



[2021] JMSC Civ. 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04284

BETWEEN	JUDINE HENRY	CLAIMANT
AND	TYRONE WEDDERBURN	DEFENDANT

IN OPEN COURT

**Denise Senior Smith, instructed by Oswest Senior Smith and Co, for the claimant
Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co, for the defendant**

**Heard: February 10, 11, March 31, April 2, 8, May 29, June 9, 10 and December 4,
2014 and February 25, 2015 and February 16, 17, 18, 2016 and March 25, 2021**

**Claim for conversion and detinue – Distinction between conversion and detinue –
Remedies available in conversion and detinue – Whether the defendant received
all of the disputed items – Which of the disputed items, if any, the defendant
received, as gifts – Whether the defendant entered into a contractual agreement
with the claimant to supervise the construction of the claimant’s house – Whether
the defendant purchased and shipped any of the disputed items – Measure of**

damages for conversion and detinue – Quantum to be awarded as special damages to the claimant – Making of an award for loss of use in the absence of specific evidence of the value of such loss – The claimant’s undertaking as to damages – Indemnifying the defendant for loss of use of items gifted to him

ANDERSON, K. J

THE BACKGROUND

- [1] The claimant filed this claim on July 26, 2012, against the defendant for damages for the tort of conversion and/or detinue. The claimant, at the material time, resided in the United States of America and the defendant was at the material time, a building inspector and works overseer, employed to the government of Jamaica and living and working, in the parish of Saint Mary.
- [2] The respective parties’ versions of the relevant facts, differs, significantly. Thus, for clarity, this court will set out each party’s case, immediately hereafter.

THE CLAIMANT’S CASE

- [3] The claimant alleged that she met the defendant in April, 2010, when he came to her property located in Galina, in the parish of Saint Mary, where she had commenced the construction of a house (hereinafter referred to as, ‘*the property*’ or ‘*the claimant’s house*’). It is her contention that the defendant, came to the property in his capacity as a building inspector, on behalf of the Saint Mary Parish Council, to sign off on the work that had been done up to that point. She alleged that at that meeting, they exchanged numbers and on her return to the United States, an intimate relationship commenced, between them.
- [4] The claimant alleged that the defendant agreed to store items that were purchased by her overseas, and also, some of which were taken from her father’s home, and which were all intended to be used at her property, which was then under

construction, until said construction was at the point wherein those items could have been housed at her property. The claimant alleged that the defendant agreed to store those items in a large container, which was located on his premises, free of cost.

[5] Those items are listed at paragraph 5 of the amended particulars of claim and are as follows, quoted by the claimant, in United States dollars:

Items	Value in USD
Barbeque Grill	450.00
Bicycle	130.00
Microwave	40.00
Toaster Oven	20.00
Oster Blender	25.00
Cutlery	19.00
Crockery	85.00
Curtains	47.00
Sheet sets (3 x 49.95)	149.85
Comforters (3 x 165)	495.00
Rowenta Iron	69.99
Light Fixture	85.00
Towels (4 bath, 2 hand and 4 wash rags)	56.00
Glassware (1 set)10	45.00
Paint	434.84
Bandsaw blades	23.94
Custom Mouldings	43.95
Hammer drill	79.00
Router bits	99.97
Jointer	872.00
Brad nailer kit Mortising attachment kit 4pc mortising chisel set Irregular angle clamping set Pipe clamp set on stand 3 pocket aprons	186.45
Grinder/ sharpener	197.55
Jointer Blades/ bits	136.60
Planer knives, nails	40.95
Gemini Speakers Gemini dual CD Gemini AMP Gemini Equaliser Gemini Mixer Gemini case Power Strip Gemini Head Phones	All totalling 1604.98

Pioneer Car Stereo Autopage Alarm	481.50
Sectional Leather couch 2 Armless chairs 1 double recliner 1 wedge seat 1 chaise	2138.93
Accessory Kit and Spray gun and Accessories	104.15
Other building equipment	171.20
Warrior Items	85.00
9 Saunas	22500.00
Shower stall	450.00
4 boxes of hanger	32.00
20 boxes of glass tiles	15360.40
5 glass face basins	750.00
Stainless steel water dispenser	50.00
2 Chandeliers	2000.00
48 inch Television set	600.00
Glass top TV stand	199.99
Whirlpool Washing Machine	750.00
Pool table	329.99
Blood pressure kit	35.00
Firearm safe	399.00
Telescope	69.99
Penis pump	20.00
Massage chair	229.99
Chest table	72.99
Carton with chairs	59.99
Carpet	299.99
Slendertone Flex Ab Toner	72.99
Premium Travel Road Kit	32.99
Backup Car camera system	64.99
TOTAL	52,798.15

[6] The claimant has alleged that she shipped some of the items as listed above, to Jamaica and paid for the entire cost of shipment and clearance at the wharf. The total cost of shipment amounts to US\$1,690.00 which the claimant seeks to recover as special damages, along with the value of the disputed items, to the total of US \$54,055.18.

[7] The claimant has contended that the relevant items were purchased for her own property which was being built and that, the tools were purchased to be given to the carpenter - Mr. Garfield Russell, to use to make the needed furniture for same.

- [8] The claimant has stated that before leaving Jamaica in April 2010, she had all the relevant tools and workers in place, and had left Ms. Corrine McKnight, in charge of overseeing the construction of the property.
- [9] From the claimant's initial meeting with the defendant in April, 2010, she has led evidence that she had travelled to Jamaica in June, August and October of that year, '*to keep an eye on the property.*' She has stated that she sent monies to the defendant, both as loans and as gifts, which she is not seeking to recover as part of this claim.
- [10] Sometime in 2012, the relationship between the parties ended and according to the claimant, she made a demand for the items, which the defendant had been storing for her. It is her contention that the defendant informed her that she had to pay storage cost for same, which led to her making a report at the Oracabessa Police Station. She alleged that she later learnt that the defendant was then claiming that the all of the items were his.
- [11] The claimant sought and was granted injunctive relief on April 16, 2013, which restrained the defendant from dealing with the relevant items, until the trial of this matter, or further ordered.

THE DEFENDANT'S CASE

- [12] The defendant has contended that he was introduced to the claimant at his home, as someone who was building a property and needed an overseer. He alleged that at this meeting, they entered into a verbal agreement, which stipulated that he ought to have been paid at each quarter of the construction, the sum of \$300,000, with the supervision cost per week, being \$25,000.
- [13] The defendant alleged that as the overseer, he was responsible for supervising the workmen, purchasing materials and the overall supervision of the construction funded by the monies which the claimant sent to him. He alleged that he visited the property using his lunch breaks and evenings.

