

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: ANUHCV 1999/0252
BETWEEN:

DALE NAYLOR

Claimant

**AND
ST.JAMES' CLUB ANTIGUA LTD
CAPTAIN PHIL BOYD
HORIZON INTERNATIONAL GROUP LTD
BARRY MC GONIGAL**

Defendants

Appearances:

Kendrickson Kentish for the Claimant
John Fuller for the Defendant

**2016: February 15
2016: June 6**

ASSESSMENT OF DAMAGES

- [1] **GLASGOW, M:** Mr. Dale Naylor has approached the court for an assessment of the damages due to him following the grant of a judgment on liability against the first defendant. The facts leading to the damages sought by Mr. Naylor tell a sad tale.

BACKGROUND

- [2] In March 1998, Mr. Naylor sailed his yacht, the Watercooler II to Antigua. It was moored at the St. James' Club Marina, a property owned and operated by the first defendant (hereinafter St. James' Club). At the end of his vacation, Mr. Naylor left his yacht in the custody of Captain Phil Boyd, the 2nd defendant, who was the harbor master at the St. James' Club Marina. Before his departure from Antigua, Mr. Naylor entered into some sort of agreement with Captain Boyd that when he left Antigua, he (Boyd) was responsible for the care and maintenance of the yacht in exchange for a monthly fee. In addition to periodic maintenance, Captain Boyd was to ensure that the vessel was

presented for viewing by potential buyers and that it received shelter in case of a hurricane. Mr. Naylor left his contact details with Captain Boyd in case he needed to discuss any issues related to the vessel. The arrangement was to subsist for about six months until Mr. Naylor's return to Antigua for a further visit.

[3] On September 20, 1998 Hurricane Georges struck Antigua with devastating force. The destruction left many seeking recovery from their insurance companies for losses stemming from the storm. Thus enters the 4th defendant, Mr. McGonigal. Mr. McGonigal visited Antigua as an insurance adjuster under the instructions of the 4th defendant, Horizon International and took up residence at St. James' Club for the period of his duties. Sometime after arriving at St. James' Club, Mr. McGonigal and Captain Boyd entered into a scheme to extract monies from Mr. Naylor. When Mr. Naylor returned to Antigua on November 11, 1998, he was confronted with a "Council of Lloyd's Maritime Lien and Salvage Award". The document purported to be a claim for US\$105,625 and apparently followed an appraisal by Horizon International in respect of the salvage of the yacht during the passage of the hurricane. Mr. Naylor was not contacted by Captain Boyd at any point prior to his arrival in Antigua to inform him of the hurricane damage or the salvage or indeed the sums allegedly due to him. Mr. Naylor realized that the yacht was impounded as it was tied to the dock of the marina. Captain Boyd and Mr. McGonigal had, with the assistance of St James' Club, tied a chain link fence around the propeller shaft. St James' Club had apparently taken the word of the two gentlemen that the state of affairs leading to the lien and salvage award was indeed accurate. It turns out that the award flowed from the entirely fraudulent contrivance of Captain Boyd and Mr. McGonigal.

[4] When Mr. Naylor refused to meet the demands for payment made by Captain Boyd, Mr. McGonigal and St James' Club, he was met with a writ of summons taken out by St James' Club for the sum due for the fictitious claim. The long and short of it is that the writ of summons was dismissed by the trial judge as he was satisfied that the salvage award that the defendants insisted ought to be paid by Mr. Naylor was bogus. Mr. Naylor then issued these proceedings seeking relief for the losses suffered due to the wrongful acts of the defendants. The trial was conducted against St James' Club alone as Mr. Naylor had previously obtained a default judgment against all the other defendants. It was found at trial that St James' Club was liable to Mr. Naylor for his special

damages, general damages for wrongful detention of the yacht, general damages for the loss of business reputation and goodwill, interest and costs. The assessment of those heads of losses form the subject of this ruling.

