the Attorney General. On the other hand, the Attorney General could have, but did not, appeal against the judge's conclusion that the diminution in value of the excavator was the difference between the market value of the excavator on 19 October 2015 and no value or a nominal value when the excavator was returned to the appellant on 21 February 2018. The appellant's own evidence was that if the excavator was repaired at a cost of TT$724,345.01 it would be in "good working condition" and would be restored "to its original saleable condition." Indeed, the claimant's own submission was that the loss in value of the excavator during the time it was detained amounted to TT$724,345.01. Accordingly, on appeal the Attorney General could have contended that the cost of repairs was a more accurate method of calculating the diminution in value of the excavator.

(d) The procedural history in relation to the appellant's appeal to the Court of Appeal

33. The Attorney General, despite having potential grounds for an appeal, did not appeal against the judge's award. However, the appellant appealed to the Court of Appeal against the judge's dismissal of its claim for loss of rental payments during the period of unlawful detention. The Attorney General did not serve a counter notice.

34. Prior to the hearing of the appeal both the appellant and the Attorney General filed written submissions. The written submissions dated 13 September 2019 filed on behalf of the Attorney General sought to uphold the judge's finding that the appellant was not entitled to an award of damages for loss of use of the excavator for the time it was detained by the police. The written submissions did not contain any suggestion that the award made by the judge was excessive or that because of the award the Attorney General was entitled to an order that the appellant should deliver the excavator to the State.

(e) The judgment of the Court of Appeal dated 9 September 2020

35. In its judgment dated 9 September 2020 the Court of Appeal first considered the appellant's appeal against the judge's dismissal of the appellant's claim for loss of rental payments during the period of unlawful detention. The Court of Appeal referred

to the evidence that, prior to the period of unlawful detention, the excavator had been sold by the appellant to and delivered to the buyer. Based on that evidence the Court of Appeal concluded, at para 27, that "… the findings of the judge and her conclusion on the issue of damages for loss of use are unassailable." Accordingly, at para 33, the Court of Appeal concluded that the judge was correct in finding that the appellant was not entitled to an award of damages for loss of use of the excavator for the time that it was unlawfully detained by the respondent. In addition, the Court of Appeal held, at para 34, that "the appellant has not provided an iota of evidence to show the prospective rentals after the excavator was seized and detained nor the contracts which had been entered into prior to seizure, which it was unable to pursue." Accordingly, the Court of Appeal considered that the evidence of Nigel Bennett that during the time of detention the appellant had to forego a number of contracts that were entered into for the rental of the excavator, was not "viable" so that the judge was correct to dismiss the loss of use claim on this alternative basis. The appellant has not appealed to the Board in relation to this aspect of the Court of Appeal's decision. Accordingly, there is no issue before the Board in relation to the loss of rental payments during the period of unlawful detention of the excavator.

36. As indicated at para 3 above, at the appeal hearing the Court of Appeal "raised the issue as to whether the appellant was entitled to have the excavator returned to it in circumstances in which it was awarded the value of the excavator as special damages": see para 35 of the judgment of Mohammed JA.

37. Mr Ramdeen, counsel on behalf of the appellant, submitted in oral submissions to the Court of Appeal that if the State was seeking to have the excavator returned to it, the responsibility fell on the Attorney General to give a respondent's notice in the matter and no such notice had been given. However, the Court of Appeal considered that it had jurisdiction to make an order in relation to this issue by virtue of section 39 of the SCJA even though no counter-notice had been given by the Attorney General.

38. In considering this further issue the Court of Appeal, at para 42, construed that part of the judge's order dated 22 March 2018 which gave the appellant permission to enter judgment against the defendant as actually granting a declaration that the appellant was entitled to possession of the excavator and as actually making an order that the excavator be delivered by the police to the appellant.

39. In relation to the forms of judgments in detinue, the Court of Appeal referred to *General and Finance Facilities Ltd v Cooks Cars (Romford) Limited* [1963] 1 WLR 644 in which Lord Diplock said at page 650:

> "… detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and

> *damages for its detention*; or (2) for return of the chattel or recovery of its value as assessed and *damages for its detention*; or (3) for return of the chattel and *damages for its detention*." (Emphasis added.)