- [14]** Given the nature of their relationship, the defendant contended that he was aware that the claimant was having financial difficulties and that she was unable to purchase the needed construction materials. This led to him opening credit accounts for her to obtain construction materials and other miscellaneous work-related materials. He also alleged that as the relevant quarter-marks approached, she was unable to pay him. According to the defendant's account of the pertinent events, it was for that reason that he had delayed collecting the monies owed to him, pursuant to their verbal agreement.
- [15]** The defendant posited that as their intimate relationship developed, they were planning on living together, in his house in the future.
- [16]** The defendant alleged that during the relationship, the claimant sent items for his woodwork shop as gifts for him and he would clear them. He also contended that when he travelled to her home in the United States, they purchased some items for him, and he paid the shipping cost to Jamaica. These tools he noted, were to be used in his woodwork shop, for works which he did, both on his own house and for others who utilize his services.
- [17]** It is the defendant's contention that it is the nature of the termination of the relationship which has caused the claimant to file this claim. He also contended that on the visitation of his premises by police personnel, he had returned the relevant items which belonged to the claimant on June 25, 2012.
- [18]** The defendant contended further that he has never received from the claimant any glassware, 10 gallons of paint, a shower stall, 32 or 48 inch television, whirlpool washing machine, 20 boxes of glass tiles and 5 sets of entry lock doors.
- [19]** The defendant has conceded that some items which were sent to him, he was holding for the claimant and that he has returned same. Outside of that, he has contended that the other items were given to him as gifts and/or barter for the work which he had done on the property and which he was not compensated for. It is to

be noted that the defendant has filed no ancillary claim, pertaining to any of the disputed items.

[20] For the record, it is noted in this judgment, that the counsel now on record for the defendant, came on record, on February 25, 2015, at which time, the defendant was already being cross-examined on the witness stand. Prior to that, the defendant was being represented by Mr. Aon Stewart, instructed by the firm: Knight, Junor and Samuels.

[21] For ease of reference, the following items will be referred to, in this judgment, as follows:

- i. **Items from father's house:** one four-burner gas stove, one microwave, one blender, one toaster, one wolfgang knife set and items of clothing.
- ii. **Woodwork tools:** bandsaw blades, router bits, jointer, brad nailer kit, mortising attachment kit, 4pc mortising chisel set, irregular angle clamping set, pipe clamp set on stand, 3 pocket aprons, grinder/ sharpener, jointer blades/ bits, planer knives, nails and hammer drill.
- iii. **Items not received:** glassware, 10 gallon of paint, a shower stall, 32" or 48" television, whirlpool washing machine, 20 boxes of tiles and 5 sets of entry locks.
- iv. **Other gifted items** - penis pump, pioneer car stereo, autopage alarm and firearm safe.
- v. **The remaining household items:** barbeque grill, microwave, toaster oven, olster blender, cutlery, crockery , curtains, sheet sets, comforters, rowenta iron, light fixture, towels (4 bath, 2 hand and 4 wash rags), glassware (1 set of 10), paint, gemini speakers, gemini dual c, gemini amp, gemini equaliser, gemini mixer, gemini case, power strip, gemini head phones, sectional leather coach, 2 armless

chairs, 1 double recliner, 1 wedge seat, 1 chaise, other building equipment, warrior items , 9 saunas, shower stall, 4 boxes of hanger, 20 boxes of glass tiles, 5 glass face basins, stainless steel water dispenser, 2 chandeliers, 48 inch television set, glass top television stand, whirlpool washing machine, pool table, blood pressure kit, telescope, massage chair, chest table, carton with chairs, carpet and slendertone flex ab toner.

ISSUES

[22] The following issues are now before this court, for determination:

- a. Whether the defendant ever received from the claimant, the items which he claims, he never received.
- b. Whether there was an agreement between the parties for the defendant to oversee the construction work that was being done on the claimant's house, while same was under construction.
- c. If any such agreement existed, was it a part of that agreement that as payment for services rendered, the defendant was to receive various items which would be purchased by the claimant and shipped to Jamaica at the claimant's expense?
- d. Whether the claimant ever owed to the defendant, monies, arising from his expenditure of monies to enable the construction of her property to continue and if so, what effect if any, should that have on the outcome of this claim.
- e. Whether the defendant purchased some of the items and shipped them to Jamaica, at his own expense.

- f. As regards the items which the claimant obtained from her father's house, after her father had passed away, what has happened to those items, since the claimant obtained them?
- g. Whether the defendant has returned to the claimant, the items that he has alleged that he returned to her and if so, when did he return same and even if he returned same, are any of those items returned among the items which are the subject of this claim.
- h. Did the defendant receive from the claimant, any of the disputed items as gifts and if so, which one(s)?

THE LAW AND ANALYSIS

Burden and standard of proof

[23] The burden of proof in matters such as these rests with the person who has instituted the claim, which is founded upon various allegations that are being vigorously disputed. Hence the well-known phrase, '*he who asserts must prove.*' The claimant has brought this claim against the defendant, and she therefore, has the burden of proving her case in that regard and the requisite standard of proof is, as applied, proof on a balance of probabilities.

The issue of credibility

[24] In assessing credibility, as between two (2) witnesses, one of whom is telling the truth in important respects and the other witness, who is not doing so, as regards those same matters, it is always important for the court of first instance to consider contemporaneous documents, probabilities and possible motives. The Privy Council made this clear, in the case: **Villeneuve and another v Gaillard and another – [2011] UKPC 1**, per Ld. Walker, at paragraph 67:

'Furthermore it is implicit in the statement of Lord Macmillan in Powell v Streatham Manor Nursing Home [1935] AC 243 at p.256 that the probabilities and possibilities

*of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. **Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities.** It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.'* [Emphasis added]

See also: **Armagas v Mundogas SA (The Ocean Frost) – [1986] 1 AC 717**, at page 757, per Dunn, L.J. This court has adopted the approach as suggested immediately above, in assessing the parties' respective evidence and the evidence of the claimant's witnesses. Only the defendant gave evidence in support of his defence to this claim.

- [25] The court is guided by the fact that this claim was filed by the claimant after a bitter ending to an intimate relationship between the parties. As such, the evidence in this case, as presented by the respective parties, will be considered in that light. The principles of probability and possible motives with reference to the objective facts in this case, will inform the court's analysis, in arriving at the respective conclusions, regarding the issues.
- [26] There is no dispute between the parties that the claimant purchased and shipped most of the disputed items, to Jamaica. The dispute in this case, is captured by the court's adumbration of the issues above. Consequently, this court will examine whether, based on the evidence as presented, those assertions which the claimant has made and which the defendant has vehemently denied, have been made out, in respect of the relevant issues.
- [27] The claimant has brought four (4) witnesses, including herself, to prove her claim. The defendant is the only witness for the defence. Though the claimant has more witnesses than the defendant, that is not to be equated with having a case, which is of greater merit. This court will have to individually examine each witness' evidence and assess it in terms of its individual weight, to the relevant issues,

adumbrated above. In doing so, the court finds it useful, to begin by separately and directly, examining the evidence given by the claimant's witnesses, before analysing the issues and addressing the evidence given by the respective parties to this claim.

