

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2010/0138

BETWEEN

CARL DE FREITAS

CLAIMANT

and

R & R INVESTMENTS LTD.

DEFENDANT

Appearances:

Mr. Emery Robertson Snr. and Ms. Samantha Robertson with Ms. Maia Eustace for the claimant.
Ms. Patina Knights for the defendant.

2017: Sept. 26
Oct. 3
2018: Jan. 11
Feb. 26

JUDGMENT

BACKGROUND

[1] **Henry, J.:** By Claim Form filed on 30th April 2008 and amended subsequently¹, Mr. Carl De Freitas brought action against R & R Investments Ltd. ('R & R') for the value of 22 steel sheet piles, damages and costs. Mr. De Freitas alleged that from about 1994, he kept the piles on land owned by him at Ratho Mill, Saint Vincent. He claimed that R & R bought the land from RBTT Caribbean

¹ 25th January 2010.

Bank Ltd.² in April 2006 and has converted the steel piles to its own use. He contended that in doing so R & R went onto his land.

- [2] Mr. De Freitas alleged that he made several visits to the subject property and eventually spoke with Mr. Reginald Adams Snr., a director of R & R. He said that he made several attempts to remove the steel piles and to get access to the premises but was unsuccessful. He complained that R & R utilized the steel piles in the construction of a building. He seeks USD\$121,550.00 as the replacement value.
- [3] R & R denied that Mr. De Freitas owned the land at the material times or kept anything on the lands at the time of the purchase. It contended that it bought the land and everything on it from RBTT Bank Caribbean Ltd. It acknowledged that Mr. De Freitas had asked Mr. Adams for steel sheets on the land but insisted that there were only about 5 such sheets.
- [4] R & R pleaded that Mr. Adams informed Mr. De Freitas that pieces of steel sheets were scattered around the property which he considered to be junk, and offered them to him on condition that he removed them expeditiously. It claimed that Mr. De Freitas did not collect them and when the site was being prepared they were therefore covered up, and used for foundation support. It denied Mr. De Freitas' claim. I have found that R & R is not liable to Mr. De Freitas.

ISSUES

- [5] The issues are:

- (1) Whether R & R Investments Ltd. converted to its use, 22 steel piles belonging to Carl De Freitas?
- (2) To what remedies is Carl De Freitas entitled?

ANALYSIS

Issue 1 – Did R & R Investments Ltd. convert to its use, 22 steel piles belonging to Carl De Freitas?

- [6] Mr. De Freitas is a retired businessman. He bought the subject lands from P. H. Veira & Co. Ltd. in

² Formerly known as 'Caribbean Banking Corporation'.

1994. He testified that one of its directors, Mr. Phillip Veira, gave him 22 steel sheet piles which were already on the property under a flamboyant tree. He said that he did not know how long they were on the land, however he left them there. He indicated that the land was partially enclosed by a fence, but had no gate. He claimed that he subsequently made it more secure by putting a chain and lock on it.

[7] Mr. De Freitas embarked on a charter boat operation business from that location and reclaimed land from the sea as part of his endeavours. During this process, he engaged a bulldozer to push 'stuff' off the property into the sea and arranged for trucks to bring soil and more 'stuff' to dump on it. He eventually secured a loan from RBTT Bank Limited to further develop the business. He admitted that the repayment fell into arrears and in 1999 the bank notified him that they intended to sell the property.

[8] Mr. De Freitas took no steps to remove the steel piles from the property at that time. He testified that he made arrangements to regularize his account with the bank, as a consequence of which he and the bank arrived at an understanding. He did not articulate what this 'understanding' entailed and provided no documentary evidence of the same. He remarked that the bank never advertised the property for sale; however, he erected a 'For Sale' sign.

[9] Mr. De Freitas stated that sometime in 2005, someone went into the bank and offered \$555,000.00 for the property which the bank refused. He claimed that he was not aware that the bank still intended to sell the property. He recalled seeing Reginald Adams Snr. on the subject lands sometime in 2006. Consequently, he inquired of the bank's loans manager and manager who both denied that they had authorized anyone to enter the property. It does not appear that Mr. De Freitas confronted Mr. Adams Snr. about the implied trespass. He made no such assertions.