The Court of Appeal did not identify which form of judgment was appropriate in this case. Rather, at para 40, the Court of Appeal referred to *Halsbury's Laws of England*, 3rd ed Vol 38 at paragraph 1317 and *McGregor on Damages,* 13th ed at paragraph 1032 for the principle that:

> "…a claimant in proceedings for detinue is entitled to the return of the chattel **or** its value." (Emphasis in the original.)

The Court of Appeal considered that the appellant could obtain the value of the excavator as assessed but could not at the same time obtain the return of the excavator. The Court of Appeal considered that the judge had incorrectly made orders on 22 March 2018 declaring that the appellant was entitled to possession of the excavator and that it be delivered by the Attorney General to the appellant, in circumstances where she also subsequently awarded damages for the value of the excavator. The Court of Appeal stated, at para 42, that this was "double recovery" for the appellant.

40. In order to correct the error, at para 46 the Court of Appeal, purporting to exercise its powers under section 39 of the SCJA, set aside both the declaration and the order for delivery of the excavator which the Court of Appeal considered had been made by the judge on 22 March 2018. Furthermore, the Court of Appeal, again exercising its powers under section 39 of the SCJA, also ordered, at para 46, that the appellant deliver to the Attorney General possession of the excavator. The Court of Appeal explained, at para 45, that:

> "In our view, having regard to the circumstances of this case and the remedies obtained by the appellant, we find it just and appropriate that the excavator be returned to the State, whatever its current condition and despite (as the judge found) it having either no value or a nominal value. The consideration that the excavator is of nominal value should not enure to the benefit of the appellant."

41. In relation to costs, at para 47, the Court of Appeal ordered the appellant "to pay the [Attorney General's] costs which are to be determined at two-thirds of the costs assessed in the court below." The costs order was provisional as the Court of Appeal allowed the appellant to file written submissions within seven days in support of a different order as to costs. However, the appellant did not avail of this opportunity, so

the order remained that the appellant pay the Attorney General's costs of the appeal "in the sum of two-thirds … of the costs assessed in the court below."

3. The powers of the Court of Appeal under section 39 of the SCJA

42. Given that the Court of Appeal's jurisdiction to make orders setting aside orders of the High Court and to make any order which ought to have been made is dependent on section 39 of the SCJA, it is appropriate to set out the relevant parts of that section immediately. In so far as relevant it provides:

> "(1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to –
>
> > (a) confirm, vary, amend, or set aside the order or make any such order as the Court from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;
> >
> > (b) …;
> >
> > (c) ….
>
> (2) The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties.
>
> (3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.

(4) ….”

43. The extent of the powers conferred on the Court of Appeal by section 39 was considered by the Board in *Hannays v Baldeosingh* [1992] 1 WLR 395. In that case the claimant brought proceedings for a sum due from the defendant on a stated and settled account. The claimant applied for final judgment under Order 14 of the Rules of the Supreme Court (Trinidad and Tobago). The claimant’s application was dismissed by Collymore J, who gave the defendant unconditional leave to defend, which grant of leave was unappealable: section 38(3)(c) of the SCJA. The claimant then served a reply to the defence and the defendant applied to strike out the reply as tending to raise a new cause of action not consistent with the statement of claim. That application was dismissed by Brooks J. The defendant appealed to the Court of Appeal, which not only dismissed the appeal but also, purporting to exercise the jurisdiction conferred on it by section 39 of the SCJA, gave judgment for the claimant in the sum claimed. The defendant appealed to the Board contending, amongst other matters, that the Court of Appeal did not have jurisdiction under section 39 to give judgment for the claimant on an appeal from an order of Brooks J dealing with an application to strike out the claimant’s reply.

44. Lord Jauncey of Tullichettle, giving the judgment of the Board, considered in turn the proper construction of sections 39(1)(a), (2) and (3).