Examining witnesses' evidence

Gary Slue

[28] Mr. Slue was brought as a witness to support the claimant's assertion that the defendant was not in charge of overseeing the construction of the property.

[29] Mr. Slue led evidence that when he started working on the property, he would give his invoices to Ms. McKnight. He indicated that the claimant would pay his and the other six to seven workers' wages, herself, or through Ms. McKnight, when she was not on the island. He led evidence that he would accompany the claimant to hardware stores to purchase construction materials for the property. He also led evidence that the claimant communicated to him, that she wanted her property to be constructed like that of the defendant's, with which he was familiar, having done similar work for the defendant.

[30] This evidence goes to contradict the defendant's evidence that he was in charge of overseeing the construction of the claimant's property, paid workers and purchased materials for the property. The court accepts that evidence of Mr. Slue. The court has examined his demeanour and has assessed his evidence in the grand scheme of the objective facts of this case and thus, accepts him to be a credible witness and accepts his evidence as truthful.

Corrine McKnight

[31] Ms. McKnight was brought as a witness in support of the claimant's assertion that Ms. McKnight was in charge of supervising the construction of the property. She was also brought as a witness to dispute the defendant's assertion that certain items were not received by him and she was also brought to give evidence of the

condition of the items which were taken from the claimant's father's house and delivered to the defendant's premises.

[32] Ms. McKnight alleged that the claimant asked her to supervise the construction of her house, with her having assisted on an earlier occasion to identify the plot of land to build same. She alleged that she, on the instruction of the claimant, paid the workmen and purchased materials from the hardware stores.

[33] She stated that she collected monies sent by the claimant, and that, if there were items to be collected at the wharf, she was responsible for clearing them. She also led evidence that she was the one responsible for chartering transport for the items cleared at the wharf. Some of the items she supervised being cleared and delivered to the defendant's premises include: glass face basins, 1 shower stall and 20 boxes of tiles.

[34] She further led evidence that construction of the claimant's house stopped when the claimant's father died and the claimant then stored items which were taken from the her father's house, at the defendant's premises. These items were: one four-burner gas stove, one microwave, one blender, one toaster, one wolfgang knife set and items of clothing.

[35] The court is of the considered opinion that the evidence of Ms. McKnight is credible. She has presented credible evidence in support of her assertions, which when considered in the general context of probability, and considered with the objective fact of the long-standing relationship between herself and the claimant, is to be believed, in respect of the relevant issues. She appeared to me to be a witness who did not exaggerate, but rather, told the truth. The court accepts her evidence in its entirety, as summarized above.

Garfield Russell

[36] Mr. Russell, was brought as a witness by the claimant to give evidence in respect of the defendant's assertions regarding certain woodwork tools. He was also

brought as a witness to dispute the defendant's assertion that certain items were not received by him (the defendant) and he also gave evidence in respect of the condition of the items which were allegedly taken from the claimant's father's house and delivered to the defendant's premises.

[37] Mr. Russell has led evidence that he was introduced to the claimant by Ms. McKnight in January 2010 and the claimant informed him that she was building a house, wherein she needed his services to build the furniture for her. He alleged that the claimant, at that time, agreed to purchase and ship to Jamaica, for the purposes of enabling him to receive same, the tools that he required, in order to construct several items for the property.

[38] Mr. Russell stated that while he was doing some work at the defendant's house, he assisted in unloading into the defendant's house, the following items: two barrels, one barbeque grill, one four burner gas stove and a bicycle. On a separate occasion, he stated that he assisted in unloading the following items: 9 saunas, 2 chandeliers, 20 boxes of glass tiles and a shower stall. He stated that he witnessed the following items being stored at the defendant's premises: a big carpet, some comforters, a glass TV stand, a whirlpool front loader washing machine and a barrel with food and clothing items.

[39] The court accepts Mr. Russell's evidence, partially. The court accepts that he was a carpenter who worked with the defendant and that he witnessed and assisted with the delivery of certain items to the defendant's premises, including those items from the claimant's father's house and those items which the defendant asserts he never received.

[40] The court however, does not accept his evidence as it relates to the tools, he alleged he ought to have received to carry out carpentry work. The defendant had submitted through his counsel, that, it seems odd, as regards the items that Mr. Russell has said that were sent to Jamaica by the claimant in order for him to use to carry out carpentry work, at the claimant's house on the property, that those

items would have been purchased for Mr. Russell, at that time. That time, was when the construction of the outer-section of the property was still ongoing. There was no internal work being done or required to be done at that time. This is in comparison to the defendant's evidence that he was in the process of making furniture for his house and which, Mr. Russell has given evidence that he was employed to the defendant to do and also that the defendant owned a woodwork shop, at which, he made furniture for others.

[41] The court finds it incredible that those tools, were bought for him, by the claimant in circumstances wherein the claimant would not have any use for them again. The defendant stated and the court accepts, that he utilized these tools in his woodworking shop. In addition, Mr. Russell gave evidence that he has and buys his own tools, '*sometimes.*'

[42] When considered in the grand scheme of the objective facts of this case, this court does not find Mr. Russell's evidence, in that respect, nor the claimant's evidence in that respect, which was very similar, to be truthful.

ANALYZING THE ISSUES

Items not received

[43] Part of the defendant's examination-in-chief evidence, as per paragraph 39 of the defendant's witness statement, the defendant has stated that from the list above, he did not receive certain items. These are: any glassware, 10 gallons of paint, a shower stall, 32" or 48" television, whirlpool washing machine, 20 boxes of tiles and 5 sets of entry locks.

[44] In that respect, the claimant needed to have advanced sufficient evidence to prove on a balance of probabilities, that the defendant received the disputed items. The claimant has done that, by means of evidence through herself, during cross-examination and through Mr. Russell during his examination-in-chief evidence, as partly set out at paragraphs 4 and 5 of his witness statement and Ms. McKnight,

during her examination-in-chief evidence, as partly set out at paragraph 11 of her witness statement. Mr. Russell and Ms. McKnight both testified that they witnessed the delivery of the said items to the defendant's home.

[45] On cross-examination of Ms. McKnight, the following were suggested to her:

'S: The items indicated at paragraph 11 of your witness statement were gifts to Mr. Wedderburn and not to be used for the purpose of completing construction of Ms. Henry's house.

A: Correction Sir, I collected 20 boxes of glass tiles and a shower stall. They weren't given as gifts to Mr. Wedderburn, they were to be used in completing the construction of Ms. Henry's house.

S: 20 boxes of glass tiles and a shower stall, were not unloaded from the truck and stored in a container at Mr. Wedderburn's house.