[10] Mr. De Freitas indicated that he was aware that the bank could sell the property if he breached the terms and conditions of the mortgage. He maintained that although he was in arrears in 1999 in 2005 he was satisfying them. In any event, he said that sometime after he saw Mr. Adams Snr. on

the land, the bank's manager notified him by telephone that Mr. Adams had bought the property for \$525,000.00.

- [11] Mr. De Freitas indicated that about a week later he went to the property where he met Mr. Adams, and informed him that he would send someone to pick up the sheet steel piles. He observed that they had by then been removed from under the flamboyant tree, placed more central on the land and were covered with fresh dirt. Mr. Reginald Adams refuted Mr. De Freitas' assertion that there is a flamboyant tree on the site or that one was there in 2006. Be that as it may, Mr. De Freitas contended that R & R has utilized the steel piles in its construction and is therefore liable to him for compensation for their replacement value.
- [12] His witness Mr. John Mc Kenzie testified that sometime in 2006 he went to Ratho Mill in a truck to pick up the steel piles on Mr. De Freitas' behalf. He could not say when exactly but he remembered seeing them stacked under a tree at the place called 'Point' on a previous occasion. He did not count them he said, so he could not say how many there were. He explained that when he got there around 2.00 p.m. the place was locked and there was a chain across the entrance. He said he came out of the truck but did not try to go under the chain because that would have been considered entering onto private property. He indicated that he knew that the property belonged to Mr. Adams.
- [13] Mr. Mc Kenzie recalled seeing Mr. Reginald Adams Jnr. a couple of weeks later and telling him that he had come to pick up the steel piles for Mr. Carl. He said that he got no definite reply from Mr. Adams. He stated that after his conversation with Mr. Adams, he returned to the location at 'Point' with Mr. De Freitas and they took pictures. It is not clear whether this took place in 2006 or sometime later. No such pictures were adduced.
- [14] Mr. Mc Kenzie stated that on that occasion he remembered seeing the steel sheet piles in an upright position next to where the concrete walls to the building were being casted. Under cross-examination he changed that part of his testimony and stated that the steel piles were lying on the ground under the tree and they appeared to be rusted. He then testified that some were upright and some were lying down. He insisted that this is what he saw on both occasions when he went to

the site. He conceded that his memory would have been better when he provided the witness statement in 2010.

- [15] Mr. Mc Kenzie said that the steel piles were very heavy and could not be lifted by him and Mr. De Freitas. He estimated that it would take about 4 persons to lift one steel pile. He indicated that they would have obtained help if necessary. He testified that the truck had a lift or hoist which was capable of lifting up weight of about a ton. He explained that the tray is lowered to the ground to facilitate the loading of items into the truck but that one would have to take the item over to the truck and deposit it onto the tray for lifting.
- [16] Mr. Reginald Adams provided testimony on R & R's behalf. He indicated that his father Reginald E. Adams is also a director of R & R. According to him, the company bought the subject land from RBTT Bank Caribbean Limited in 2006. He testified that the land had lots of 'stuff' on it, such as rubble, an old truck chassis, old bent-up steel rods of varying sizes, heaps of debris, dirt and about 5 old rusted sheet piles scattered among the rubble. He characterized it as being 'like a dump site' with the rubble covering an area of about the first fifty feet at the entrance of the property.
- [17] He recalled that R & R was ready to commence work about 1 month after Mr. De Freitas was told that he could have the steel piles. He testified that within 6 weeks of purchasing the property, the company began bulldozing the land, doing earthworks and dumped materials on it which they purchased for that purpose. Under cross-examination he admitted that the preparation of the construction site commenced in August 2007. He indicated that the construction lasted about 3 to 4 years and that work is ongoing. He said that once work started it continued every day except Sunday, and someone was always present.
- [18] He said that during preparation of the site for construction they encountered pieces of steel rooted in the soil. He explained that they were so firmly encased that they secured the services of Winston Sandy to cut them. He indicated that as the steel piles were cut away they were rolled back into the foundation.