45. In relation to section 39(1)(a), at page 401 B-D, Lord Jauncey said:

> “The first part of section 39(1)(a) empowers the Court of Appeal inter alia to ‘make any such order as the court from whose order the appeal is brought might have made.’ The last three words cannot be construed as referring to the overall jurisdiction of the court below but must be restricted by the circumstances in which that court acted. Thus one must *look at the application before that court and consider what order that court could competently have made thereupon*. The reference to ‘such further or other order’ once again must refer to orders consequential upon any order which could or ought to have been made upon the application.” (Emphasis added.)

Accordingly, under section 39(1)(a) the Court of Appeal could only make orders which might competently have been made on the application before the High Court.

46. In relation to section 39(2), at page 401 D, Lord Jauncey said:

> "Section 39(2) does not help the plaintiff because the last sentence presupposes that the order which the Court of Appeal may make arises out of the decision in the lower court."

So, the jurisdiction depends on what order the High Court could competently have made on the application before that court.

47. In relation to section 39(3), at page 401 D-F, Lord Jauncey said:

> "Furthermore [the plaintiff] cannot obtain any assistance from section 39(3). That subsection is in the same terms as Ord LVIII, r 14 of the Rules of the Supreme Court, as they were in 1876, and it was said by Mellish LJ in *Sugden v Lord St Leonards* (1876) 1 PD 154, 209:
>
> > 'The object of this was to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing was to be open on the merits before the Court of Appeal.'
>
> It is clear from that dictum that subsection (3) is referring to an appealable order whereas, for the reasons already stated, Collymore J's order granting the defendant unconditional leave to defend was unappealable."

So, section 39(3) should be construed as referring to interlocutory orders which were appealable. Furthermore, the purpose of section 39(3) is that the parties be not prejudiced by omission to appeal against an interlocutory order which directly or incidentally involves a decision on the point of the appeal. If it does directly or incidentally involve a decision on the point of the appeal, then, as Mellish LJ stated, "[the] whole thing [is] to be open on the merits before the Court of Appeal."

48. The only order which was before the Court of Appeal in *Hannays v Baldeosingh* was that of Brooks J dismissing the defendant's application to strike out the claimant's reply. Brooks J had no jurisdiction on that application to enter judgment for the claimant. Accordingly, the Court of Appeal also did not have jurisdiction under section 39 to give judgment for the claimant; so the Board allowed the defendant's appeal from that order and remitted the case back to the Court of Appeal so that the action might be listed for an early trial.

4. Legal principles in relation to detinue

49. The Torts (Interference with Goods) Act 1977 abolished detinue in England, Wales and Northern Ireland: see sections 2(1) and 16(2). There is no cause of action of detinue in Scotland. Detinue continues to be actionable in Trinidad and Tobago as well as in certain other common law jurisdictions such as Ireland and Australia.

50. Detinue is primarily an action for the return of goods.

51. As Diplock LJ stated in *General and Finance Facilities Ltd* an action in detinue may result in a judgment in one of three different forms: see the quotation in para 39 above. Diplock LJ stated, at page 650, that "[a] judgment in the first form, [for the value of the chattel as assessed and damages for its detention] is appropriate where the chattel is an ordinary article in commerce, for the court will not normally order specific restitution in such a case, where damages are an adequate remedy." A judgment in the second form is for return of the goods or recovery of their value as assessed and damages for their detention. A judgment in this form gives the claimant the opportunity to decide between enforcing specific restitution of the goods and claiming their value: see *McGregor on Damages*, 13th ed (1972), at para 1032. A judgment in the third form is for return of the goods and damages for their detention. Under this form the claimant cannot obtain the value of the goods but he or she can obtain damages for their detention. As Diplock LJ stated in *General and Finance Facilities Ltd*, at page 651, "Under [this form] the only pecuniary sum recoverable is damages for detention of the chattel." The Board considers that damages for detention can include damages for depreciation in value during the period of unlawful detention: see para 54 below.