SUBMISSIONS

Naylor's request

- [5] Mr. Naylor seeks damages for the wrongful detention of his yacht, depreciation, mental distress, conversion of the tackle and other equipment, loss of business reputation and good will, exemplary damages, interests and costs.
- [6] In respect of wrongful detention, Mr. Naylor's evidence is that the vessel was detained for fifteen days from 11th November to 26th November, 1988. He submits that, based on the cases of **Inverugie v Hackett**¹ and **AG v Gibson**², the court must award damages under this head of loss to be calculated by reference to the rental value of the yacht at the material time. The proposal for this head of loss is rental of approximately US \$ 20,000.00 per week amounting to US\$ 40,000.00 or XCD 104,000.00 for the period of the boat's detention.
- [7] In terms of depreciation in value, Mr. Naylor claims the sum of US\$ 60,590.00 being the difference between the vessels' assessed value of at least US \$105,000.00 and the subsequent sale price of US\$ 44,410.00. For this proposition he relies on the case of **Horsford v Jarvis**³.
- [8] For mental distress, Mr. Naylor says the entire experience had a terrible psychological effect on him. He felt trapped by powerfully connected people through no fault of his own. He continues to seek professional counseling for the unfortunate events which have left him with a fear of returning to Antigua lest he is arrested or kidnaped. The case of **Jackson v Horizon Holidays**⁴ is suggested as authority for the court's power to award the sum \$50,000.00 under this head of loss.

¹ [1995] 1 WLR 713

² SCCiv App. No. 36 of 2006 (Bahamas)

³ ABHCVAP 1994/0014

⁴ [1975] 1 WLR 1468

As to conversion of the tackle and other equipment, the court is asked to award \$20,000.00. The sum of US\$200,000.00 is sought for loss of business reputation and goodwill and 'a sum in the range of \$800,000 to \$1000, 000.00' as exemplary damages.

St James' Club response

[9] St James' Club firstly disputes the sum claimed as exemplary damages on the grounds that there is no evidence that its actions fall within what is said to be the '*closed and ... strictly limited*'⁵ basis for an award of this nature. Of the three categories set out in **Rookes v Bernard**⁶, the case for St James' Club is that this claim may only fall within the second category, that is to say, an award for wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant. In this instance, St James' Club says it acted without bad faith or malice and without regard to profit. There is no disputing that St James' Club honestly believed the maritime lien and salvage award to be legitimate. In fact it was specifically found by the trial judge in this claim that Captain Boyd's actions were for his own profit, not St James' Club. The court's attention is further drawn to the trial judge's finding that St James' Club did not knowingly participate in the fraudulent scheme. The trial judge also found that St James' Club did not authorize the fraudulent claim or engage the recovery process against Mr. Naylor without regard to whether or not the claim was true. St James' Club therefore concludes that Mr. Naylor has not proven this loss.

[10] On the issue of conversion of the tackle and other equipment, St James' Club argues that Mr. Naylor has two options; *he can recover damages for the loss suffered, or proceeds of the conversion obtained by the Defendant*⁷. In this case, St James' Club proposes an award for the loss suffered since it claims that it obtained no proceeds from the detention of the yacht. For the loss suffered, it is proposed that *the normal measure of damages for conversion is the market value of the goods at the time that the defendant converted them*⁸. St James' Club relies on

⁵ Paragraph 4 of the defendant's submissions filed on December 15, 2015

⁶ [1964] 1 All ER 367

⁷ *Supra*, note 4 at para.12

⁸ *Ibid* at para 14

Kuwait Airways Corp v Iraqi Airways Co⁹. St James' Club offers the sum of \$5734.78 on the basis that it is to compensate Mr. Naylor for the tri data recorder, rode, fenders and the tackle as these were the total of the goods lost to Mr. Naylor. St James' Club reasons that losses beyond the sum it has offered should not be granted since *"damages for conversion are linked to actual cost and market value, not just random figures or arbitrary as appears to be the case in respect of the \$20,000.00 being claimed."*¹⁰ St James' Club points out that there are no factors present on this assessment to warrant a departure from the normal measure of damages in particular the absence of any proof that it sought to benefit or unjustly enrich itself from the conversion. There is also no consequential loss present since St James' Club acted innocently throughout the encounter with Mr. Naylor. Different yardsticks must be applied where parties dishonestly appropriated property and where parties acted innocently. St James' Club acted in good faith throughout and no consequential loss has been proved against it.

[11] In respect of mental distress, St James' Club says that no award should be granted as Mr. Naylor has proved no such loss. In *"any event, damages for mental distress on its own, without substantiation of actual psychological or psychiatric harm, has historically been relatively nominal."* **Boardman v Sanderson**¹¹. St James' Club asks the court to disregard the evidence of Mr. Naylor's fear of returning to Antigua and the cancelling of this contract as consequences too remote as these outcomes could not be reasonably foreseen as a direct effect of the detention of the yacht.