A: Yes Sir. They were unloaded and placed in a container at Mr. Wedderburn's house.'

*'S'-Suggestion
'A'- Answer*

[46] The court wishes to reiterate that Ms. McKnight's evidence in this respect is accepted, as adumbrated above. The claimant and Ms. McKnight has given evidence that she has relied on Ms. McKnight to conduct business on her behalf, while she was overseas. The fact that she has given evidence that in doing so, she witnessed the disputed items being delivered to the defendant's premises, is accepted by this court.

[47] Mr. Russell has also given evidence in this respect that he assisted in the unloading of the items in the defendant's premises, where he was then doing some carpentry work. The evidence given by Mr. Russell, which is unchallenged by the defendant, placed Mr. Russell in sufficient proximity to the defendant's premises and as such, the court accepts his evidence, as regards those items, which he assisted to be unloaded, at the defendant's premises, to be truthful.

[48] Further, on cross-examination, the defendant was asked if he agreed that the claimant shipped the 20 boxes of tiles to him. His response to that question was, that if he saw his original shipping receipt he would know what she sent, however,

he does not recall receiving the tiles. That answer by the defendant, was unhelpful to him, in the circumstances. It is unhelpful because it makes it clear that even he, has doubts, in his own mind, as to the accuracy of his assertion, that he did not receive those boxes of tiles

[49] Further, the claimant, on cross-examination, has also given evidence that she, after having sent the tiles, went and saw them in the container at the defendant's premises. That account of the claimant is believed as being probable, in the grand scheme of credibility, in this case.

[50] From the analysis adumbrated above, the court is of the opinion that on a balance of probabilities, the claimant has established, through Ms. McKnight and Mr. Russell that those items which the defendant disputed he never received, were, far more than likely than not, received by the defendant. As such, the assertion by the defendant, bears no further analysis in these reasons and the court will treat with the relevant items as being the possession of the defendant.

Alleged verbal agreement

[51] The defendant wishes that the court finds that there was a verbal agreement as between him and the claimant that entitles him to retain custody of the several items which the claimant left at his premises, as payment for the work which he has done, pursuant to that agreement.

[52] Under cross-examination, the claimant was asked a line of questions, as regards that verbal agreement. Those are as follows:

'Q: What were the terms of the arrangement on which those items were supposed to be kept by Mr. Wedderburn?

A: The terms are that he would store the items in his 40 cubic foot container that is situated outside of his house that he is constructing, until my house is secured enough to remove the items.

Q: Was he supposed to be paid for storing these items?

A: No. He never asked for any money.'

- [53] The court must first note that if this agreement is accepted as truthful, it is to be deemed unlawful. Being an employee in the public sector, the defendant cannot lawfully enter into an agreement to oversee the construction of properties in accordance with Parish Council's regulations, which he is employed by the Government of Jamaica to do. While engaged in any such activities, that is an obvious conflict of interest, which is expressly precluded by the **Staff Orders for the Public Service**.
- [54] For said consideration to properly form a legally binding agreement, which can be enforced by this court, the defendant needed to have adduced evidence as to some permission being granted to him, which allows him to engage in any such private sector work. There being no evidence of said permission being granted, this court is not prepared to accept that his account is credible, as regards said verbal agreement. **See Order 4.2.9 of the Staff Orders for the Public Service**. That contract also, would be unenforceable, if the defendant had filed an ancillary claim, seeking to enforce same. See: Per **Bankes LJ in Anderson Ltd v Daniel (1923) 40 TLR 61**. As earlier herein stated though, the defendant has not filed any ancillary claim.
- [55] Even if this court is incorrect in having reached that conclusion, the defendant's defence, in its entirety, will be examined and carefully considered. Given that there is conflicting evidence as to the existence of that agreement, as alleged, the issue of credibility is live. Though the defendant bears no legal burden, his assertion ought to be weighed in the grand scheme of that which has been presented by the claimant and it is for this court to determine, whether same is creditworthy.
- [56] In order to resolve the issue as to whether there existed a verbal agreement, in the general terms as alleged by the defendant, the court ought to be provided with viva voce evidence as well as relevant documentary evidence, not only to prove the existence of that agreement, but also the terms thereof. See paragraph 11 of **Cablemax Limited v J.T Cable Network Ltd and Ors. [2012] JMCA Civ. 14** per

Panton JA (as he then was) and **Caribbean Cement Company Limited v Freight Management Limited [2016] JMCA Civ. 2.**

[57] It is settled that in order for a contract to be legally binding, there must be an offer, acceptance of that offer and consideration. The claimant has denied having any discussions with the defendant pertaining to a verbal agreement, and maintained that the discussions as between the parties, were within the ambit of their intimate relationship and at no time, concerned a business agreement.

Sufficient acts of part performance

[58] In **Kingswood Estate Co. Ltd. v Anderson (1963) 2 QB 169**, UpJohn J cited the following passage from Fry's Specific Performance, 6th edition:

'The true principle of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one, that they prove the existence of some contract and are consistent with the contract alleged.'

[59] The court is of the considered opinion that the parties' conduct had, at no time at all, constituted a legally binding agreement. The court bases that conclusion from the undisputed evidence, that the parties were in an intimate relationship. The defendant's conduct, may very well, be explicable in the context of such relationship, and not so much point to the existence of a business agreement. Those facts, taken together do not point to a contract, or moreover, the specific contract, which the defendant has alleged.

[60] Also, the evidence of Ms. McKnight and Mr. Slue, in this respect, which the court has accepted, supports the claimant's contention and serves to further dispel the defendant's evidence of this agreement, which he has not led sufficient evidence in support of.

[61] This court only has the bare assertion of the defendant of that agreement and has no sufficient supporting evidence which establishes the terms of that agreement, as he has alleged.

Alleged outstanding credit account

[62] The defendant has also alleged that he is entitled to retain custody for the items in question as they are to be given to him as compensation, for sums which he expended on the claimant's behalf, to purchase construction materials for the property which she has not repaid to him.

[63] On cross-examination of the defendant, it was revealed that:

'S: You would agree with me Mr. Wedderburn that in your evidence to this court, you have not provided any documents to show the credit arrangements you alleged you formed with hardware supplies in Port Maria for the purchase of hardware supplies.

A: Yes I agree with it.

S: There were no such documents because you never had any credit arrangements with these supplies for the purchase of materials for Ms. Henry's house.

A: Yes I do, even though I am still indebted to the hardware.

S: You have not provided anything to the court because you did not pay any workmen to work on Ms. Henry's house?

A: No I did not pay workmen to work on Ms. Henry's house.'