- [19] Mr. Adams explained that there were toilets and other items on the site. He said that he considered them to be garbage. He could not remember how many toilets or steel piles were met on the site. He recalled counting a lot of steel beams and around 10 or 11 toilets. He recalled that the steel piles were all tossed around and stuck into the soil. He remarked however that if they were any good they would have kept them.
- [20] Mr. Adams claimed that he did not know to whom the 5 steel piles on the land belonged and he made no inquiries. Under cross-examination he said that they were on top of the soil when the land was purchased. At one point he said that they were embedded in the soil. He added that there were other pieces of steel piles embedded in the ground, which were sticking out and as a result they had to be cut out of the ground. He could not remember how many were sticking out in that fashion. He accepted that there might have been more than five and added that it could have been less. He admitted that he counted them but said that he could not remember if there were 5, 6 or even 3.
- [21] Mr. Adams testified that his father told him that Mr. De Freitas had come to the site and said that he would like to collect the 5 steel piles. He said that his father told Mr. De Freitas that he could have the piles but he would need to hurry because construction would begin soon. He maintained that Mr. De Freitas had nothing on the land. He explained that even though he had nothing there, 'we' (presumably the company) gave Mr. De Freitas a lot of items from the land, because they had no use for them.
- [22] He was adamant that he could not state categorically how many steel piles were on the land. He testified that he did not remove them before the work started and that the piles were therefore pushed into the earth and covered with dirt and sand. He denied that Mr. De Freitas made several attempts to collect the steel piles which were frustrated. He refuted Mr. De Freitas' assertion that there were 22 steel piles and denied that R & R used the 22 steel piles as alleged.
- [23] He testified that he cannot deny that 22 steel piles were on the land because he does not know the exact number of piles which were lodged in the ground. He said that since he never saw them he

was not able to count them. He indicated that they heard nothing from Mr. De Freitas about the steel pieces until the action was initiated. He acknowledged that R & R had received a letter from Cato & Cato on behalf of Mr. De Freitas, dated 27th June 2007. He was shown a copy of the letter. In it, Ms. Agnes Cato represented that she was retained by Mr. De Freitas to write requesting that he be permitted access to remove 22 steel piles, each 20' long.

[24] Ms. Cato recorded further that each steel pile was valued at US\$5,000.00 amounting to a total of \$110,000.00. She wrote that Mr. De Freitas had spoken to the addressee on several occasions about collecting the steel piles but found the place locked each occasion he went to collect them and he therefore could not gain access to the premises. She indicated further that he had tried unsuccessfully to contact Mr. Reginald Adams to discuss the matter. She wrote that Mr. De Freitas had engaged the services of John 'Striker' Mc Kenzie who would be contacting R & R to make arrangements to remove the steel piles. Ms. Cato ended the missive by pointing out that if Mr. Mc Kenzie's efforts were frustrated or the piles were not delivered, legal action would be taken to secure their return.

[25] When the letter was shown to him, Mr. Adams noted that he had a meeting with Mr. De Freitas long after construction had started on the property and about 18 months before he gave his witness statement in May 2010. At that time, he said that Mr. De Freitas had come to his home to fix an ice machine. He remarked that Mr. De Freitas said nothing to him about the matter of return of the steel piles. I believe him. He stated that he considered the things found on the land to be part and parcel of the land and that they belonged to R & R. He added that he did not believe that Mr. De Freitas had anything on the land which belonged to him.

[26] It has not gone unremarked that Mr. De Freitas testified about speaking with Mr. Adams on one occasion about the steel piles, and not several as mentioned in the letter. Likewise, Mc Kenzie did not say that he had contacted R & R to make arrangements to collect the steel piles. His testimony is that he showed up unannounced and met the entrance inaccessible because it was chained. It strikes me that Mr. De Freitas would be aware of the presence of a chain at the entrance since he claimed that he installed it.

