IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, GHANA

CORAM: DATE-BAH JSC (PRESIDING)
ANSAH JSC
DOTSE JSC
BONNIE JSC
BAMFO(MRS) JSC

CIVIL APPEAL
J4/13/2011

30TH MAY 2012

PETER ANKOMAH
DNT 3/48 DOME NEWTOWN
ACCRA - **PLAINTIFF/APPELLANT/ APPELLANT**

VRS

CITY INVESTMENT COMPANY LIMITED
NEAR VANGUARD ASSURANCE
INDEPENDENCE AVENUE
ACCRA
DEFENDANT/RESPONDENT RESPONDENT

J U D G M E N T

DOTSE JSC:

The facts in this appeal admit of no controversy whatsoever. The wife of the plaintiff/appellant/appellant, hereinafter referred to as the plaintiff, defaulted in the repayment of loans he took from the defendants/respondents/respondent hereinafter referred to as the defendant. As a result of this default, the defendants instituted action against the wife of the plaintiff and obtained judgment against her.

It was in the course of the execution of the judgment that the defendants caused the Deputy Sheriff to attach items which belonged to the plaintiff from their matrimonial home. The items of property seized from the plaintiff were a Mitsubishi car and a deep freezer. Following the failure of the defendants to return the said items to the plaintiff upon repeated demands, the plaintiff instituted an action in the High Court against the defendants. In view of the issues raised in this appeal, which hinged on what constitutes General and Special damages, it is considered worthwhile to produce in detail the entire reliefs that the plaintiff claimed against the defendants.

> *"Delivery up of Mitsubishi Saloon car with registration number GR 9185 G unlawfully caused by the defendants to be seized by the Sheriff or the value of the said car and damages for its detention. Delivery up of one refrigerator unlawfully caused by the defendants to be seized by the Sheriff on execution or the value thereof and* ***damages for its detention."***

In a supporting statement of claim, the plaintiff provided the particulars of damages in paragraph 4 of the statement of claim as follows:

> *"The plaintiff has since the seizure of the car and the refrigerator demanded their return but the defendants have refused to cause their return or delivery up with the consequence that the plaintiff has suffered loss and damage.*

Particulars of Damage

(i) Loss of use of the said car at ¢250,00 per day from 8th September 1997 and continuing

(ii) Cost of putting the vehicle in a good and road worthy condition.

(iii) Loss of use of the said refrigerator at ¢50,000.00 per day from 8th September 1997 and continuing

(iv) Cost of repair

And the plaintiff claims

An order for the delivery up of the said Mitsubishi Car No. GR 9185 G and the refrigerator, or payment of their respective values".

HIGH COURT DECISION

After protracted and delayed proceedings, the trial High Court delivered judgment in favour of the plaintiff as follows:

"I now proceed to deal with damages. Plaintiff told the court that he purchased the vehicle at an amount of ¢65 million he also said it costs him ¢250,000.00 a day to secure alternative means of transport. He told the court that he is a trader. He gave evidence on 24/5/2000. I must say that despite the fact that no contrary evidence was offered, I find that figure to be inflated and quite excessive. I have formed this opinion because plaintiff went on to give the value of the seized refrigerator as ¢25 million. If plaintiff had to use alternative vehicle for his business rounds I think an amount of ¢50,000.00 per day in those days would be a fair and reasonable figure. I therefore hold plaintiff to be entitled to ¢50,000.00 per day as damages for the wrongful seizure of the vehicle with effect from 8th September 1997 to the date of this judgment. From this should be deducted all Saturdays and Sundays as well as all national and public holidays.

I have already made mention of the exaggerated figure of ¢25 million placed on the refrigerator by plaintiff. That is quite incredible. He also

told the court on 24/5/2000 that he earned ¢50,000.00 per day from the use of the refrigerator. This is also astronomical. The refrigerator was seized from the house not a store. I do not think even if it was being used commercially, I can award plaintiff anything beyond ¢10,000.00 per day. I therefore award him ¢10,000.00 per day with effect from 8th September 1997, minus all Saturdays and Sundays national and public holidays to date of this judgment. I order that the amount so calculated should be subject to tax.

In respect of both the vehicle and refrigerator, I hold plaintiff to be entitled to their respective replacement value". *Emphasis supplied.*

APPEAL COURT

Being aggrieved and dissatisfied with the level of damages awarded for the loss of use, the plaintiff appealed to the Court of Appeal.