[64] This court has no documentary evidence of that amount, which the defendant contends is outstanding. If that assertion of his is truthful, and he was aware of this claim before the court, whereupon these items are being sought by the claimant, who, according to him, is being dishonest, the question ought to be asked: Why is there no documentation to substantiate what amount is outstanding to these hardware stores? Or at the very least, why is there no explanation as to why there is no documentary evidence in support of that assertion of the defendant? Why is there no evidence from the defendant as to any efforts of his, to obtain said documentation? This court has no answers to any of those important questions.

[65] Further, this court has received documentary evidence which indicates that monies were sent by the claimant, to the defendant. The defendant wishes that the court

find that, notwithstanding all the monies which the claimant sent, for birthdays, Valentine's Day and Christmas, she was unable afford to send monies to purchase materials for her property, causing him to have opened credit accounts, which had sums outstanding at the termination of the relationship. That assertion of his, in the opinion of this court, lacks credibility since there is no evidence presented, as to the relevant amount owed, or even any documentary evidence whatsoever, led by the defendant, in support of his assertion that he even opened one credit account, much less, '*credit accounts*,' or that the defendant purchased any items used for construction purposes. That assertion is belied by his admission that the claimant paid for all of her expenses connected to her trips to Jamaica, and for him to visit her overseas, as well as that the claimant gave him money, for various occasions, adumbrated earlier.

[66] That bare assertion by the defendant, is also rejected by this court.

Items bought and/or shipped at the defendant's own expense

[67] As part of the defendant's examination-in-chief evidence, as per paragraph 18 of his witness statement, the defendant has asserted that when he travelled overseas, the claimant purchased some woodwork tools for him and they jointly paid, to have those items shipped to Jamaica. The defendant has given evidence that on another occasion when he travelled overseas to the visit the claimant, they jointly purchased the 5 piece sectional couch and Gemini component set. He further gave evidence that at the ending of the relationship, when the claimant visited his property in Jamaica in February of 2012, the relevant documentations comprised of the receipts for those items, were taken away from there by the claimant. As such, according to the defendant, he has been unable to advance any documentary evidence in respect of this assertion of his.

[68] The court in arriving at the decision as to who is more credible, is entitled to base its reasoning, in part, on the undisputed facts in the case. From this case, it is undisputed that the claimant, at the very least, (according to the defendant's own

evidence) paid for all his expenses to go overseas. Though the claimant's generosity in this respect does not negate the defendant's ability to afford the items in question, the court finds it less likely to be true, than the claimant's evidence, which the court is more minded to accept, that she purchased all of the disputed items.

[69] As regards those items which he has alleged he contributed to, the court does not find him to be credible in that respect. His evidence in respect of the claimant paying his expenses to travel overseas, sending him monies as well as purchasing woodwork tools for him as gifts, is found to be less probable, when considered in the context of the accepted facts and documentary evidence that exists, in this case.

Items returned to the claimant

[70] As part of his examination-in-chief evidence, as per paragraph 40 of his witness statement, the defendant notes that:

'It is clear that some things sent to me belonged to Ms. Henry and that I was merely keeping them until such time as she requested them such as the sewing machine which I returned...'

[71] The defendant only particularized that he returned a sewing machine. The court notes that that sewing machine is not being claimed for, as a part of this claim. The defendant has not stipulated what other specific items he has returned to the claimant, from among the subject items of this claim. This assertion of the defendant is of no relevance, for the purposes of the present claim.

Items from her father's house

[72] Among the items which the claimant contends, that the defendant has, in his possession, are some items which were taken from her father's house.

[73] The court notes that the claimant has made mention of a four burner gas stove. However, no evidence has been specifically presented to the court as to its value

and whether it is a part of the claim. In the circumstances, the court is unable to treat with same as being an item of this claim.

[74] The defendant in his evidence has not denied receiving the items from the claimant's father's house, instead, it has primarily been his contention, throughout this claim, that he received those items as gifts.

[75] As regard the state of these items, the claimant has given evidence through Ms. McKnight that: the microwave, toaster oven, knife set and items of clothing were new, but some were gently used.

[76] At trial, the claimant led evidence that the bicycle, microwave, blender, barbeque grill, were new. That evidence was corroborated by Mr. Russell. She noted that the items in the barrel, the iron and the comforter were all gently used, while the silverwares and pots were used.

[77] The defendant gave no specific evidence, as to the specific circumstances which led to his having allegedly received as gifts from the claimant, the items from the claimant's father's house. I have rejected the defendant's evidence that he received any of those items, as gifts.

Whether there were any items which this court accepts were gifts to the defendant.

Woodwork tools

[78] In the defendant's examination-in-chief evidence, as per paragraph 17 of his witness statement, the defendant stated that if he wanted things overseas, the claimant would purchase same for him and they would be given to him as gifts. These items include tools for his woodwork shop. These he explained, were either given to him to be used by themselves, or in conjunction with existing tools, owned by him. These tools he noted were to be used at his woodwork shop at his house, where he did work for his house and also outside work, that he was paid by customers to do.

- [79]** In response, the claimant and Mr. Russell, in his examination-in-chief evidence at paragraph 6 of his witness statement, have given evidence that the claimant promised Mr. Russell the jointer, jig saw and drill to him, to do work on the claimant's property. Mr. Russell also gave evidence on cross-examination that he had been doing cabinet work for over eighteen (18) years and that throughout that period he did not own any tools. That is to my mind, simply incredible. It is not impossible, but it is highly unlikely.
- [80]** On cross-examination of the claimant, it was revealed that Mr. Russell was introduced to her, sometime in 2010. Counsel for the defendant suggested to the claimant that there was no agreement between her and Mr. Russell for him to be given tools to work on the property, in circumstances where he would have already been paid, to do said work, and she denied that suggestion.
- [81]** The court, at this juncture, ought to consider which of the accounts given, is credible, as regards to the woodwork tools, on a balance of probabilities.
- [82]** The claimant, as part of her examination-in-chief evidence, has stated at paragraph 15 of her witness statement, that she sent money to the defendant in February 2011, to purchase a band saw. She has also given evidence under cross-examination, that she has seen a woodworking shop at the defendant's premises. These admissions by the claimant give weight to the defendant's assertion that some of the tools in question, example the band saw blades, would not have been purchased to be used by him, independently, but were purchased to be used in conjunction with existing tools, already owned by the defendant.
- [83]** This court is of the considered opinion that, in the circumstances, the woodwork tools which were purchased by the claimant, were far more likely to be gifts to the defendant, with whom, it is unchallenged that she had an intimate relationship, and was accustomed to advancing monetary favours, than to Mr. Russell. This court finds that it is far more likely that these items, were purchased as gifts to the defendant, than for Mr. Russell to carry out the building of furniture for the property,

in circumstances where he was accustomed to do work for the defendant, at his woodwork shop, using the tools, that the defendant owned.

[84] For the reasons above, the court accepts the defendant's contention, in respect of the woodwork tools, that they were received as gifts.