- [27] Mr. Adams' account that the site was being worked 6 days a week as not controverted. I therefore accept it. It seems to me therefore that if Mr. De Freitas and Mr. Mc Kenzie had visited the site as alleged, they appeared to have done so when it was closed for business and maybe even on a Sunday. Neither could remember what date they went. I therefore infer and conclude that they did so when the business was closed. Even if I accept Mr. Mc Kenzie's account, that he visited the place on two occasions, once with Mr. De Freitas and the other time alone, my impressions are that it is remarkable and perhaps not merely coincidental that they arrived there when the business was not operating.
- [28] Mr. De Freitas did not dispute Mr. Adams' recollection about the time when Mr. De Freitas repaired Mr. Adams' ice machine under amicable circumstances. There did not appear to be any hindrance to Mr. De Freitas contacting Mr. Adams to arrange a mutually convenient time to recover the steel piles. Mr. De Freitas did not say that he made such contact and he provided no statements regarding any stone walling by R & R in accommodating him at a mutually convenient time to recover the steel piles. What he did allege was that he made numerous attempts to get in touch with the Adams', but he did not say when and by what means.
- [29] What appears to have happened is that Mr. De Freitas chose to send his agent and to show up at Point in Ratho Mill at his own convenience without regard to the schedule of R & R and without prior appointment with R & R's principals. In such circumstances, he would have been taking a chance that he would meet someone, unless he went during the normal hours of operations. Mr. Adams' testimony is that R & R operated from that location six days each week and that trucks and other vehicles routinely entered during those times, was not discredited. I believe him. Mr. De Freitas has not established on a balance of probabilities that he went there during such hours. I find that he did not.
- [30] Mr. Winston Sandy is a welder. He testified that he was employed by Mr. Reginald Adams Snr. to cut some iron out of the ground at a site in Ratho Mill which was being cleared by a track excavator machine. He referred to the area as a dump site, with large concrete slabs, steel from 'broken down' buildings and other stuff. He said that he went there about 2 or 3 times to cut off pieces of

iron which were ensconced in the ground at different places at the site. He observed that as the machine pushed the area to clear the site, pieces of iron were discovered. He noted that the machine could not push them so he had to cut them off.

[31] He indicated that he also had to cut some of the steel from the concrete slabs to enable the machine to move freely. He observed that pieces of flat plates were also found on the property and that he had to cut them off. He recalled that all of those pieces of steel and concrete slabs were covered up under other 'rubble- dirt stone'. He was not discredited and his testimony was not contradicted. I therefore accept his account.

[32] Although Mr. De Freitas pleaded that the subject land was his, he seemed to have conceded that it had been sold to R & R by RBTT bank. However, he testified that he had taken action against RBTT bank and was awaiting final resolution of that matter. His legal practitioners were unable to provide any specifics about that claim. The court was left with the impression that he had not quite accepted that the sale of the property was legitimate.

[33] At the close of the trial, the court asked learned counsel Ms. Samantha Robertson about the claim no. in the referenced case. She indicated that it was claim no. 282 of 2007 and added that she had not appeared in it. Mr. De Freitas did not supply the court with any further particulars about that matter.

[34] The court is required to take judicial notice of related suits progressing within its jurisdiction, even if they are assigned to other judicial officers. In pursuit of the interests of justice, I accordingly obtained the referenced court file held by the Registrar as custodian. I discovered that the claim referenced by Mr. De Freitas was actually a proceeding started by Notice of Application on August 7th, 2007. No claim form was filed in that matter.

[35] The applicants were Syl's Investments Limited, Blue Waters Charters, Carl De Freitas and Audrey De Freitas. They obtained an *ex parte* injunction on 10th August 2007, restraining RBTT Bank Caribbean Limited ('the bank') from selling, charging, disposing of or dealing with any property owned by them. It also compelled the bank to provide them with details of all accounts held in their names particularly all transactions relating to receipts of monies realized from '... the sale ... of

property known as 'Point' situate at Ratho Mill, comprising 2 roods and 15 poles of land ... the 22 steel piles ...which were on the said lands at 'Point' which [the bank] sold and has not accounted [for] to [Mr. De Freitas] ...'.

[36] The injunction and related orders were set aside by court order dated 9th June, 2008. Based on endorsements on the file and court orders filed in it, it appears that the only outstanding application concerning Mr. De Freitas, was one by the bank. It was seeking an order for oral examination of Mr. De Freitas for the purpose of assessing his means to satisfy his debt obligations to the bank. It was filed on 18th November 2009 and oral examination was ordered and scheduled to take place on 30th November 2009. There is no indication that it took place. The matter was struck out for want of prosecution, by court order dated 15th March, 2016.

[37] In light of the foregoing, I have no difficulty in finding that there is no pending matter involving Mr. De Freitas and RBTT bank regarding the legality of the sale to R & R. In the premises, I am satisfied that the subject parcel of land is owned by R & R and that Mr. De Freitas has no interest, right or title in it. The court will therefore limit its inquiry in the instant case to ownership of the steel piles.

[38] At the end of the trial, the parties were ordered to file written submissions and list of authorities. Mr. De Freitas filed skeleton arguments prior to the trial but no written submissions as ordered. As I understand it, his position is that the steel piles belonged to him even after the sale of the property to R & R; and further that R & R had a duty to inquire about the owner and give him (the owner) an opportunity to remove them.