The appeal was dismissed and it was held that damages for loss of use of a chattel are special damages and must be strictly pleaded and proven. It was held by the Court of Appeal that the Plaintiff had failed to strictly prove his special damages and as such, he was not entitled to same. However, the Court of Appeal, applied equitable principles and held that the plaintiff was therefore only entitled to nominal damages which were entirely within the trial judge's discretion. The Court of Appeal found that the said discretion had been appropriately exercised and as such, the Honourable Court declined to overturn the judgment of the trial court.

APPEAL TO SUPREME COURT

As the plaintiff still felt dissatisfied with the decision of the Court of Appeal, he then filed the following grounds of appeal to the Supreme Court.

Grounds of Appeal

(i) The Court of Appeal misdirected itself in law when it held that the claim for damages for loss of use of the vehicle and refrigerator was a claim for special damages whereas such a claim is one for general damages.

(ii) The Court of Appeal erred in affirming the trial court's decision on the assessment of the damages for loss of use of the two properties for their wrongful detention by the respondent company.

(iii) The Court of Appeal erred in seeing nothing wrong with the exclusion by the trial judge of certain days from the period over which the loss of use is to be calculated when there was no evidence at the trial indicating how many such days were within the relevant period or that on those days the appellant did not need those properties for his use.

(iv) The Court of Appeal erred in failing to appreciate the purport of the complaint that the trial judge erred in rejecting the figures mentioned by the appellant as the general amount of loss per day during the period of the wrongful detention when the figures were not challenged under cross-examination and no evidence to contradict them was led by anybody and no evidence to contradict them was led by anybody and the figures were not manifestly unreasonable."

LEGAL ISSUE

Even though learned Counsel for the parties have spent considerable time and space in their statements of case on what they consider germane to this appeal, the crux of the present appeal so far as we are concerned revolves around the plaintiff's assertion that the defendant committed the tort of detinue, and thus, **the plaintiff is entitled to damages not only for the value of the chattels seized, but also loss of use of those chattels.**

And as a corollary, that the plaintiff is entitled to the loss of use as general damages and not special damages.

As a result, learned Counsel for the plaintiff Mr. James Ahenkorah in his written statement of case did not lose any opportunity to drive home the fact that the learned trial Judge should have treated the claims for loss of use of the chattels as a claim for general damages and not special damages as was held by the learned trial judge.

What then is the tort of Detinue and the legal effects of a person held to have committed Detinue?

Detinue is "*The unlawful failure to deliver up goods when demanded and it lies when a person wrongfully detains the goods of another"* Halsbury's Laws of England (5th Ed., 1975) volume 12 para 1416.

According to Halsbury's Laws of England, in detinue, the judgment is usually for the return of the chattel detained or for its value, together with damages for its detention Ibid, page 456.

However, where the said chattel has been actually damaged or destroyed, then the owner of that chattel is additionally entitled to damages for loss of use. In the case of a chattel which is not employed for private gain, the plaintiff is entitled to general damages for loss of use. 1 bid, para 1165.

Halsbury's Laws of England states emphatically at same paragraph 11 65 that there is no rule of thumb about assessment of damages in a case where the plaintiff is entitled to general damages for loss of use. However, when a substitute is hired, the damages may be the cost of hire.
For example, a private individual is entitled to general damages for inconvenience due to the loss of a chattel such as a motor car.

It is very important to note that damages for loss of use are not in general recoverable unless the loss of use is consequential on some actual wrongful damage occasioned to the chattel. The dictum of Lord Denning, M.R. in **SCM v. Whittall [1971] AC 337** buttresses this point:

> *"When a defendant... causes physical damage to the person or property of the plaintiff, in such circumstances that the plaintiff is entitled to compensation for the physical damage, then he can claim in addition for economic loss consequent on it" at 341.*

Therefore, in the decided cases where the court awarded damages for loss of use against the defendants, it was always established that the defendant had caused an actual damage to the chattel involved.

In **The Mediana [1900] AC 113**, where the facts were that, the vessel belonging to the Appellant collided with and then sank another vessel which belonged to the Respondents. The Respondents sued and prayed, among other things, for damages for loss of use of their vessel. **It was held by the House of Lords that the Respondents were entitled to damages for loss of use of their vessel.**

Similarly, in **The Greta Holme [1897] AC 118**, some trustees were owners of a ship whose steam dredger was later damaged by another ship, causing the trustees to be deprived of the ship's usage. It was held by the House of Lords that the trustees were entitled to damages for loss of use.