Other gifted items

[85] As regards the car stereo system, the claimant, gave evidence during cross-examination that she did not have a car in Jamaica but the backup system and premium travel road kit were to be used for the Mitsubishi van that Mr. Wedderburn owned. She was then asked why it was that she was then claiming for those items. Her response to that question was: notwithstanding the purpose, for which she bought these items, they were not installed in the vehicle and as such, she now claims for them. She then admitted that if they were installed she would not be claiming for them. This admission by the claimant, on cross-examination, has caused me, not to believe the claimant's testimony, as regards that car stereo system. It is instead, my considered view, that the claimant had purchased and gifted same, to the defendant.

[86] In relation to the firearm safe, the defendant has indicated that it was purchased as a gift for him as he is a licensed firearm holder. The claimant on the other hand testified during her cross-examination evidence, that while she does not have a firearm, she bought and shipped the firearm safe to Jamaica to '*store her important valuables.*' The court does not accept that assertion of hers, to be true.

[87] In relation to the penis pump, that was not purchased for the claimant's property, as she wishes this court to accept. On cross-examination the claimant was adamant that the penis pump was not bought for the defendant, but she is willing to give it to him as a gift.

[88] Further on cross-examination, the claimant denied ever giving the defendant tokens of her appreciation during the course of their relationship. This evidence is

not accepted by the court, as it is in direct contravention to the evidence which she gave earlier, as part and parcel of her examination-in-chief evidence, as per paragraphs 14 and 15 of her witness statement, that she gave the defendant loans, which the court accepts. The court finds that the claimant's evidence in that respect is untrue. This court is also, of the considered view, that the penis pump was purchased by the claimant, as a gift for the defendant.

The remaining disputed items

[89] The defendant in his witness statement – examination- in chief evidence, has presented to the court that it is ludicrous for the claimant to ask the court to find that the remaining household items were sent to Jamaica for her property, which was being constructed. On the other hand, however, he is asking the court to find that the said items were sent for his house, which was at a further level of construction.

[90] Interesting to note, the defendant has not led any evidence to rebut the claimant's evidence that the said items were stored in a container on his property. The court ought to ask itself: Why were these household items, which the defendant alleged that he received as gifts from the claimant, in storage, and not in use in his home? The court, also ought to ask itself: Why is it that if the defendant's account is to be believed, did he not, between the period of demand and being served with injunctive relief, take steps to have the items removed from the container into his home?

[91] The court has further to ask itself: Why would the claimant agree to give defendant all of the items so listed at paragraph 21(v), above? There is explanation for some of the items, which this court has accepted as gifts to the defendant, but certainly not all, or even most of the category of items.

[92] Mr. Russell further gave evidence in his examination-in-chief evidence, as per paragraph 9 in his witness statement as follows:

'Having stored all of these items, Mr. Wedderburn told me that he and Ms. Henry were no longer together and he was going to hand over her items that he had stored and call it a day.'

- [93] The court must state that this evidence by Mr. Russell constitutes an '*informal admission*.' That is, it is a statement which was allegedly made by the defendant, being a party in this claim, other than while the defendant was testifying in this court, which is adverse to his case. According to the learned author, Adrian Keane, **the Modern Law of Evidence 2nd ed, pages 194-195**, said admission is admissible as an exception to the hearsay rule. This court accepts Mr. Russell's evidence in this regard. The court must then ask itself: Why would the defendant have, in the past, spoken contrary to the position which he is now vigorously asserting?
- [94] The court accepts that evidence of Mr. Russell, and observes that it contradicts the position which the defendant now advances, which is that all of the items were given to him as gifts. As per his own previous admission to Mr. Russell which this court has accepted as true, the defendant was storing the remaining household items for Ms. Henry and he was to return same to her, on the termination of their relationship.
- [95] In relation to the saunas, the defendant gave evidence in his examination-in-chief evidence, as per paragraph 25, that 5 of the 9 saunas are his and that he did not have any problem, returning the remaining 4 to the claimant. At trial however, he indicated that all 9 saunas were bought for him as gifts. In addition, there is uncontradicted evidence, that when the bailiff came to his house, and sought to retrieve/obtain all of the disputed items, it was the defendant's response that all of those items, were/are his, and therefore, they cannot and will not be allowed to be removed from there. This inconsistency in relation to the evidence of these saunas, is noteworthy. It informs the court's analysis as to whether this class of items (being primarily household items), were given to the defendant as gifts.
- [96] The court is unable to accept the defendant's evidence, that the remaining household items were given to him as gifts. The court finds that assertion of his, to

be improbable, in circumstances where it is undisputed that the claimant's property was under construction, and she had asked the defendant to store those items until a later date. Further, this conclusion is buttressed by the claimant's averment, that the defendant's property was at a further level of construction than the claimant's, to the extent that the defendant, in March 2010, employed Mr. Russell to do some cabinet work on his behalf. It is within that context that the court finds that the claimant could not have intended to give the defendant the remaining household items, as gifts.

[97] The court thus finds that save the woodwork tools, firearm safe, penis pump, Pioneer alarm system and car stereo system, the remaining household items were not given to the defendant, as gifts.

[98] The court will now examine the claimant's claim in respect of the items that this court has determined, were not given to the defendant, by the claimant, as gifts, so as to determine whether the claimant has met her claim in conversion and/or detinue for those items, and if so, what remedy may be afforded to her.

Conversion

[99] As has been referred to by the Court of Appeal, in the case – **The Commissioner of Police and The Attorney General and Vassell Lowe [2012] JMCA Civ. 55**, in the 21st edition of the text – Salmon and Heuston's Law of Torts, at page 97, conversion is described as:

'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.' (See: paragraphs 9 and 35 of the Lowe case).

[100] In paragraph 39 of their judgment in the Lowe case, their lordships opined in reference to the tort of conversion, that:

'...it is evident that the key to the establishment of the tort is wrongful interference or unjustifiable interference with the chattel so as to question or deny the owner's title to it.' See: **Kuwait Airways v Iraqi Airways [2002] 2 AC 883**.

[101] In **Scrutton LJ in Oakley v Lyster [1931] 1 KB 148**, 153 it is stated as follows:

'Atkin J goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intended to challenge the property or possession of the true owner.'

[102] The court will now examine whether on the facts of this case, the elements of conversion have been met. These are: dealing with the remaining household items in a manner inconsistent with the right of the person entitled to it; and an intention in so doing, to deny that claimant's right or to assert a right which is in fact inconsistent with such right.

Dealing with the remaining items in a manner inconsistent with the claimant's right

[103] On the facts of this claim, it is undisputed that the defendant, has dealt with the remaining items, in a manner which is inconsistent with the right of the claimant. This is evidenced by the defendant's own admission at paragraph 38 of his witness statement, that from all of that which the claimant has sent to him, he has returned those things that, *'he knew belonged to her,'* and that, he is not, *'in possession of anything belonging to her.'*

[104] The court from that evidence, has drawn the reasonable inference that the defendant has dealt with the remaining items in a manner which is inconsistent with the claimant's right, being the owner of same, and who was therefore, entitled to possession and use of those items, as and when she desired to possess and/or use same. The defendant did not permit her to do so, because, he chose to treat those items as though they were then, his own.