[12] St James' Club offers the sum of US \$10,000.00 per week for the wrongful detention of the vessel estimated as US\$20,000.00 for the 15 day period of detention. The measure of damages proposed is the rental sum for the vessel at the time it was detained. The sum of \$162,381.20 is accepted as a fair offer for the depreciation of the vessel.

⁹ [2004] EWHC 2603

¹⁰ Supra, note 4 at para. 19

¹¹ [1961] EWCA Civ 6

LAW, ANALYSIS AND AWARD

Wrongful detention

- [13] Where recompense for loss resulting from the wrongful detention or interference with goods is concerned, it is said that *"the aim of the law is to provide a just remedy."*¹² See Lord Nicholls of Birkenhead in **Kuwait Airways Corporation v Iraqi Airways Company and others**¹³ where his Lordship stresses that

"The aim of the law, in respect of wrongful interference with goods, is to provide a just remedy. Despite its proprietary base, this tort does not stand apart and command awards of damages measured by some special and artificial standard of its own. The fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award just compensation for loss suffered. Normally ('prima facie') the measure of damages is the market value of the goods at the time the defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner. He has been dispossessed of his goods by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount, may be appropriate. The plaintiff may have suffered additional damage consequential on the loss of his goods. Or the goods may have been returned."

- [14] Relevant to this present discourse is his Lordship's earlier observation that¹⁴ -

"In days past, when forms of action and pleading technicalities reigned supreme, awards of damages for trover and detinue may have been made in accordance with set formulae. Those days have long gone. As long ago as 1879 Thesiger LJ, in Hiort v London and North Western Railway Co 4 Exch Div 188, 199, observed that the action of trover had been surrounded by technicalities which might in some instances have worked injustice. He continued:

'I think, however, of late the tendency of the courts has been to treat this action with more common sense than it had been previously treated. Just as in other actions of tort it is held that a person to

¹² Kuwait Airways Corporation v Iraqi Airways Company and others [2002]UKHL 19 at para 67

¹³ [2002]UKHL 19 at para 67

¹⁴ [2002]UKHL 19 at paras 63 to 66

whom a wrong has been done can only recover the damages which flow from the wrong; so in an action of trover it is the tendency of the courts to apply the same rule.'

In that case the Court of Appeal awarded the plaintiffs nominal damages of one shilling in respect of the defendants' conversion of sixty quarters of oats worth £79. The goods would have been equally lost to the plaintiffs if, instead of being misdelivered, they had been retained and properly delivered by the railway company under the subsequent lawful orders given by the plaintiffs.

Similarly, in Williams v Peel River Land and Mineral Co Ltd (1886) 55 LT 689, 692-693, Bowen LJ, whose judgments are invariably instructive, was scathingly dismissive of the idea that substantial damages should be awarded in an action for wrongful detention of goods when there has been no substantial loss. He said:

'You do not give damages in an action for detention in poenam; it is not a paternal correction inflicted by the court, but simply compensation for the loss. ... I cannot think that the law could really lay down anything so ridiculous as that a man should be compensated whether he suffered damages or not.'

This approach has been adopted by the Court of Appeal on several occasions. In 1966 it was applied in Wickham Holdings v Brooke House Motors Ltd [1967] 1 WLR 295, 299-300. In refusing to award damages measured by reference to the value of the Rover car converted by the garage dealer, Lord Denning MR said that the plaintiff finance company was 'only entitled to what it has lost by the wrongful act of the defendants'. Again, in Brandeis Goldschmidt & Co Ltd v Western Transport Ltd [1981] QB 864, 870: failing evidence of loss resulting from the wrongful detention of copper, the court awarded only nominal damages. Having acquired the copper for use as a raw material in its business, the fall in the market value of the copper occasioned the plaintiff no loss. Brandon LJ could not see why there should be any universally applicable rule for assessing damages for wrongful detention of goods: '[d]amages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained'. This view was echoed by the Court of Appeal in IBL Ltd v Coussens [1991] 2 All ER 133, 139 and 142.

66. A similar approach has been adopted by the High Court of Australia, in Butler v Egg and Egg Pulp Marketing Board (1966) 114 CLR 185. Damages for the eggs converted by the producer were assessed, not on their value at the time of the conversion, but upon the actual loss sustained by the defendant, namely, the profit the board would have made on a resale of the eggs".