52. What then is the form of the judgment if the chattel has been returned prior to judgment? The answer given in *McGregor on Damages*, 13th ed (1972), is to be found at para 1042 which states:

> "Where the defendant offers and the plaintiff accepts redelivery of the goods at any time before judgment, this goes to bar further maintenance of the action for the goods or their value, since the action of detinue, unlike conversion, is primarily for the return of the goods and not for damages. … The plaintiff may, however, still recover damages for detention if he can prove that he has suffered loss."

A similar answer is given in *Clerk and Lindsell on Torts*, 14th ed (1975) at para 1173. Accordingly, once the chattel has been returned and its return has been accepted, the form of a judgment is ordinarily confined to damages for detention.

53. What is the measure of damages for detention? In *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, Brandon LJ stated, at page 870:

> "Looking at the matter from the point of view of principle first, I cannot see why there should be any universally applicable rule for assessing damages for wrongful detention of goods, …. Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case."

Brandon LJ continued, at page 870, by stating that "It is for plaintiffs to prove what loss, if any, they have suffered by reason of a tort, …"

54. One measure of damages for detention in the case of goods used in the claimant's business is the cost of hiring a reasonable substitute less the expenses the claimant would have incurred had he still had the goods: see *Davis v Oswell* (1837) 7 C & P 804; 173 ER 351 and *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 per Denning LJ at 254. Another measure is the income lost whilst a revenue-generating asset is detained: see *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*. A further measure is the fall in the market value of the goods during the period of unlawful detention: see *Williams v Archer* (1847) 5 CB 318. As Brandon LJ stated in *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd*, the measure of damages awarded may vary infinitely so I consider that there is no reason in principle why depreciation in the asset's value could not be another measure of damages. However, once the asset has been returned and its return has been accepted, a court cannot award as damages the value of the asset as this would result in double recovery. In such circumstances the claimant would have both the asset and its value. However, a court can award damages representing the diminution in value of the asset caused by its detention. An issue in this appeal is whether the judge made an award representing the value of the excavator resulting in double recovery or whether the judge made an award for the diminution in value of the excavator.

5. The first issue: whether the Court of Appeal had jurisdiction under section 39 of the SCJA to order the appellant to return the excavator to the Attorney General

55. The appeal to the Court of Appeal was from the order of the High Court dated 1 June 2018. To determine whether the Court of Appeal had jurisdiction to order the delivery of the excavator to the Attorney General under section 39(1)(a) of the SCJA it is necessary to "look at the application before [the High Court] and consider what order that court could competently have made thereupon.": see the emphasised sentence in the

quotation at para 45 above. The application that led to the judgment dated 1 June 2018 was to (a) determine the period of unlawful detention of the excavator; (b) assess the amount of damages in detinue; and (c) determine whether the appellant should be awarded aggravated damages and if so in what amount. The appellant's entitlement to possession of the excavator had been resolved when it was returned to it by the police on 21 February 2018 prior to any court order having been made. On the hearing of the assessment of damages application the judge could not have ordered the appellant to deliver the excavator to the Attorney General. Accordingly, the Court of Appeal lacked jurisdiction under section 39(1)(a) to order the appellant to deliver the excavator to the Attorney General unless sections 39(2) or (3) assists the Attorney General in his contention that the Court of Appeal did have jurisdiction.

56. Section 39(2) does not assist the Attorney General as the jurisdiction depends on what order the High Court could competently have made on the application before that court.

57. The only question is whether the Attorney General can obtain assistance from section 39(3). The Attorney General did not submit that section 39(3) assists in the proposition that the Court of Appeal had jurisdiction to order the delivery of the excavator to the State. Furthermore, neither party addressed the Board in relation to whether the order dated 22 March 2018 was an interlocutory order and if so whether or how that order could extend the powers of the Court of Appeal to order the delivery of the excavator to the State. No authority was cited to the Board in relation to the distinction between an interlocutory order and a final order.

58. For the purpose of this appeal alone and without deciding the matter, the Board is prepared to proceed on the basis that the earlier order of the judge dated 22 March 2018 is an interlocutory order: see *White v Brunton* [1984] QB 570, [1984] 2 All ER 606.