Intention to deny that the claimant's right or to assert a right which is inconsistent with such a right.

[105] It is difficult to conclude that there is no intention to deny the claimant her right to the remaining items, especially in light of the dictum by Scrutton LJ, which has

been applied in numerous Court of Appeal cases. Though the claimant has not led any specific evidence that the defendant intended to deprive her of the said remaining items, which she has an entitlement to, the absence of that evidence does not leave the court unable to draw an inference from that which has been led, that said intention was in existence. Clearly the defendant's acts were done inconsistent with the claimant's right, though the defendant '*may not know of or intended to challenge the property or possession of*' the claimant, being the true owner.

[106] For this reason, the court finds that on a balance of probabilities, the claimant has made out her claim, against the defendant for conversion with respect to the remaining items.

Detinue

[107] Waddington JA, in **George and Branday Ltd. v Lee (1964) 7 W.I.R. 278E**, defined detinue as follows:

'The gist of the cause of action in detinue is the wrongful detention, and in order to establish that it is necessary to prove a demand for the return of the property detained and a refusal after a reasonable time, to comply with such demand. The authorities establish that a demand must be unconditional and specific.'

The distinction between a cause of action in detinue and one in conversion

[108] The distinction between a cause of action in conversion and a cause of action in detinue is that conversion is a single wrongful act and the cause of action accrues at the date of the conversion. Detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. See: Diplock, L.J., in **General and Finance Facilities Ltd. v Cooks Cars (Romford) Ltd., [1963] 2 All ER 317.**

Whether there has been an unconditional demand for the remaining items

[109] The claimant has led evidence that sometime in 2012, she asked the defendant, upon the termination of their intimate relationship, to return her goods. The exact date when she so asked the defendant, is though, unknown to this court, as also is the exact, or even approximate date when the parties' intimate relationship ended. What this court does know though, is that the defendant gave evidence by means of paragraph 37 of his witness statement that:

'In June 2012, a bailiff came to my house along with her cousin who is a woman constable police to get things that she allegedly left at my house which I objected.'

[110] From that evidence, this court has concluded that the claimant made an unconditional demand for the return of goods which she contends, are hers, in June of 2012.

Has the defendant refused to comply with that demand within a reasonable time

[111] It is undisputed that the remaining household items were demanded, at the very least in June of 2012, and were not returned on April 16, 2013 being the date when the interim injunction was granted. Certainly the period of ten (10) months, in the opinion of this court is, an unreasonable one. Thus, upon said observation, the claimant's case, against the defendant, for detinue has been made out in respect of the remaining household items.

[112] Having found that, on a balance of probabilities, the claimant's claim against the defendant for conversion and detinue has been met.

Measure of damages for conversion

[113] The measure of damages for conversion is the value of the goods at the time of conversion, plus any consequential damages, for consequential losses. See **General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd and Clerk and Lindsell 20th ed.** at paragraph 17-87. Consequential losses include: devaluation in the items and loss of use/hire.

Measure of damages for detinue

[114] At pages 377 and 378 of **Rosenthal v Alderton and Sons Limited [1946] 1 KB 374**, Evershed J said:

'In an action of detinue the value of the goods claimed but not returned ought, in our judgment, to be assessed as at the date of the judgment or verdict. A successful plaintiff in an action of detinue was, under the old practice, entitled to judgment for the re-delivery of the goods or, in case they were not returned, to their value together with damages and costs; and such value was either assessed by the jury at the trial or by the sheriff upon an inquest (see e.g., Viner's Abridgement, 2nd ed., vol 8., p. 40; Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 313; Phillips v. Jones (1), per Parke B.). Unless the alternative methods of assessing value were liable to produce substantially different results, the time at which the value was in each case to be determined, must have been the date of the verdict.'

[115] The court is guided by the measure of damages in both conversion and detinue. Ordinarily, it would be within the ambit of the court, where the claimant is successful in proving her claim for detinue, to order that the goods be returned to her.

[116] The measure of damages for the remaining household items, with respect to the claimant's claim in detinue, would be the market value of those items, as at the date of judgment. The court notes that, that assessment would be a difficult one, since this court does not have information as to the value of the remaining household items, as at the date of this judgment. As such, the court is constrained to explore the possibility of awarding a quantum of damages, within the ambit of the tort of conversion. It is of importance to note, that the claimant has not sought the relief of restitution and is instead, seeking to be awarded damages, rather than to be given back the remaining household items which this court has determined, are hers and were converted by the defendant.

Quantum to be awarded

[117] Though the claimant has sought to recover the sum of US \$1690.00, being the aggregate costs, pertaining to her having shipped several of the disputed items to Jamaica, that sum cannot be recovered as part of this case. Though that was a

cost incurred by her, it is not a loss which the defendant ought to compensate the claimant for. The claimant, by her own evidence, decided to ship these items to Jamaica, for her property. The expense to ship those several items, cannot properly be recovered by her, as part and parcel of this claim, or any other claim, for that matter.

[118] The award as sought by the claimant is to be treated as special damages. That award is meant to place the claimant, as far as it may be possible to do so, by monetary means only, in the position that the claimant would have been in, had the defendant not converted the remaining household items. Special damages should, as a general rule, be both specially pleaded and specially proven.

[119] In calculating what quantum should be awarded, the court ought to have regard to the value of the items, as at the date of conversion. The court having accepted that the defendant failed to return the remaining household items when demanded in June of 2012 and has converted same, will treat with the conversion date as such- June 25, 2012.

[120] In the Court of Appeal decision of **Jamalco v Lunette Dennie – [2014] JMCA Civ. 29**, the court had before it, an appeal from a decision of the Supreme Court concerning an award of special damages, in circumstances where there was no evidence led, vis a vis that item of special damages claimed for, such as would have readily enabled the trial court to ascertain the extent that particular loss. On appeal, at paragraph 60, Phillips JA summarized the principles of recoverability of damages and added that:

‘...if the damage sustained is clear and substantial, but the assessment of the same is difficult, the court must do the best it can in the circumstances.’

[121] Where the court is satisfied that there has been a clear and substantial loss suffered by a litigant, though there may be no evidence for the court to calculate such award with precision, the court ought to do its best to make the relevant assessment.