[15] His Lordship later opined¹⁵

"I have noted that the fundamental object of an award of damages for conversion is to award just compensation for loss suffered. Sometimes, when the goods or their equivalent are returned, the owner suffers no financial loss. But the wrongdoer may well have benefited from his temporary use of the owner's goods. It would not be right that he should be able to keep this benefit. The court may order him to pay damages assessed by reference to the value of the benefit he derived from his wrongdoing. I considered this principle in Attorney General v Blake [2001] 1 AC 268, 278-280. In an appropriate case the court may award damages on this 'user principle' in addition to compensation for loss suffered. For instance, if the goods are returned damaged, the court may award damages assessed by reference to the benefit obtained by the wrongdoer as well as the cost of repair."

[16] The concept of the user principle was explained thusly in **Attorney General v Blake**¹⁶

"I shall first set the scene by noting how the court approaches the question of financial recompense for interference with rights of property. As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong: Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25, 39. Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle

¹⁵ [2002] UKHL 19 at para. 87

¹⁶ [2000] IP & T 1261 at pages 1267 to 1269

is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user: see *Whitwam v. Westminster Brymbo Coal Co.* [1892] 2 Ch. 538, and the 'wayleave' cases such as *Martin v. Porter* (1839) 5 M. and W. 351 and *Jegon v. Vivian* (1871) L.R. 6 Ch. 742. A more recent example was the non-removal of a floating dock, in *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359.

The same principle is applied to the wrongful detention of goods. An instance is the much cited decision of the Court of Appeal in *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246, concerning portable switchboards. But the principle has a distinguished ancestry. Earl of Halsbury L.C. famously asked in *The Mediana* [1900] A.C. 113, 117, that if a person took away a chair from his room and kept it for 12 months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? To the same effect was Lord Shaw's telling example in *Watson, Laidlaw & Co. Ltd. v. Pott, Cassels, and Williamson* (1914) 31 R.P.C. 104, 119. It bears repetition:

'If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise." '

Lord Shaw prefaced this observation with a statement of general principle:

'wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle . . . either of price or of hire.'

That was a patent infringement case. The House of Lords held that damages should be assessed on the footing of a royalty for every infringing article.

This principle is established and not controversial. More difficult is the alignment of this measure of damages within the basic compensatory measure. Recently there has been a move towards applying the label of restitution to awards of this character: see, for instance, *Ministry of Defence v. Ashman* [1993] 2 E.G.L.R. 102, 105, and *Ministry of Defence v. Thompson* [1993] 2 E.G.L.R. 107. However that may be, these awards cannot be regarded

as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule."

[17] Applying the foregoing to the facts of this case the following emerges –

- (1) "Where wrongful interference with goods is concerned, the law's aim is achieve a just compensation for the loss suffered. In this regard the injured party is to be allowed a measure of damages which, as far as a monetary award is possible, may put him in the position he would have been had he not sustained the wrong. The normal measure of damages is the market value of the goods at the time that they were expropriated. The circumstances may, however, dictate that another measure of damages is adopted that may yield a higher or lower compensation. The general guiding principle is that the award is assessed by the claimant's loss not by the defendant's gain. Notwithstanding this general approach to compensation, there may be cases where it is evident that the claimant has not strictly suffered financial loss by the temporary deprivation of the goods. The claimant is still to be awarded damages for being kept out of the goods. The defendant in such instances may be ordered to pay compensation based on the value of the benefit derived from the use of the claimant's goods;"
- (2) "In this case, for instance, Mr. Naylor has not complained that he suffered any direct financial loss, say for instance, that he used the vessel for hire or any other profit making activity or that he had to procure a temporary replacement during its detention. There is equally no evidence that St James' Club used the yacht for any purpose or obtained any benefit financial or otherwise from its detention for which it ought to account. There is nonetheless an assertion by Mr. Naylor of diminution in value;"

(3) "The absence of evidence that the vessel was profit earning or that St James' Club derived any benefit from detaining the same does not preclude an award. See **AG v Gibson**¹⁷,"

[18] Both parties propose that the award is calculated by reference to the rental value of the vessel. The rental value suggested is the rate paid for a yacht of that class and condition. Mr. Naylor states in his evidence that the rental value should be between US\$5120.00 to US\$460.00 per week. Mr. Naylor's recommended rates on his affidavit do not offer any assistance since there is nothing to substantiate or buttress his plain assertion that the rental value at the time of the detention was in the range of US\$5120.00 to US\$460.00 per week. In his submissions he claims that boats of that class may be rented in the Caribbean for US 20,000 to US \$30,000.00 per week. St. James' Club offers a rental value of US\$10,000.00 on its submissions. I pause here to point out that submissions will not suffice as evidence. The varying contentions on the submissions as to the rental values are therefore unhelpful to this exercise.