59. The Board is also prepared to proceed on the basis that, if the interlocutory order dated 22 March 2018 directly or incidentally involved a decision on the point of the appeal, the powers of the Court of Appeal under section 39(3) would enable the Court of Appeal to look at the whole thing on the merits including the interlocutory order.

60. Therefore, it is necessary to consider whether the order of 22 March 2018 either directly or incidentally involved a decision on the point of the appeal. If it did not then the jurisdiction of the Court of Appeal does not extend to, for instance, confirming, varying, amending, or setting aside the order dated 22 March 2018. The Court of Appeal stated, at para 42, that, by her order dated 22 March 2018, the judge had granted a declaration that the appellant was entitled to possession of the excavator and that by her order dated 1 June 2018 she had awarded the value of the excavator thereby awarding "double recovery" to the appellant. If the order of 22 March 2018 did grant a

declaration to the appellant, then that order would have involved a decision on the point of the appeal as to whether "double recovery" had been awarded, so as to permit the Court of Appeal to look at the whole thing on the merits under section 39(3). However, the judge did not grant a declaration that the appellant was entitled to possession of the excavator nor did the appellant obtain such a declaration: see paras 14 and 31 above. By returning the excavator on 21 February 2018 the police had conceded that the appellant was entitled to possession. The order dated 22 March 2018 did not involve either directly or indirectly a decision on the point of the appeal so that section 39(3) does not assist the Attorney General.

61. The Board concludes that the Court of Appeal did not have jurisdiction to order the appellant to deliver the excavator to the State. Accordingly, the Board allows the appellant's appeal in relation to this issue and sets aside the Court of Appeal's order that the appellant deliver the excavator to the State.

62. Furthermore, the Board considers that the Court of Appeal was in error in purporting to set aside orders made in the High Court declaring that the excavator be delivered to the appellant by the Attorney General and for the delivery up by the Attorney General to the appellant of the excavator. No such orders had been made. Accordingly, the Court of Appeal fell into error when it purported to set aside orders which had not been made by the High Court: see paras 14 and 31 above.

6. The second issue: whether the Court of Appeal erred in law in ordering the delivery up of the excavator to the Attorney General

63. The Board notes that in all three forms of judgments in detinue identified by Diplock LJ in *General and Finance Facilities Ltd* the claimant can obtain damages for the goods' detention in addition to either obtaining the return of the goods or their value: see the emphasised parts of the quotation at para 39 above. The Court of Appeal's formulation, at para 40 of its judgment, that "a claimant in proceedings for detinue is entitled to the return of the chattel **or** its value" omits any reference to the claimant's entitlement to damages for its detention. The formulation is correct in that once the goods are returned and their return has been accepted, the claimant cannot obtain their value. However, the Court of Appeal was in error in omitting that the claimant can obtain damages for detention in addition to the return of the goods. Indeed, Halsbury's Laws of England, 3rd ed, Vol 38 (1962) states at para 1317 that:

> "Damages are also awarded in detinue in respect of the detention of the goods, *whether or not they are returned*;" (Emphasis added.)

The authors cite in support of this proposition the following authorities, namely *Williams v Archer* and *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*.

64. The appellant submits that the Court of Appeal fell into error when it proceeded on the bases that the appellant had obtained possession of the excavator by virtue of a court order and that it could not obtain damages for diminution in value.

65. The Board agrees that the Court of Appeal fell into error in several respects.

66. First, the appellant did not obtain possession of the excavator by virtue of a court order. The excavator was returned to the appellant by the police on 21 February 2018 approximately one month before the judge made the order dated 22 March 2018. Furthermore, in that order the judge did not order that the excavator be returned to the appellant nor did the appellant, on foot of the permission to enter judgment, obtain an order for delivery up of the excavator: see paras 14 and 31 above.