[39] Mr. De Freitas submitted that this case involves a 'straight action of conversion'. He argued that R & R cannot avail itself of the defence of 'purchaser for value' because a 'prudent purchaser would always inquire'. He contended that the steel piles are not normally on land. He asserted that at all material times he had stored chattels on the land, including 22 steel sheet piles, 20 feet in length each. He contended that R & R admitted finding a quantity of steel sheet piles and assorted steel on the land.

- [40] He submitted further that there is nothing on the face of Deed of Conveyance 1902 of 2006 purporting to transfer any interest claim or title to chattels on the land to R & R. He contended that the bank had no legal or equitable interest in the chattels. He argued that it is trite law that chattels are not fixtures and therefore do not form part of the land and cannot be conveyed by deed.
- [41] R & R accepted that the tort of conversion involves an interference with rights of ownership to chattels. It submitted that the claimant in an action for conversion must show that he had the requisite possessory title in law, to either actual possession or the right to immediate possession.
- [42] Quoting from Salmond on Torts, it adopted the statements of the learned author where he stated:
'A conversion is an act (or complex series of acts) of wilful interference without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. Two elements are combined in such interference: (i) a dealing with the chattel in a manner inconsistent with the right of person entitled to it, and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right. But where the act done is necessarily a denial of the other's right or an assertion of a right inconsistent with it, the tort may have been committed. For conversion may consist in an act deliberately done inconsistent with another's right though the doer may not know or intend to challenge the property or possession of that other.'³
- [43] Mr. De Freitas submitted that the chattels were converted because R & R had knowledge that he was the lawful owner. He contended that by its own admission R & R 'pushed the steel and stone and rubble into the earth and covered them up with dirt and sand'. He argued that those actions constitute wilful interference with his right to possession, and are marked by the absence of any lawful justification. He submitted that he was thereby deprived of the use and possession of his steel.

³ At para. 125.

[44] R & R countered that apart from Mr. De Freitas stating that there were 22 pieces of steel piles given to him by P.H. Veira in 1994, he has provided no evidence to show that in April 2006, at the date of purchase of the land that there were 22 steel piles on the land. It argued further that but for the letter dated June 2007 from Cato & Cato to R & R stating that he is owner of 22 steel piles situate on the land, there is no evidence showing that in 2006, he demonstrated or stated to the R & R's representative that he was the owner of the steel scattered on or embedded in the land. It contended that at all material times R & R was not aware of the prior owner of the land or that the rusted pieces of steel scattered and embedded in the dirt belonged to him or was of any value.

[45] Mr. De Freitas argued that conversion is also known as the tort of strict liability. Quoting from Halsbury's Laws of England, he contended that:

"In modern times, the word 'conversion' has acquired a technical meaning. It is a common law claim which imposes strict liability for any wrongful interference with the right to possession of a chattel."⁴

He submitted that whether the R & R's representatives laboured under the 'misimpression' that the steel sheet piles were worthless is irrelevant, if it is established that R & R knew the steel sheet piles were his property when it disposed of them or used them in its foundation.

[46] Mr. De Freitas argued that it is uncontroverted that he drew the attention of R & R to his ownership of the steel sheet piles and arranged to collect same. He reasoned that their subsequent disposal or use by R & R constitutes an act of wilful interference inconsistent with his right. He cited in support, the judgment of Mummery LJ in **MCC Proceeds Inc. v Lehman Bros International (Europe)** where he said:

'Conversion is a common law action, tortious in form imposing strict liability for a wrongful interference with the right to possession of a chattel. It consists of an act of wilful interference without lawful justification with any chattel in any manner inconsistent with the rights of another whereby that other is deprived of the use and possession of it.'⁵

⁴ Vol. 45(2) 4th Edition Reissue, para. 542.

⁵ [1998] 4 All ER 675 at page 686.