[19] In addition to the foregoing matters, I have some reservations about utilizing the recommended rates to assess the loss in respect of a vessel that was not profit earning or for which no evidence was led to demonstrate that St James' Club used the same for any financial gain. I accept that the state of the law recited extensively above is that St James's Club must pay to Mr. Naylor a reasonable sum for the detention of his property without reference to the company's use of the same or whether Mr. Naylor used it for profit or suffered any direct financial loss from its unlawful retention of his property. What matters for this assessment is that Mr. Naylor was without use of his yacht for 15 days. However, I would be hesitant to award the loss based on the proposed rates. I am more inclined to adopt the approach of the court in the **AG v Gibson** since the assessment in that case is somewhat similar to Mr. Naylor's circumstances on this assessment.

[20] In **Gibson**, the police arrested one Austin Knowles pursuant to an extradition warrant. Whilst executing the warrant, the police seized certain vehicles which were believed to belong to Mr. Knowles. It was later discovered that the vehicles were not owned by Mr. Knowles but were in fact owned by the two respondents who filed a claim for the return of the vehicles and damages. The vehicles were returned after the claim was issued. On the pleadings and at the assessment there

¹⁷ SCCiv App. No. 36 of 2006 (Bahamas)

was no evidence that the vehicles were profit earning or that the respondents suffered any inconvenience, or that they hired a substitute vehicle. Nonetheless, the trial judge awarded damages based on rental rates for the hire of similar vehicles. On appeal, the court disapproved the trial judge's approach of utilizing the rates for hire of profit earning vehicles to determine the appropriate award to be given in a situation where the assessment was in respect of vehicles that were not profit earning. Sawyer P reasoned that¹⁸

"Where the property of which a plaintiff has been deprived is used for profit-making, the appropriate method of assessing damages may be to see what profits had been previously earned by the plaintiff in respect of the particular property over a similar period of time. In the case of vehicles which are normally hired at fixed rates to customers of their owner, one can conveniently refer to the usual rates of hire"

Where, as on the facts in this case, the vehicles were not normally hired out and were not profit-making chattels, the assessment could reasonably be based on such factors as the inconvenience caused to the owner or, diminution in the value of the vehicles, the amount by which they have been devalued. Those are just two things that, in my judgment ought to have been considered by the learned judge in assessing damages in this case but which were not drawn to the learned judge's attention. (Bold, emphasis mine)

- [21] Sawyer P preferred to award a nominal figure after considering the value of the vehicle and taking depreciation over time into account. Longley JA assessed loss of use as "*a deprivation of interest on money spent on the thing purchased minus depreciation*"¹⁹. He applied a rate of 15% interest on the higher range of the prices for the vehicles with an allowance for depreciation to arrive at a reasonable grant. As with the vehicles in **Gibson**, there is no evidence in this case that the yacht was profit earning or that Mr. Naylor was so put out during its detention that he had to hire another vessel. It is evident that he would have been severely inconvenienced as he wished to use the vessel to entertain himself and friends.

¹⁸ SCCiv App. No. 36 of 2006 (Bahamas) at paras 44 and 46

¹⁹ SCCiv App. No. 36 of 2006 (Bahamas) at para. 40

[22] I adopt the approach of the court of appeal in **Gibson** for the fact that, as I have said above, there is no evidence in this case that the vessel was used for profit making. There is equally no evidence that Mr. Naylor was so put out as to hire another vessel or that St James' Club used it for any gain. I would award a sum based on the fact that St James' Club kept Mr. Naylor out of the usage of his vessel for the 15 day period. The parties have already agreed that Mr. Naylor must be compensated for the diminution in value of his vessel in the sum of \$162,381.20 and I award the same as agreed. Applying the rate of interest of 15 percent as was used in **Gibson** to the estimated value of US\$105,000 and making some adjustment for inflation, I am of the opinion that a fair award would be in the range of US\$4000 to US\$6000.00. I award the higher sum of US\$6000.00 to Mr. Naylor for St. James' Club's unlawful detention of his yacht for 15 days

Conversion of the tackle and other equipment

[23] Damages are to be awarded, as found by the trial judge, for the conversion of the tackle, tri – data recorder, rode and fenders. Mr. Naylor has not proposed that any sum should be granted beyond the value of these items. See **Kuwait Airways Corp v Iraqi Airways Co** above. He has specifically pleaded in his affidavit evidence that the 'replacement costs' of these items is \$3499.76. Beyond the values claimed, he requests an award of \$20,000.00. No basis has been provided for this request and as such it is not granted. St James' Club has stated in its affidavit in response that the items would be valued in the region of \$5734.78. Again, no evidence of this assertion has been given to the court. In the absence of evidence of the value of the items claimed, the court may, in the exercise of its discretionary power, grant a nominal sum as damages²⁰. I would award the nominal sum of \$4000.00 under this head of loss.