67. Second, and fundamentally, the Court of Appeal wrongly categorised the award of special damages of TT$1,328,320.00 as being an award of the value of the excavator rather than as an award for the depreciation in the value of the excavator. As the Board has indicated the judge would have been in error if she had simply made an award of damages representing the value of the excavator in circumstances where the excavator had been returned by the police to the appellant and the appellant had accepted its return. However, on a fair reading of the judge's judgment dated 1 June 2018 that is not the way she approached the assessment of damages for detinue. She did not simply assess the value of the excavator and wrongly award that value as damages. Rather, she carefully considered the evidence as to the condition of the excavator caused by the failure of the police to take any steps to maintain it and by storing it in an open area where it was exposed to the weather. After considering that evidence the judge concluded that there had been such a depreciation in the value of the excavator over the period of unlawful detention that it had no or only a nominal value. The Board considers that the Court of Appeal was in error in finding that the order of the judge dated 1 June 2018 when read with the order dated 22 March 2018 meant that the appellant had obtained the value of the excavator as assessed at the same time as obtaining the return of the excavator. Rather, the judge awarded depreciation damages and the fact that the damages were equal to the excavator's full market value simply reflected the fact that it was returned in a state in which it had no or only a nominal value.

68. Third, the Court of Appeal overlooked that detinue is primarily an action for the return of goods. The appellant by virtue of its proprietary rights was entitled to the return of, and to retain possession of, the excavator, no matter how badly damaged it was. The judge's award of depreciation damages on the basis that the excavator had no

value, or a nominal value, did not deprive the appellant of its ownership of and right to possession of the excavator. The Court of Appeal's order that the appellant deliver the excavator to the State not only is contrary to the primary purpose of detinue as being an action for the return of goods but also incorrectly overrides the appellant's proprietary rights. The appellant owned and was entitled to possession of the excavator. The State did not own and was not entitled to possession of the excavator. There was no legal basis to order that the excavator be given to the State. The Court of Appeal was in error in ordering the appellant to deliver the excavator to the State.

69. If the Board had not allowed the appellant's appeal under the first issue, then the Board would have allowed the appellant's appeal under this issue. On this additional basis the Board sets aside the Court of Appeal's order that the appellant deliver the excavator to the State.

7. The third issue: whether the Court of Appeal erred in ordering the appellant to pay the Attorney General's costs of the appeal in the sum of two-thirds of the costs in the High Court

70. The appellant's appeal to the Court of Appeal against the failure of the judge to award damages for loss of rental income was dismissed. The appellant accepts that it was correct to order it to pay the Attorney General's costs of the appeal to the Court of Appeal. However, the appellant submits that it was wrong in principle for the Court of Appeal to quantify costs at two thirds of the costs below because there was only one matter in issue before the Court of Appeal whilst there were several matters in issue before the High Court. The matter in issue before the Court of Appeal was whether the appellant was entitled to damages for loss of rental income. The matters in issue in the High Court were not only loss of rental income but also depreciation damages, aggravated damages, interest and, until 21 February 2018, delivery up of the excavator. Accordingly, the appellant submits that the Court of Appeal ought to have exercised discretion under rule 67.5(4) of the Civil Proceedings Rules 1998 read with rule 66.6(5) to order the appellant to pay a lesser percentage than two thirds of the quantified costs in the High Court.

71. The point now raised in relation to costs is a new point raised for the first time before the Board. No submissions on behalf of the appellant were made before the Court of Appeal despite the appellant being given an opportunity to make those submissions. It is well established that the Board will generally not allow a party to raise a new point on an appeal before it. The Board will follow its usual practice so that the appeal in relation to this issue is dismissed.

8. Conclusion

72. The Board allows the appellant's appeal against the order of the Court of Appeal that the appellant return the excavator to the State and sets aside that part of the Court of Appeal's order.

73. As the High Court did not make an order declaring that the appellant was entitled to possession of the excavator or an order for the delivery up by the Attorney General to the appellant of the excavator, the Board also sets aside those parts of the Court of Appeal's order which purport to set aside those orders of the High Court.

74. The Board dismisses the appellant's appeal in relation to the quantification by the Court of Appeal of costs to be paid by the appellant in relation to its appeal to the Court of Appeal at two thirds of the costs in the High Court.