- [47] R & R submitted further that the bank has not been joined as a party to the proceedings and there is a lack of evidence to indicate if the bank took steps to do what was “right and reasonable.” It contended that what can be gleaned is that in 1999 when Mr. De Freitas was informed of the bank’s intention to sell the property, he took no steps to vacate it, and waited over 7 years to seek to claim right of possession of the steel piles.
- [48] There is some merit to this contention. I note that Mr. De Freitas took legal action against the bank in 2007 to prevent it from selling the subject property and also for an accounting of the proceeds of sale of the 22 steel piles. This signifies that he was well aware that the bank had sold or intended to proceed with the sale of the property. In the circumstances, I infer that he had notice that the bank intended to exercise its power of sale over the land. He would therefore have been put on notice by the bank, that it would have been in his interest to secure any valuable chattels he might have had on the land in the event that such a sale had proceeded.
- [49] Curiously, Mr. De Freitas has not provided this court with any details about any notice he received from the bank in respect of the sale and what actions he took to remove his property from the land at that time. Interestingly, that the action was initiated after the property had been sold to R & R. By his own admission, Mr. De Freitas recognized that the property had been conveyed to R & R by the time he made the request to the company for the steel piles.
- [50] Notwithstanding knowledge of the sale, Mr. De Freitas was proceeding in court to obtain what could only have been described as a remedy after the fact. He did not seek recovery of the land from the bank. He did not allege fraud or mistake by the bank in that matter. Rather he was seeking details of payments and other dealings with the bank. His claim for an injunction having been made after the fact was too late, because the court cannot restrain a sale which has already taken place.
- [51] The parties have correctly outlined the features of the tort of conversion. It is characterized by the deliberate misappropriation by one person of goods belonging to another. It is immaterial if the

interference is done in good faith or through ignorance.⁶ It usually involves complete assumption of possession by the tortfeasor accompanied by disposal in a manner inconsistent with the owner's rights.

[52] R & R submitted that it is evident that after being informed of the bank's intention to sell the property, Mr. De Freitas still had access to it as he affixed his own 'for sale' sign, yet took no steps to remove items that he claims were worth US\$121,550.00 or EC\$326,750.71. It argued that the only evidence as to the state of the property at the time of its purchase, comes from the company which averred that the site is as a dump site.

[53] R & R submitted that on acquiring the lands at Ratho Mill it also acquired possession of the steel piles because they were not given it. It argued that in those circumstances, the possessor would reasonably be in a state of uncertainty as to whether the items belonged to anyone and if they did whether they were abandoned. In support, it relied on a pronouncement by Edelman QC in the case of **Robot Arenas Ltd. & Anor v Waterfield & Anor**⁷, where he referred to Palmer on Bailment regarding the issue of abandonment.

[54] It states:-

'The notion of abandonment may apply in two different senses to objects found by a non-owner: one colloquial and one juristic. In the first sense, a loser may abandon the search for a lost object, whether by reason of other claims on his time, or a belief that the place where the object has been lost is one where others are likely to find it and return it. The loser in that position does not resign any proprietary or possessory claims to the chattel, and when the chattel is found the ordinary rules apply: the law recognises the paramount claim of the owner and, subject to that, normally awards the goods to the person first in possession. The second and more important is that of a divesting abandonment, where the finder comes upon a chattel that the owner has previously left or cast away with the intention of divesting himself not only of possession but also of ownership.'

⁶ Halsbury's Laws of England, Vol. 97 (2015), para. 604.

⁷ [2010] EWHC 115.

[55] Citing the cases of **Da Rocha-Afodu and another v Mortgage Express Limited and another**⁸ and **Robot Arenas Ltd & Anor v Waterfield & Anor**⁷, R & R submitted that:

‘the duty of an involuntary bailee is to do what is right and reasonable. What is right and reasonable depends upon the findings of fact in each case.’

[56] R & R argued that in the instant case there has been a divesting abandonment. It contended that what must be ascertained is whether Mr. De Freitas had an intention to abandon the steel piles and whether there was some physical act of relinquishment. It submitted that the steel located on the property were scattered throughout; approximately 5 pieces of steel was met on the surface, while other pieces were imbedded in the dirt and had to be cut out.

[57] R & R submitted that it did not know who the previous owner of the property was, the property having been purchased from the bank. I note however that this assertion is not maintainable, because the copy of the referenced Deed of Conveyance clearly refers to Carl De Freitas as the defaulting mortgagor and the previous owner.