Consequential losses

[24] Where damages beyond the normal measure of damages is concerned, it is said that²¹

²⁰ See for instance *McMaster v AG SVGHVC* 2009/0326 at paragraph 29

²¹ Common Law Series: The Law of Torts, 3rd edn. at paras. 11.127 – 11.128

"Apart from the value of the chattel converted, the claimant is also entitled to claim any consequential losses of the wrongful act. Two possibilities present themselves as possible rules for remoteness for consequential damages: the 'direct and natural consequences' test, and the more restrictive 'reasonably foreseeable consequences' test. In Kuwait Airlines Corp'n v Iraqi Airways Co (Nos 4 & 5) Lord Nicholls, obiter, held that each of these rules for remoteness for consequential damages was applicable to the tort of conversion. As it was recognised that conversion could create hardship in the case of innocent conversion, it was appropriate to adopt the more restrictive 'reasonably foreseeable consequences' remoteness rule where the defendant had acted with a bona fide belief that the goods were his own. However, there was no reason for similar leniency in the case of person who knowingly converted goods; here the convertor should be liable for the direct and natural consequences of the conversion.

The relevant remoteness rule must be applied at the time of the acts that constitute the conversion. If the relevant test is reasonable foreseeability, the loss must be reasonably foreseeable by the convertor at the time of the conversion...

Damages may also be claimed for inconvenience, distress and loss of enjoyment resulting from the conversion, and such an award may be inflated where it is appropriate to award aggravated damages for such items."

- [25] I will consider the request for an award for mental distress, loss of business reputation and goodwill under the head of consequential losses.

Mental distress

- [26] In respect of mental distress, I am convinced that Mr. Naylor was distressed as a result of his interaction with the defendants including St. James' Club. Indeed the learned trial judge found that the affair caused him *'considerable inconvenience and damage to his reputation'*. In his affidavit in support of the claim for damages, he says he was never contacted by Captain Boyd about the maritime lien and salvage award. He learned of the same only upon his arrival in Antigua. When he

confronted the manager of St. James' Club he was presented with two bills including the sums claimed under the maritime lien and salvage award. His efforts to discuss the matter with Mr. McGonigal were met with demands for payment in lieu of the award and a stream of colorful language. He was also put through the trouble, costs and expense of defending the high court writ initiated by St James' Club. In fact while attempting to leave Antigua to travel to St Thomas USVI on November 21, 1998 he was forcibly removed from a LIAT flight by the police acting further to instructions from St James' Club as part of its ongoing litigation against him on the fictitious lien and salvage award. The public arrest was performed in the presence of his guests who were traveling with him at the time. The high court writ was subsequently dismissed but only after a series of investigations by representatives of the insurers, Richard Sparrow Marine Insurance Consultants of Leicester, United Kingdom. Further to these investigations, it was confirmed that the lien and award were part of an elaborate hoax. In addition, lawyers were engaged in both England and Antigua. Mr. Naylor says that the process had a terrible psychological effect on him. He felt trapped by powerful people. The conduct of the defendants, including St. James' Club affected his return to Antigua for several years since he feared either being arrested or kidnapped.

- [27] The assessment is against St James' Club and I think it is apposite to recite some of what his Lordship Mitchell J had to say in his judgment about the role it played in this situation²²

"At the time of the chaining of the boat to the dock and the subsequent issue of the writ, the management and staff of St James' Club accepted the word of Mr. Mc Gonigal and Capt Boyd that they had a valid claim against Mr. Naylor. They acted on this acceptance and took steps to assist Mr. Mc Gonigal and Capt Boyd in their fraudulent enterprise. St James' Club wrongfully put its name to the writ which resulted in the warrant of arrest against Watercolour. The instructions to the attorneys to issue the writ came initially from Mr. Mc Gonigal and Capt Boyd. But the attorneys would not have continued with the action if the management and staff of the hotel had not confirmed to them the validity of the writ. I accept the evidence of the acting general manager of the hotel that Mr. Naylor owed the hotel a relatively small sum for hotel bills and that the hotel had only been interested in collecting this amount, But, the suit was for the full amount claimed by Capt Boyd. After the