Additionally, in **Admiralty v. SS Cheskiang [1926] AC 665,** the Respondent's steamship collided with a light cruiser and damaged her. **It was held by the House of Lords that the Respondent was liable for damages for loss of use.**

In the instant appeal, it is quite clear that, the authorities cited and provided by the plaintiff in this case also support the principle of law that damages for loss of use can only be claimed where it is established that there has been actual damage to the chattel.

For example, **Salmond and Heuston on the Law of Torts Heuston & Buckley,** Salmond and Heuston on the Law of Torts (19th Ed.). Sweet & Maxwell explains that

> ***"In the case of collision between two ships or motor-cars due to negligence of the defendants, the plaintiff will be able to recover general damages for the loss of the use of his ship during repairs, even if it be not used for trading for profit, or for the loss of the use of his motor-car even though it be used for pleasure purposes."*** Emphasis supplied.

The passage is very specific in mentioning that it is where actual damage is caused to a chattel, to wit, a collision between two ships or motor-cars, that the plaintiff will be able to recover general damages for the loss of the use of his ship or car during repairs.

M.A. Jones in his Textbook on Torts (8th Ed.). Oxford University Press stated as follows:

> *1.5.1.4 Damage to property*
>
> *"The basic rule for the measure of damages is again that the claimant should b e restored to his position before the tort was committed. Where the property has been completely destroyed, the measure of the loss is the market value of the property at the time of destruction… Damages are also recoverable for loss of use of property before it is replaced…* ***Damages for loss of use may include the cost of***

hiring a substitute where it is reasonable to do so*..." Emphasis supplied*

Here too, there are broad indicators in the passage that what is being stated in reference to "damages for loss of use" applies only to cases where there has been an actual damage to chattel. The indicators include the title of the passage itself ("Damage to property"), and the fact that the passage begins with the phrase *'in the case of damage to property'*.

Nowhere in any of the authorities submitted by Counsel for the plaintiff is it stated that a plaintiff who does not establish during the trial that some damage was caused to his chattel is nevertheless entitled to general damages for loss of use.

In view of all the above, it follows that although the Defendant is liable for Detinue in this case, he is not liable for damages for loss of use of the vehicle and the refrigerator because the plaintiff failed to establish that actual damage had been caused to these chattels.

However, as stated above, where the defendant is liable for Detinue, the plaintiff is entitled to either a return of the chattel detained or for its value, together with damages for its detention.

In this present case, the learned trial court judge has already awarded damages for the value of the refrigerator and the car. Therefore, all that the plaintiff is entitled to in this case is damages for wrongful detention.

In the instant case, the learned trial judge has correctly ordered the plaintiff to be entitled to the replacement value of the chattels, i.e. the car and the refrigerator. In this case, even though the learned trial Judge expressed some disgust about the exaggerated values placed on the chattels, i.e. ¢65 million cedis for the car and ¢25 million for the refrigerator, he nonetheless granted them.

The plaintiff must indeed find himself very lucky to have gone away with the lackadaisical manner in which he proved his assertions in a court of law. What must be noted is that, the courts have times without number reiterated the fact that it is a cardinal rule of evidence that whoever asserts must prove. In other words, the burden of proving an assertion is

on the person who makes the positive. See Section 17 (1) and (2) of the Evidence Act, 1975 NRCD 323.

In our opinion, it was certainly not enough for the plaintiff to have recited some figures as the replacement values for the chattels unlawfully detained. Proof in law means that sufficient evidence must have been led before the court i.e. by the production of Proforma Invoices from regular and accredited distributors of the chattels concerned as the current sale price of the chattels.

That way, there would have been satisfactory evidence led by the plaintiff to support the replacement value and cost of the chattels.

However, since there is infact no appeal against the replacement costs, the above is only an academic exercise and has no bearings on the fortunes of this appeal.

We are certain that the assessment of the damages for loss of use of the chattels by the trial court followed established practice. This is because, from the nature of the pleadings as already referred to supra in the statement of claim, the particulars of damages given indicate a clear intention that the items of damage are special in nature. This is so because the plaintiff specifically mentioned the amounts of loss per day. One would therefore expect that, those claims would be strictly proved by not only mounting the witness box to repeat the figures but by the production of documentary evidence as proof of payment of those amounts.