[122] In the circumstances, though the court does not have any evidence of the value of the remaining household items as at June 25, 2012, the court is able to make an assessment, based on the evidence presented that the remaining household items would have depreciated from their respective dates of purchases to June 25, 2012. Thus, it is in the ambit of the court to do its best to ascertain what those remaining household items would have cost, in United States dollars. The items were purchased between November 2006 to December 2011, based on the receipts, which have been tendered into evidence. In the circumstances, the court finds that a diminution of 5% in the value of the remaining household items, can be assessed. That diminution in value arises, because of the time that would have elapsed between the respective dates of purchase of the remaining household items and the approximate date of the defendant's conversion of same. The claimant is therefore entitled to recover the sum of **US \$47,647.00**. See the table below.

Items	Value in USD
Bicycle	130.00
Barbeque Grill	450.00
Microwave	40.00
Toaster Oven	20.00
Oster Blender	25.00
Cutlery	19.00
Crockery	85.00
Curtains	47.00
Sheet sets (3 x 49.95)	149.85
Comforters (3 x 165)	495.00
Rowenta Iron	69.99
Light Fixture	85.00
Towels (4 bath, 2 hand and 4 wash rags)	56.00
Glassware (1 set of 10)	45.00
Paint	434.84
Gemini Speakers Gemini dual CD Gemini AMP Gemini Equaliser Gemini Mixer Gemini case Power Strip	All totalling 1604.98

Gemini Head Phones	
Sectional Leather coach 2 Armless chairs 1 double recliner 1 wedge seat 1 chaise	2138.93
Accessory Kit and Spray gun and Accessories	104.15
Other building equipment	171.20
Warrior Items	85.00
9 Saunas	22500.00
Shower stall	450.00
4 boxes of hanger	32.00
20 boxes of glass tiles	15360.40
5 glass face basins	750.00
Stainless steel water dispenser	50.00
2 Chandeliers	2000.00
48 inch Television set	600.00
Glass top TV stand	199.99
Whirlpool Washing Machine	750.00
Pool table	329.99
Blood pressure kit	35.00
Telescope	69.99
Massage chair	229.99
Chest table	72.99
Carton with chairs	59.99
Carpet	299.99
Slendertone Flex Ab Toner	72.99
Total	50154.74
Less 5%	-2507.74
TOTAL	47,647.00

[123] Though the claimant has claimed for the relevant sum in United States dollars, the court's order will calculate the relevant figure in Jamaican Dollars. The value of the United States dollar to Jamaican dollars, as at today's date is \$145.86. This yields the total sum as **\$6,949,791.42.**

Loss of use

[124] Ordinarily, in a claim of this nature, the court may, if satisfied based on the evidence before it, make an award for loss of use, if such loss is proved, or can be inferred, to have been suffered in the particular circumstances. As is observed above, the claimant has not advanced any evidence of the specific sum which would serve as strict proof of such loss of use. However, the absence of this evidence does not render the court unable to make such award, having been satisfied that the claimant has, as a result of the defendant converting the remaining household items from June 25, 2012, to date, been unable to use the remaining household items. It is to be noted by this court that even though an interim injunction was granted in favour of the claimant on April 16, 2013 and has been in place since said date, that does not preclude the court from making an award for loss of use. It was the defendant's conversion of the remaining household items that caused the claimant to seek and obtain that relief, though the defendant himself was not using the said items, between the date of the injunction and the date of this judgment.

[125] Having been satisfied that such substantial loss was suffered, it is open to the court to award nominal damages for loss of use, or in the alternative, to make an assessment as to a sum, which in the opinion of the court, will serve to reasonably compensate the claimant the loss of use of the remaining household items, which the court is satisfied that the claimant has suffered.

[126] The court is of the opinion that were it to award nominal damages for loss of use, that such would constitute a travesty of justice, in all the circumstances of this case, as regards the remaining household items. That leaves the court with the latter option. It is the considered view of this court that the sum of one million and five hundred thousand Jamaican dollars (\$1,500,000.00) ought to be awarded for loss of use, bearing in mind that the claimant has been without the use of any of those items, for nearly nine (9) years, through no fault of hers.

The claimant's undertaking as to damages

[127] The court having concluded above, that the defendant at all times, was entitled to keep the woodwork tools and other gifted items for his own use, at this juncture, must address the consequence of the interim injunction, in respect of those items. Since the defendant was entitled to keep same for his use, at all material times, the claimant ought not to have sought to obtain, much less, actually obtained, the injunctive relief, pertaining to the said items. The claimant then, having sought the injunction in respect to those items, as per her undertaking as to damages, ought to indemnify the defendant for his loss of use of the items, which were given to him as gifts, while the injunctive relief was in place, at the instance of the claimant, preventing the defendant, from using those items.

Costs

[128] Part 64 of the Civil Procedure Rules which outlines the general rules concerning costs orders. **Rule 64.6 (3) and 64.6 (4) (b) and (d)**, read as follows:

'(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(4) In particular it must have regard to –

a. ...

b. whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

c..

d. whether it was reasonable for a party - (i) to pursue a particular allegation; and/or (ii) to raise a particular issue;'

[129] Since the claimant has not been entirely successful in proving this claim, she shall be awarded four-fifths (80%) of the costs of this claim.

CONCLUSION

[130] This court has examined the assertions as alleged by the defendant as regards all of the items which are the subject of this claim. From that exercise, this court has

concluded that the defendant is entitled to keep the woodworking tools, firearm safe, car stereo, autopage alarm and penis pump, as gifts.

[131] As regards the remaining household items, the claimant has met the burden of proof as regards both claims for detinue and conversion. Though both claims are successful, the court is not in a position to award damages in detinue as the court does not know, nor is in a proper position to ascertain the value of the remaining household items as at the date of judgment. For that reason, this court has instead decided to provide a remedy to the claimant, that being special damages, for conversion.

[132] The delay in the delivery of this judgment is deeply regretted and no words can be proffered to properly provide any explanation for same.

DISPOSITION

[133] In the circumstances, this court's orders, are as follows:-

(1) The claimant is awarded special damages for conversion in the sum of \$8,449,791.42 with interest at the rate of 3% from June 25, 2012 to date of judgment.

(2) The defendant is entitled to keep the following items, as they were purchased and given to him as gifts:

- Bandsaw blades
- Router bits
- Jointer
- Brad nailer kit
- Mortising attachment kit
- 4pc mortising chisel set
- Irregular angle clamping set
- Pipe clamp set on stand
- 3 pocket aprons
- Grinder/ sharpener
- Jointer Blades/ bits
- Planer knives, nails
- Hammer drill

Firearm safe
Penis pump
Autopage Alarm
Pioneer Car stereo

- (3) A hearing is to be scheduled by the Registrar in conjunction with the parties, in order to have this court determine the extent to which the claimant should indemnify the defendant, as regards the items which this court has concluded were gifted to the defendant, as referred to in detail, in order no. 2, above.
- (4) The claimant is awarded four-fifths (80%) of the costs of this claim.
- (5) The claimant shall file and serve this order.

.....

Hon. K. Anderson, J.