²² ANUHCv 1999/0252 at paras. 11-12

issue of the fraudulent writ, the managing director confirmed to the company's attorney's the instructions to pursue the action to collect the money owing. This was a reckless step. It ensured that the action continued for months more than it should have. In the course of this trial, the managing director accepted that there had in fact been no justification for the claim made on the company's behalf by Mr. Mc Gonigal and Capt Boyd. He says that once he was advised by his attorney that the claim was unsustainable and the instructions about the award untrue, he instructed her to discontinue the proceedings. However, the proceedings were not discontinued, the attorneys merely withdrawing from representing the company in the suit. This failure to act on his instructions also ensured that the proceedings continued longer than they should have.

The hotel must accept responsibility for the actions of its management and other staff besides Capt Boyd. They supported him in his claim against Mr. Naylor. They actively participated in the detention of the yacht. When he brought the action against Mr. Naylor in the name of the company, they did not immediately give instructions to withdraw the suit, but permitted it to proceed through the courts for several months. I am satisfied that St James' Club was grossly negligent when it actively supported Capt Boyd and Mr. Mc Gonigal in their illegal seizure of the boat and authorized its chaining to their dock."

- [28] Mr. Naylor asks for an award for his mental distress and relies in the case of **Jackson v Horizon Holidays**. I do not believe this authority supports the proposition that an award for mental distress ought to be given in a claim for negligence or wrongful interference with goods or indeed an action for remedies for the commission of a tort. In **Jackson**, the claimant petitioned the court for relief including, among other things, distress and discomfort suffered by himself and members of his family due to the defendant's breach of contract for a family holiday. St James' Club argues that the trial judge did not award relief for mental distress and further that while this type of relief can be obtained on action for deceit, the trial judge specifically found that there was no deceit on its part. Even if such an award can be granted, it is contended that there is no substantiation of actual psychological or psychiatric harm. **Boardman v Sanderson** is given as authority for this view. Naylor's claim of a fear to return to Antigua and the canceling of his contract with the Pakistani cricket team could not have been reasonably foreseen as a direct consequence of the detention.

Mr. Naylor's "susceptibility" is said to be "*beyond any range of normal expectancy or reasonable foresight*;

[29] I have no hesitation in disagreeing with St James' Club on its posture to this loss. The learned trial judge's findings set out above indisputably demonstrate the negligent and reckless conduct of the company and its officials. By way of example, I cannot see how it can be rationalized, that it was beyond the realm of reasonable foreseeability that anyone, including Mr. Naylor, would have been tremendously distressed at being forcibly removed from an aircraft in front of strangers and friends. I do not find any support for the position canvassed by the company based on **Boardman v Sanderson**. In that case a father who witnessed the defendant's car being reversed on to his young son's foot was granted relief for 'some symptoms of shock' ensuing from witnessing the event. It was found that the resulting shock to the father was reasonably foreseeable in all the circumstances. I find that it ought to be within the reasonable contemplation of a defendant that a claimant in the similar circumstances to which Mr. Naylor was put would be very distressed. It would not be far-fetched or beyond reasonable foreseeability that Mr. Naylor would harbor serious trepidations about trips to Antigua after his ordeals which were a consequence of the conduct of the company and those for whom it was responsible.

[30] I have deliberately adopted the reasonable foreseeability test as opposed to the direct and natural consequences test. See Lord Nicholls in **Kuwait Airways Corp v Iraqi Airways Co** above. I believe that while St James' Club acted with indefensible recklessness and negligence, the company's actions flowed from an entirely misguided and improper reliance on the two fraudsters and not from a deliberate scheme to deprive Mr. Naylor of his vessel without justification. Mr. Naylor would be entitled to some award for this loss but his submissions, again, do not offer any assistance on the basis for the claim for \$50,000.00. Therefore even though I agree that he suffered mental distress as a result of this ordeal, I do not believe the award ought to be as high as \$50,000.00 in the absence of substantiation of the basis for such a request. A fair nominal award would be \$30,000.00.