Alternatively, evidence could have been led to establish that the vehicle hired in the absence of the plaintiff's vehicle which was unlawfully detained cost so much and that the period of hire was for this or that period. The same could have been done for the refrigerator.

It was very unfortunate that the plaintiff did not do any of the above but chose only to repeat what he claimed it cost him to hire alternative vehicle and refrigerator.

We believe that there should have been some element of seriousness on the part of the plaintiff to convince the court about the genuineness of the claims he had brought to court.

In the absence of proper proof, the trial court was right in doubting the amounts quoted and using his discretion to award the amounts.

Assuming the nature of the claims for loss of use by the plaintiff of the chattels can be put in the category of general damages, in which case, the plaintiff need not strictly prove the amounts pleaded, under the circumstances of this case, can the plaintiff be deemed to have acquitted himself such as would have enabled the court to have granted him enhanced awards other than what was granted or awarded him by the trial and appellate courts?

In evaluating the submission of learned counsel for the plaintiff Mr. Ahenkorah that the damages being claimed by the plaintiff are in the nature of general damages, we realise that from the endorsement on the writ of summons, the plaintiff pleaded "damages for the detention" of the chattels simpliciter.

It was in the supporting statement of claim that the particulars of the damages were given as ¢250,000.00 per day for the car and ¢50,000.00 per day for the refrigerator from the date of wrongful detention i.e. 8th September 1997.

The traditional view which is supported by a litany of authorities is that, if the plaintiff expects the court to award him the amounts specially pleaded in the statement of claim, then he ought to strictly prove the amounts so claimed.

In the circumstances of this case, for example the plaintiff would have to lead evidence as to the exact expenditure of the amounts.

It would be expedient to tender receipts if these were obtained from the owners of the chattels that were hired or procured in lieu of those that were wrongfully detained.

Depending on the circumstances of the particular case, evidence might have to be led by calling witnesses from the places concerned to support the fact that the amounts claimed were infact duly expended and paid.

On the other hand, the pleadings of the plaintiff can also be taken to be a claim for general damages. In this case, the amounts stated by the plaintiff

in the statement of claim as damages for loss of use can be used as a guide or indicator upon which the trial court is to act.

In the instant case, the learned trial Judge and those of the Court of Appeal considered the figures mentioned by the plaintiff in his evidence in chief as grossly exaggerated. We are of the considered view that it was perfectly within the discretion of the trial and appellate court Judges to have cut down the amounts the plaintiff claimed without proof in view of the evidence on record.

It must be noted that, the lower courts correctly applied themselves to the law when they held that the plaintiff did not strictly prove the damages for loss of use being claimed by him. It does not really matter whether the damages are described as general or special. The distinction between the two really lies in the fact that whilst special damages must be strictly proved in order for a claimant to succeed, that of general damages need not be strictly proved. Like in the instant case, because the trial and appellate court judges did not consider the plaintiff as having proved satisfactorily the damages for loss of use, they awarded what in law is called nominal damages. Since both parties have all referred to the case of ***Norgbey & Anr v Asante & Anr [1992] 1 GLR 506, at 516***, where Acquah J, (as he then was) commented in some detail on this issue of special damages and what is considered as proof and the various levels of proof required at each stage, we will quote in extenso the said statement from page 516 – 517 of the report

> *"The plaintiff claims special and general damages against the defendant. And it is trite learning that special damages must be proved and proved strictly. But let me digress a little to explain what is required in a proof of special damages and the consequences following from the failure by a claimant to satisfy the said requirements. A successful proof of a special damage involves basically proof of the subject matter of the special damage, and then proof of the value claimed for that subject matter. Now these two-fold requirements may boil down to two, three or four steps depending on the nature of the claim. For example, where someone claims as special damage the sum of ¢10,000 as being the value of his damaged watch, this will involve the claimant in proving first, that the defendant did*

indeed destroy his watch; and secondly, that the value of the damage watch is ¢10,000. Again where the claim for special damage is ¢10,000 being cost of repairs for a damaged watch, the claimant has to prove first that the defendant did damage his watch; secondly, that the claimant did repair the said damaged watch; and thirdly, that the repairs cost him ¢10,000. Thus in my recent judgment in ***Fuseini v Ayivor, High Court, Ho, 12 April 1991****, unreported, I explained what is required of a plaintiff who claims as special damages the cost of repairs on his damaged vehicle as follows:*

> *"I am of the view that a desirable way of establishing cost of repairs on a vehicle is first to establish the actual damage to the vehicle. And this may be achieved by the evidence and report of the vehicle examiner who examined the vehicle at the request of the police. In the absence of a vehicle examiner, or in addition to him, any competent engineer who examined the vehicle after the accident can equally testify on the extent of damage the vehicle sustained. Having established the extent of damage, the second step is to call evidence of the mechanics who actually worked on the vehicle to testify on the work done and how long it took them to complete the work. And the final step is the tendering of the receipts for the items bought and the amount paid as workmanship. Where there are no receipts, satisfactory evidence can be led to establish that the parts and workmanship testified to by the mechanics were in fact paid for. In my view these are the three steps a plaintiff has to go through in establishing his claim for cost of repairs."*

Acquah J, (as he then) was, continued the judgment as follows:-

> *"The legal position therefore is that in a claim for special damages where the claimant succeeds in proving both the subject matter and the value, he is entitled to be awarded the value he claims. But where he succeeds in proving only the subject matter but fails to prove the value of the subject matter, the claimant is not to be denied any compensation. In such a situation the claimant is entitled to be awarded some value for the damaged subject matter. In* ***Yirenkyi v***

***Tarzan International Transport [1962] 1 GLR 75 at 78**, Ollennu J (as he then was) explained it thus:*

> *"The plaintiff completely failed to prove the special damages as claimed. But that failure does not disentitle him to some damages. There is no doubt that he suffered some loss. The fact that the evidence he led has not made it possible for the court to assess damages is not completely fatal. It has been held that in such cases he should be awarded nominal damage [sic]…"*

Applying the facts of the above case to the facts of the instant case, we are of the considered view that, the plaintiff in the instant case failed to actually prove the replacement values of the chattels as well as the damages for the loss of use.

However, since there is no appeal against the replacement value we will rest that matter. The issue of the damages for loss of use however raises some concern in view of the fact that the plaintiff also failed to satisfactorily prove the need for the payment of an enhanced amount. It was definitely not sufficient for the plaintiff, to mount the witness box and repeat the same amount pleaded as damages for loss of use without more.

We are indeed fortified in the views we have taken in this case by reference to the statement of Blay JSC in the case of **Chahin and Sons v Epope Printing Press [1963] 1 GLR 163 at 168 S.C** where Blay JSC stated thus:-

> *"They (i.e. the plaintiffs- respondents) merely presented a list of articles they alleged they had lost, fixed prices to them, and without attempting in any way to prove their values, expected the court to award them damages to the tune of the amounts claimed. I am therefore in agreement with the submissions of counsel for the appellants that the learned trial Judge erred in assessing special damages of £2,507 10s which is the amount the respondents claimed in their statement of claim and particulars."*

We are however of the view that there was infact no real basis for the exclusion of Saturdays, Sundays and public holidays from the

computation of the damages for loss of use of the chattels at the rates awarded by the trial court and affirmed by the Court of Appeal.

It should be noted that once the car and the refrigerator were not being used in strict sense for commercial activities but for personal and domestic use, the exclusion of those days were unwarranted.

We would also direct that being chattels, which were personally being used, the order that the amounts of damages awarded should be taxed is not well founded and is accordingly set aside.

An appeal generally is by way of re-hearing of a case. See case of ***Tuakwa v Bosom [2001-2002] SCGLR 61.*** We are therefore of the considered view that, applying the principles on Detinue as a tort, the plaintiff herein was legitimately entitled to replacement value of the chattels, to wit the refrigerator and the motor car for wrongful seizure. On the same principles, the plaintiff should not have been entitled to damages for loss of use of the chattels as he did not establish that any damage was caused to the chattels.

On the contrary, we are of the view that, the plaintiff should have claimed damages for wrongful detention of his chattels, i.e. damages in detinue and not the loss of use of the chattels.

In order not to completely change the tenor of the award of damages, we would not pursue that course of conduct but stick to the following decisions.

In the result, the appeal herein is dismissed, save for the following orders:-

1. The damages for loss of use of the car and the refrigerator awarded by the trial and appeal court to the plaintiff are extended to include all Saturdays, Sundays and public holidays during the period.

2. The said amounts are not to be taxed.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) DR. S. K. DATE- BAH

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

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