[58] R & R contended further that having regard to the foregoing, other statements from the **Robot Arenas case** is equally germane. In this context it highlighted Edelman QC’s pronouncement that liability in conversion, in circumstances similar to Mr. De Freitas’ create a position that is:

‘... exceptionally, not a strict liability. Rather, liability depends on whether the Defendant knew or ought reasonably to have known that the goods belonged to a third party. ... The less valuable the property appears to be, and in particular if its continued presence on the property is causing inconvenience to the purchaser, the more reasonable it might be for the purchaser to treat the property as having been abandoned if it has not been collected or claimed within a reasonable period of time.’⁷

[59] It argued that it had indicated that someone was on the site every day except Sunday and further that Mr. De Freitas had approximately:

1. 7 years from the date he was informed that the bank intended to sell the property; and

⁸ [2014] EWCA Civ 454.

2. 1 month from when he claimed to have spoken to Mr. Adams; (who indicated that construction would soon begin on the site);
to remove his belongings.

[60] R & R contended that until Mr. De Freitas indicated that he wanted the steel, there is no evidence to suggest that R & R knew or had any inclination that it was useful and/or belonged to a third party. In this regard, it submitted that the **Robot Arenas case** is also very instructive where the learned judge stated:

'Mr. Waterfield, in the circumstances, was entitled to assume that Mr. Weston appreciated the urgency of the need to remove the equipment ...and that any reasonable businessman being appraised of the situation would realise that if it was his equipment that was in Building 29, there was an urgent need to remove it.'⁹

[61] R & R compared its position to that of the defendant in the **Robot Arenas case** in which the court in dismissing the claim for conversion, concluded that after a lapse of 5 weeks, the claimant was entitled to proceed on the basis that no one was laying claim to the goods and it was sufficient for him to conclude that they were no longer wanted. R & R contended that it was incumbent on Mr. De Freitas to remove the steel urgently after he was advised that they were going to begin construction works on the property very soon. That argument is eminently reasonable and commends itself to me.

[62] R & R pointed out that the evidence revealed that if he is to be believed, Mr. McKenzie visited the site once to collect the steel; without the proper equipment or enough persons to load the steel onto the truck. It argued that no-one came to collect the five pieces steel that were scattered on the surface or the pieces embedded in the soil, consequently they prepared the site for construction by cutting out the pieces sticking out of the soil and flattening the area. They maintained that the pieces of steel were not converted for their use but rather was shoved into the soil to enable R & R to prepare the site.

⁹ At paragraph 95.

- [63] Although Mr. De Freitas brought this action in conversion, it raises issues of bailment which have been highlighted by R & R. It is therefore necessary to consider them. In doing so, the court must also address the obligations of a mortgagee in respect of chattels belonging to a mortgagor, where the mortgagee chooses to exercise its power of sale over the mortgaged property.
- [64] It has been established that a mortgagor has a duty to deliver up vacant possession of property over which the mortgagee has elected to exercise a power of sale in the event of the mortgagors' default. That duty arises when the mortgagee takes all of the necessary contractual or statutory legal action and gives the mortgagor notice of its intention so to do.¹⁰ The duty does not 'kick in' during the preparatory stages of such action. Likewise, a mortgagee is deemed to be an involuntary bailee where he obtains possession of chattels after executing a warrant for possession or on taking appropriate action to exercise power of sale. In such circumstances he is obligated to do what is right and reasonable. The facts of each case will determine what right and reasonable.¹⁰
- [65] The learned authors of Halsbury's Laws of England state that the relevant conditions of the mortgage provide a framework within which that common law duty of care is to operate. They note that any of the trigger events in the mortgage conditions is merely a starting point. In each case, the court has to go on and ask whether what the mortgagee did was, in the particular circumstances of the case, right and reasonable.¹⁰
- [66] Since RBTT bank is not a party to the instant claim, and R & R is not a mortgagee, the foregoing principles are inapplicable. The relationship of mortgagor and mortgagee does not exist between the parties. The court must therefore examine the guiding principles which govern determination of related or similar issues arising in the instant case.
- [67] The learned writers of Halsbury's Laws of England shed some light on this subject. They opined:
 'while it is possible to be in possession of goods without knowledge of their presence, their nature, their location or even their existence, possession without knowledge of what is possessed does not generally render the possessor a bailee. However, although a possessor who is unaware that he is in possession of goods belonging to

¹⁰ Halsbury's Laws of England, Vol. 77 (2016) para. 564.

another is not a bailee, he may owe to the owner a duty to take reasonable care to identify the owner's interest before destroying or otherwise dealing in the goods.’¹¹