Loss of business reputation and goodwill

[31] In respect of loss of business reputation and goodwill, Mr. Naylor's evidence is that he lost lucrative contracts to perform coaching and physiotherapist duties with the Pakistani cricket team and the London French Rugby team. He says that this type of loss is recoverable. Again there is not much assistance given to the court in terms of the basis for this argument. I would think that, as helpfully stated by McGregor on Damages²³, whether Mr. Naylor can recover such losses or losses beyond the market value of the good would also turn on basic principles of remoteness of damage as discussed herein above. There is some debate set out in the texts as to whether an award may be given for loss of business reputation or goodwill in the context of the conversion of goods²⁴. My own view is that the question must be answered by applying the principles of remoteness to the facts of each case. In this case, Mr. Naylor supplies four pieces of correspondence in support of this head of loss; a letter dated 20th May 2003 written by one Richard Prybus, letter dated September 15, 1999 from the Pakistani Cricket Board and letters dated 29th March and 3rd June 1999 from one John Kyffin.

[32] In respect of the contract with the Pakistani cricket team, Mr. Naylor says that he refused the contract because of his fears that part of the tour would occur in Antigua. He was afraid to return to the island so soon after his recent ordeals. In terms of the rugby contract, there is no evidence that the failure to obtain those services had any correlation with conduct of St. James' Club. In Mr. Kyffin's letter he laments Mr. Naylor's inability to finalise a contract with the rugby club due to the fact that his 'attention was drawn elsewhere'. Certainly this statement does not assist the court with deciding what really transpired with respect to the inability to conclude a contract and whether the circumstances fall within reasonably foreseeable losses for which St James' Club is responsible. Mr. Naylor has, equally, not impressed me that his loss of a contract with the Pakistani team is remotely attributable to the tortious acts in this case. Mr. Prybus, who has not given evidence, says in his letter that part of the team's tour of duty involved stopping in Antigua. Much weight cannot be attached to this statement. For my part, I have already stated my view that I agree that Mr. Naylor would have some trepidation about returning to Antigua soon after this incident. But I fail to see any correlation between the wrong committed by St James' Club and Mr. Naylor's refusal to take up the

²³ McGregor on Damages, 17th edn. at para 33-063

²⁴ Ibid at paras.33-068 to 33-069

contracts. Indeed no such correlation has been shown on the facts. No award would be made for this loss.

Exemplary damages

[33] The parties are agreed that an award of exemplary damages is governed by the usual principles set out in **Rookes v Bernard** namely "*oppressive, arbitrary or unconstitutional actions by servants of the government; wrongful conduct which has been calculated by the defendant to make a profit for himself which may exceed the compensation payable to the claimant; and any situation where such an award is authorised by statute*"²⁵

[34] The second category is applicable to these circumstances. Enough has been said in this ruling about the conduct of St James' Club. There is no evidence that its action was motivated by a march to make profits without regard to Mr. Naylor's rights. As was said above, the company was driven by a flawed view that Mr. Naylor owed them money under the contrived maritime lien and salvage award. I will agree that there is, for instance, no apparent explanation or excuse for the failure to discontinue the high court writ after it became evident that there was little utility in persisting therein. However, this fact alone does not indicate that a profit driven motive pervaded but rather this conduct further exemplifies the company's abdication of its duties to Mr. Naylor. There is much to criticize about the company's approach but there is no basis in law for an award of exemplary damages and none will be granted.

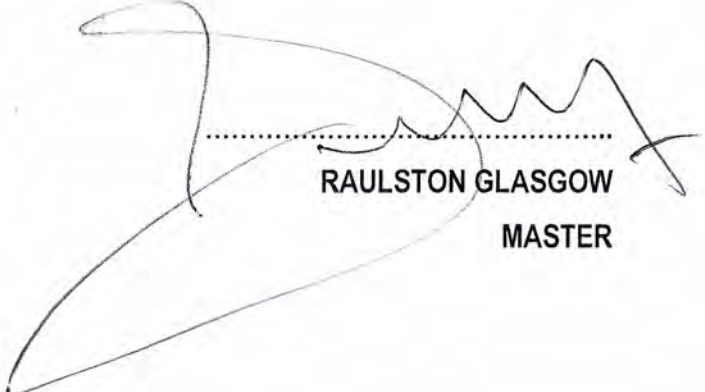
Award

[35] Mr. Naylor is awarded the following damages –

- (1) Wrongful detention of the yacht – US\$6000;
- (2) Depreciation - \$162,381.20
- (3) Conversion of the tackle, rode, tri-data recorder and fenders - \$4000.00;
- (4) Mental distress - \$30,000.00;

²⁵ Supra, note 23 at para.11.123

- (5) Total award - \$208,682.60
- (6) Prescribed costs of \$17,151.20
- (7) Interest will be awarded from the date of this judgment at the statutory rate of 5% per annum.



RAULSTON GLASGOW
MASTER