[68] They listed 3 scenarios which create what they referred to as an '**undisclosed or surreptitious bailment**':

‘(1) where a person, while being wholly unaware of the presence of the goods within his possession, in fact has possession of them; (2) where a person is aware that he is a bailee of certain goods (such as containers) but is unaware of some particular item of their contents; (3) where a person is aware of the specific possession of goods within his possession but erroneously believes that they are his own.’¹¹

[69] They recognized the existence of a fourth type of such bailment which arises ‘where a bailee of goods from a non-owner is unaware of the ownership of the true proprietor and therefore of the fact that he may be liable as a **sub-bailee or a substitutional bailee**.’ They noted further that:

‘In most of the decisions on 'unconscious' bailment the question has been whether there was a duty of care on the part of the possessor to safeguard the goods against theft, and the possessor's liability has been made conditional on his actual or constructive knowledge or notice of, and thus his implied consent to the possession of, the goods.’¹¹

[70] The learned authors noted that other obligations may flow from such bailments including the duty to:

‘avoid inadvertently occasioned damage, a duty to abstain from deliberate conduct which may constitute conversion of the goods, a duty to refrain from intentional damage or destruction, and a duty to institute reasonable inquiries as to the position, identity and interests of the owner where a reasonable person in the position of the passenger should have appreciated that the owner would wish to be consulted about any proposed action towards the goods.’¹¹

¹¹ Halsbury's Laws of England, Vol. 4 (2011) para. 104.

[71] They added that 'a possessor who has not consented to possession but is actually or should reasonably be aware of the presence in his possession of goods belonging to another will be treated (at least initially) as an involuntary bailee and is not liable except for deliberate (and perhaps reckless) damage to the goods.'¹¹

[72] The jurists provided further guidance on this subject. They remarked:

'unless the true owner has intentionally abandoned the chattel, his title to it is not lost and he may recover the chattel, provided that his right to bring a claim has not become barred by lapse of time, from any one in whose hands it may be found.'¹²

[73] Applying those principles to the facts of this case, it appears to me that R & R fits neatly into the category of a sub-bailee or a substitutional bailee. I harbour no doubt that RBTT bank was the original bailee of any chattels which remained on the subject property immediately before the sale and subsequent to the sale to R & R. The evidence is that the site looked like a dump site and contained a significant number of old fixtures including toilets, rubble and assorted metals. Mr. Adams acknowledged that there were 5 steel piles on the land. I accept his testimony that the other director - his father, gave Mr. De Freitas an opportunity to remove them and signaled to him that he should move with dispatch.

[74] If I am to act on Mr. De Freitas' testimony and that of his witness Mr. Mc Kenzie, I must find that the request was made for the steel piles as early as 2006. Mr. Mc Kenzie claimed that he went to the site on two occasions but met no one. I accept Mr. Adams' account that construction started in 2007. It means that Mr. De Freitas had about one year from 2006 to 2007 to recover his belongings (if any) from the site at Ratho Mill. He made only two attempts to do so.

[75] I find that R & R gave him more than adequate opportunity to make arrangements to locate and extricate any steel piles from the 'dump site', at Ratho Mill before they flattened the rubble in preparation for construction. I am satisfied that they did what a reasonable person would be

¹² Halsbury's Laws of England, Vol. 4 (2011) para. 116.

expected to do, short of placing them on a trailer and carting them to Mr. De Freitas' premises. R & R cannot be held responsible for Mr. De Freitas' slothfulness in retrieving from the property any belongings which he considered to be valuable. In all the circumstances, his inaction and delay can only be viewed as abandonment. R & R cannot be held liable in conversion. I find that they are not. Mr. De Freitas' claim against R & R Investments Ltd. for conversion of 22 steel piles is therefore dismissed.

Issue 2 - To what remedies is Carl De Freitas entitled?

[76] Mr. De Freitas has failed to establish his claim against R & R Investments Ltd. He is therefore not entitled to any relief. Having succeeded, R & R is entitled to costs which have been agreed at \$7,500.00.

ORDER

[77] It is accordingly ordered:

- (1) Carl De Freitas' claim is dismissed. Judgment is entered for R & R Investments Ltd.
- (2) Carl De Freitas shall pay agreed costs of \$7500.00 to R & R Investments Ltd.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar