**BARBADOS.**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 4 of 2005**

**BETWEEN:**

**REGINA SCHULTE HULSE** ***Appellant***

**AND**

**KNIGHTS LIMITED** ***Respondent***

**BEFORE: The Hon. Peter D.H. Williams, the Hon. John A. Connell and the Hon. Sherman R. Moore, Justices of Appeal.**

**2007: 26 April; 25 June; 26 July**

**2008: 18 September**

**Mr. Bryan L. Weekes of Weekes & Kissoon for the Appellant**

**Mr. Francis G. De Peiza of Carrington & Sealy for the Respondent**

**JUDGMENT**

**PETER WILLIAMS JA**

## I. INTRODUCTION

[1] This appeal concerns the appropriate damages to which Regina Schulte Hulse, the (plaintiff) appellant, is entitled for breach of contract by Knights Limited, the (defendant) respondent, of a licence and distribution agreement. The agreement between the parties was entered into to facilitate the production and distribution of songs with the exotic titles of "Dancing Flamingoes"; "Nights"; "Queen of Wonderland"; "Angels Born in Hell"; "No, Don't turn back" and "Who is scared of the Blackman?" On 26 January 2005, ***Inniss J*** awarded the plaintiff $11,503.21, $1,500.00 for nominal damages and $10,003.21 for general damages. The appellant's case is however that the general

damages were incorrectly assessed and were so low as to amount to an entirely erroneous estimate of the damages to which she was entitled.

## II. THE FACTS

[2] The plaintiff lived in Hamburg, Germany and may be described to have had a diversified career. She was an actress, singer and recording artist. As a singer she wrote her own songs, in both German and English and the musicians with whom she played were well known in Germany.

[3] The plaintiff's case was that in 1992 she made two master recordings or Digital Audio Tapes ("DATs") in Germany, the lyrics of one in German and the other in English. The titles of the songs were as stated in paragraph [1] above. The plaintiff pleaded that she also handed over to the defendant "two master copies of music videos" (paragraph 12 of the amended statement of claim). However, the defendant admitted receiving "a" DAT containing five songs, most of which were rendered in German and "one copy of one music video" (paragraph 5 of the amended defence).

[4] The plaintiff's evidence was that she gave the defendant two DATs produced in Germany and one DAT ("The Bad Man") produced at Eddie Grant's studio in Barbados at an estimated cost of US $2,000.00. She also said that two videos were shot in Barbados in March 1993. The oral evidence of Mr. Richard Lewis, Production Manager of the defendant was that he received from the plaintiff "a DAT master tape". The discrepancy in the pleadings between what the plaintiff delivered and what the defendant received was never clarified in the evidence. The judge made reference in the judgment to the fact that the plaintiff delivered one DAT and one music video (paragraph [3]), but later he referred to the plaintiff delivering her DATs to the defendant (paragraph [17]). However, what seems to be clear is that there were two German produced DATs and one Barbadian produced DAT.

[5] On 22 September 1993, the plaintiff signed a Licence and Distribution Agreement with Rainbow Wirl Incorporated, which changed its name to Rainbow Paper Products (1995) Limited and in 1997 amalgamated with Knights Limited. The duration of the agreement was for five years from 1 August 1993 to 31 July 1998. The defendant was granted the exclusive right to market, distribute and sell records of the plaintiff's master recordings and to use the artwork and other advertising material supplied by the plaintiff. In consideration of the rights granted, the defendant was to submit to the plaintiff at stipulated times a statement of royalties payable at the agreed rates. The defendant was to "make its best efforts to achieve optimal exploitations of the recordings" in the West Indies, inclusive of Puerto Rico and the United States Virgin Islands. At the date of expiration or termination of the agreement the defendant was to cease to use any recordings, master recordings or matrices made therefrom and to promptly return the material to the plaintiff. The agreement was made subject to the laws of Barbados under the exclusive jurisdiction of the High Court.

[6] On 2 June 1993, the plaintiff paid the defendant $3,238.21 as part payment for the production of an album, for which the defendant charged $6,765.00. The defendant pleaded that it produced one cassette master (from the two DATs produced in Germany), 100 cassettes, 300 cassette inserts, one record master, 150 records, 300 record jackets and record labels at a total cost of $2,194.00 (paragraph 7). Apart from the above, there was no clear evidence of what the defendant did between August 1993 and December 1994 in pursuance of the agreement. The evidence of Mr. Lewis seemed characteristic of the defendant's attitude towards the plaintiff and its obligations under the agreement. Mr. Lewis said:

> "I don't exactly recall what we did for her, but we did manufacture some product. I think we entered into a distribution agreement. I don't recall the quality of items produced…I don't recall what decision was made with respect to the material… I can't recall if [the defendant] did any promotion for the [plaintiff]."

[7] In January 1995 there was a fire at the defendant's premises and the two DATs produced in Germany were among the items destroyed. We should add that the trial proceeded on the basis that neither the plaintiff nor the defendant made any copies of the DATs. However, a cassette master produced from the two DATs was not destroyed. The main issue in the appeal is to determine the compensation to which the appellant is entitled for the destruction of the two German produced DATs in the light of the availability of the cassette master of the

DATs.

[8] Nothing appears to have transpired between the parties until August 1997, (over two and a half years after the fire) when Mr. Weekes wrote to the defendant on behalf of the plaintiff. He received negative responses to his letters from the Financial Director acting on behalf of the defendant. The Director stated that "the master tape for the album is in the possession of Ms. Hulse, so that she may proceed to manufacture and distribute her catalogue as she sees fit". However, he did not address the real issue which was the destruction of and the defendant's liability to replace the plaintiff's three DATs, especially the two which had been produced in Germany at considerable cost according to the plaintiff.

## III. THE HIGH COURT PROCEEDINGS AND THE JUDGMENT

[9] The writ was filed on 22 October 1998 after the agreement had expired (31 July 1998) and nearly four years after the fire (January 1995). The amended statement of claim pleaded a breach of the agreement by reason of the defendant's failure to provide quarterly royalty statements and failure to return the plaintiff's "property". The claim alleged that the plaintiff's "catalogue" had been shipped to a company in Miami, Florida that purchased the defendant's assets. The plaintiff therefore sought orders that she be provided with royalty statements and that her "catalogue" be returned. She also claimed damages.

[10] The amended defence admitted that the plaintiff's DAT (in the singular), a metal record stamper and record jackets, were destroyed by the fire, but pleaded that by reason of the fire, performance of the contract became impossible and the defendant was discharged from further performance thereof (paragraphs 8 and 9). The defendant pleaded that according to the agreement, royalty statements were to be issued only when royalties were payable and as there were no sales, no royalties were payable (paragraph 11). The amended defence denied that the plaintiff had suffered any loss in respect of the destroyed DAT(s) and that the plaintiff was entitled to the relief claimed or any relief at all (paragraphs 15 and 16).

[11] The judge resolved the issue of liability in favour of the plaintiff. He held that it was a term of the agreement that royalty statements were to be submitted whether or not albums were sold. However, he accepted the evidence of Mr. Best, the manager of the defendant that there were no sales of the albums and awarded the plaintiff nominal damages of $1,500.00; there was no explanation of the basis on which the figure was derived. Although an appeal was filed against the award, it was not pursued.

[12] With regard to the plaintiff's DATs, the judge found that as a result of the fire they were destroyed (paragraph [5] of the judgment) and held that the defendant was a bailee of them (paragraph [17]). He further held that the defendant had not discharged the burden of showing that it exercised due care in storing the plaintiff's property (paragraph [22]); the principle is referred to in ***Bailment*** by ***N. E. Palmer, Second Edition (1991),*** at ***page 802***. There is no appeal against the judge's finding of the defendant's liability to compensate the plaintiff for destruction of the DATs.

[13] With regard to the relief sought, the plaintiff's case was that she was entitled to the return of her DATs, but because they had been destroyed, she was entitled to their market value and because they could not be obtained in the market, she was entitled to their replacement costs. The plaintiff filed (over three years after the amended statement of claim) voluntary particulars of her loss, in which she claimed that she spent approximately DM133,000 (approximately US $111,000.00) "on the creation of the music contained on the DATs and other materials comprising her catalogue delivered to the defendant company at the commencement of the agreement". No breakdown of the figure was given nor any details of the materials comprising the catalogue. No documentation was ever produced in support of the above figure. The case seems to have proceeded on the basis of compensation for the loss of only the two German produced DATs. No other particulars were given in support of the plaintiff's loss or damages.

[14] The plaintiff's evidence was that she was unable to use the cassette master tape which was not destroyed in the fire "to produce anything". Her expert witness, Mr. Gottfried Koch produced a written report dated 12 December 2003 and gave oral evidence. His opinion was that a DAT produced from an analogue cassette tape would not contain the identical digital information on the original DAT as there would be "an unavoidable addition of noise, resulting in a loss of sound quality".

[15] The defendant's position, which the judge accepted, was that the DATs could be produced locally to a satisfactory standard from an existing analogue master cassette.

[16] The judge assessed the damages, as follows:

| | |
|---|---|
| Loss of funds for production of work | $ 3,238.21 |
| Replacement of DATs | $ 6,765.00 |
| TOTAL | $10,003.21 |

There was no explanation in the judgment of how the two figures above related to any assessment for the loss.

[17] The judge awarded damages to the plaintiff in the sum of $11,503.21 with interest and costs and ordered $20,000.00 paid into court as security for costs to be paid out to the plaintiff's attorney-at-law.

## IV. THE APPEAL

### *(a) The grounds of appeal*

[18] The appellant filed detailed grounds of appeal which for the purpose of this judgment can be regarded as encapsulated in ground 3, as follows:

> "That the learned trial judge incorrectly assessed the quantum of damages which he awarded and that the damages were in all of the circumstances so low as to amount to an entirely erroneous estimate of the damages to which the appellant is entitled".

The sole issue in the appeal is the proper measure of damages to which the appellant is entitled for the loss of the DATs.

### *(b) The governing principle*

[19] We bear in mind that the Court of Appeal will not generally interfere by reassessing a trial judge's award of damages unless the judge acted on a wrong principle of law or made an erroneous estimate of the damages. The Privy Council stated the governing principle in ***Nance v. British Colombia Electric Railway Company Ltd. [1951] A.C. 601*** at ***page 613***:

> "[T]he appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance…before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage *(Flint v. Lovell* [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries, Ltd.* [1942] A.C. 601."

The principle in ***Nance*** was applied by the Privy Council in ***Khawam v. Chellaram [1964] l W.L.R. 711***.

[20] ***Greer LJ*** in ***Flint v. Lovell [1935] 1 K.B. 354*** at ***360*** stated:

> "In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

[21] The above quotation is described as "the classic statement of the grounds upon which the Court of Appeal will interfere": ***McGregor on Damages, Seventeenth Edition (2003),*** at ***45-025***. We also follow the principle as set out in a recent decision of this Court, ***Greaves v. Lorde, Squires and Cummins, Civil Appeal No. 34 of 2005 (15 May 2008)*** at ***paras. (40)*** and ***(41)***.

***(c) Submissions***

[22] Mr. Weekes submitted that the appellant was a professional recording artist, who spent money producing material which was recorded in a particular medium and to a particular standard. He stated that the DATs were to be used for commercial sales and that it was extremely unlikely that a reproduction by the respondent would be of a quality high enough to be used for commercial recording. He therefore did not agree with the judge that the issue was whether the reproduction was suitable for the average listener but rather the issue was whether the reproduction was suitable to produce material for sale. He concluded that the appellant should have been compensated on the basis of an award of general damages. However, he conceded that a reasonable sum would be less than the amount claimed as the cost of production; he threw out figures of "$100,000.00 or $50,000.00 or $60,000.00".

[23] Mr. De Peiza submitted for the respondent that whether or not the plaintiff's DATs could be reproduced from a cassette master to a satisfactory quality for mass distribution was the only issue in the appeal and was essentially a question of fact. The judge resolved the matter in favour of the defendant (at paragraph [47] of the judgment) by relying on the evidence of the defendant's experts, Mr. Moore and Mr. Best. The judge held that the difference in quality of the music between that on the original DATs and that which could be produced on DATs from the analogue cassette master would not be discernable to the average person. He further held that the work "was to be produced for mass distribution, not for a competition to be judged by connoisseurs of music". In the light of this finding, Mr. De Peiza was not willing to concede that the appellant was entitled to any compensation for the difference in sound quality. His contention was therefore that the plaintiff should have accepted as damages the costs to produce a DAT from the cassette master tape and that her refusal to do so did not entitle her to any additional damages.

[24] It was further submitted for the respondent that in any event the plaintiff failed to prove the damages that she claimed; there was no authentication as to the production of the original DATs in terms of the persons who produced them nor was there any breakdown of the production costs. The judge therefore properly found in favour of the credibility of the defendant's case. In short, the respondent's argument was simply that the judgment is correct for the reasons that the judge gave.

***(d) Discussion***

[25] The figure awarded to the plaintiff of $3,238.21 described as "loss of funds for production of work" was in fact the part payment made by the plaintiff to the defendant. Although not challenged by the appellant, it is not clear on what principle this was refundable to the plaintiff, especially in view of the fact that the defendant pleaded that it had prepared items for the plaintiff at a cost of $2,194.00: referred to at paragraph [6] above. There would therefore have been a net balance to the plaintiff of $1,044.21.

[26] The figure awarded to the plaintiff of $6,765.00 described as "replacement of DATs" was in fact the full amount payable by the plaintiff to the defendant for production of an album from the DATs; it was unrelated to the cost of the production of the DATs. The general damages awarded for the loss of the DATs therefore bore no relationship to any assessment of the measure of damages.

[27] In fact, the defendant pleaded that "the approximate costs of producing the master DAT and metal stamper are $100.00 and $700.00 respectively" (paragraph 10 of the amended defence). Mr. Best confirmed in his evidence that "to produce a DAT from the parent cassette master would cost $100.00".

[28] This Court is therefore convinced that the first ground to justify reversing a decision of the trial judge set out in ***Flint v. Lovell*** has been fulfilled, that is, the judge's award of damages for the loss of the DATs was assessed on a wrong principle of law.

[29] The applicable principle of law for the assessment of the loss is succinctly stated by ***Lord Denning MR*** i n ***Building and Civil Engineering Holidays Scheme Management Ltd. v. Post Office [1966] 1 Q.B. 247*** at ***pages 261*** and ***262***:

> "At common law in a case of bailment, the general principle is restitutio in integrum, which means that the party damnified is entitled to such a sum of money as will put him in as good a position as if the goods had not been lost or damaged…If the party damnified suffers damage of a special kind, he is entitled to recover it, subject to the qualification that the damages must not exceed such damages as would be produced in the ordinary course of things by the act complained of…When goods are lost or damaged in transit, the damage ordinarily produced is, in the case of loss, the cost of replacement; or in the case of damage, the cost of repair. That is the amount which, **in the absence of contract**, the bailor can recover." (Emphasis added.)

The bailment in the instant case arose out of contract and the defendant was under a contractual duty to return the DATs to the plaintiff.

[30] Mr. Weeks submitted that where there is no market for the goods, the value is ascertained by the cost of production. He relies on the statement of ***Greer LJ*** in ***J. & E. Hall, Ltd. v. Barclay [1937] 3 All ER 620*** at ***624***:

> "But if he cannot get [the goods] in the market, what is his position? He must do that which is analogous to getting them in the market, namely, he must go to the only people from whom he can get goods to put him into the same position as he would have been in if his [goods] had never been taken away from him, that is to say, he must go to the manufacturer and see for what price the manufacturer will supply him with similar goods."

However, we do not think that the above principle is of universal application.

[31] There are circumstances in which it would not be economical to replace the destroyed item, but it would be more appropriate to award the bailor compensation for its loss. This case may be such a circumstance. We appreciate that the judge was at a great disadvantage because he was required to decide on the damages, an issue that was not carefully pleaded and in support of which the evidence was poorly presented. Nevertheless, it does not seem to us that the matter for the judge to determine was so much the question of whether the plaintiff had failed to mitigate damages by refusing the defendant's offer to reproduce the DATs (paragraph [44] of the judgment) but rather the value of the destroyed DATs. In fact the defendant never replaced the DATs as the master cassette was returned to the plaintiff without any attempt to reproduce the DATs or to have the reproductions tested for sound quality. Assuming that the judge was correct to hold that reproduced DATs would be commercially acceptable for mass distribution, account still had to be taken of the evidence that the reproduced DATs would have been of inferior quality to the original DATs and of the compensation to which in the circumstances the plaintiff would be entitled.

[32] It is important to examine what Mr. Moore, who was the "mastering expert" actually said. He said that "from analogue you can produce a clean quality DAT from which CDs can be produced". However he also said:

> "To copy from Analogue 4 Track to Digital the sound quality is not the same as the original because analogue signal has to be converted to digital surface and in the conversion some of the signal is actually lost."

This opinion of Mr. Moore was not referred to by the judge. Also, contrary to the judgment (paragraph [47]), Mr. Best expressed no opinion as to the difference in quality between the original DATs and DATs that could be reproduced from an analogue cassette.

[33] Further, although the judge did quote from Mr. Koch's affidavit, he did not specifically refer to Mr. Koch's opinion in his report that there would be "a loss of sound quality" in the reproduction and to his oral evidence that "it is possible to go back to digital from the analogue recording but the quality would be compromised". The issue of compensation for a loss of sound quality was therefore not addressed. In the circumstances, the judge's finding that the the DATs could be produced locally to a satisfactory standard from an existing analogue master cassette should be open to review.

[34] What was required was some general assessment of the damages taking into account the original production cost of the DATs, the value of the destroyed DATs, the quality and commercial value of DATs produced from an analogue cassette in the light of the entirety of the expert evidence, the cost-benefit of replacing the original DATs and other relevant factors so as to arrive at a figure that would have been fair to the plaintiff.

[35] This Court is convinced that the second ground to justify reversing the decision of the trial judge set out in ***Flint v. Lovell*** has also been fulfilled, that is, the amount awarded was so very small as to make it, in the judgment of this Court, an erroneous estimate of the damages to which the plaintiff was entitled. It follows that the circumstances of this case fall within the two grounds of the governing principle outlined above to justify rejecting the judge's award of damages.

## V. RELIEF AND DISPOSAL

[36] The relief sought by the appellant in the amended notice of appeal is that this Court "assess the appellant's damages at a figure which is in law a true reflection of the loss suffered by her and to make an award of damages accordingly". However, we have no consent from the respondent to assess the damages. Further, any assessment is a function more appropriately performed by the High Court.

[37] We have found the decision of the English Court of Appeal in ***IBL Ltd. v. Coussens [1991] 2 All ER 133*** helpful in guiding us as to the manner in which we should dispose of this appeal. In that case the defendant was the chairman and managing director of the plaintiff company. He failed to return to the company two cars, a Rolls Royce and an Aston Martin, when he was dismissed. The value of the cars had increased significantly between the date of his dismissal, when he could have purchased them, and the date of judgment. IBL obtained summary judgment under RSC Order 14 against the defendant. The issue that had to be determined was the correct date for the assessment of the value of the cars.

[38] The Court of Appeal held at ***pages 133*** and ***134***:

> "Damages…were not to be arbitrarily assessed as at either the date of the conversion or the date of judgment but ought to be such as fairly compensated the owner for the loss of the goods, taking into account such matters as whether the owner would have kept the goods if they had not been converted, if not, when he would have sold or replaced them, if they were kept, whether they had increased in value, and whether the owner had suffered damage for loss of use. Accordingly, the appeal would be allowed and the matter remitted to the master for damages to be assessed by reference to the value of the cars at such date as would fairly compensate the company for its loss, such assessment to be made in the light of further evidence if need be as to the value of the cars and what the company would have done with them if they had been returned [at the date of conversion]."

We appreciate that a Court of Appeal is understandably reluctant to remit a matter to the High Court for reassessment of damages in view of the inevitable delay, the additional costs incurred and the desirability of putting an end to the litigation. However, we are of the opinion that a similar course to that adopted in the ***IBL case*** should be applied in disposing of this appeal.

[39] A few points may be noted from the ***IBL case***. ***Neil LJ*** rejected the argument advanced on behalf of the respondent that the appellant should be precluded from adducing further evidence. He stated at ***page 138***:

> "It was argued that IBL should have been ready at the hearing before the deputy judge to adduce any evidence of value which they wished to put before him and that, even though the judge may have been in error, it was now too late for IBL to attempt to reopen the issue of quantum. Our attention was drawn to *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 and to *Langdale v Danby* [1982] 3 All ER 129, [1982] 1 WLR 1123.
>
> I have considered this argument but I am satisfied that it would not be in accordance with the justice of the case to accept it. It seems clear that…no significant consideration was given to how the damages should be assessed. It follows therefore that if we conclude that the deputy judge was in error it will be necessary for there to be some further assessment unless the matter can be disposed of by agreement."

[40] ***Neil LJ*** anticipated "that evidence will be necessary before the master" *(**page 140**)* and ***Nicholls LJ*** stated that "the parties should have an opportunity, if it becomes necessary, to adduce evidence" on the points relevant to the assessment of damages *(**page 145**)*.

[41] We should mention that in the instant case an application was made by the plaintiff for summary judgment pursuant to RSC Order 14, but the application was not pursued. The judge referred to the "extensive affidavits filed on both sides" (paragraph [9] of the judgment) and relied on them (at paragraphs [26], [27], [38] and [39]). However, they appear not to have been properly read into evidence at the trial in accordance with RSC Order 38 rule 2(1).

[42] It should further be noted as pointed out by ***Nicholls LJ*** at ***page 143*** of the ***IBL case*** that "there is no absolute rule regarding the date to which the goods are to be valued". In the instant case, the judge gave no consideration to the appropriate time at which the loss should be assessed. Such consideration may be material especially in view of (a) the fact that the fire predated the judgment by ten years, and (b) replacement costs might well have increased.

[43] Before the conclusion of Mr. De Peiza's submissions on 25 June 2007, we drew to the attention of both counsel our concern that this appeal involved small damages and that the costs could exceed the damages finally awarded or agreed. We therefore invited counsel to consider whether there was any scope for stopping further costs being incurred especially as we had intimated that this was a case which may have to be remitted to the High Court for reassessment of the damages. Nevertheless, the hearing of the appeal proceeded to conclusion a month later. However, we would draw attention to the fact that in the ***IBL case***, ***Neill LJ*** specifically referred to the possibility of the matter being "disposed of by agreement" *(**page 138**)* and stated that "it may be that in the light of the guidance which we have given the parties will be able to reach some agreement" *(**page 140**)*. Similarly, in the instant case, failing agreement by the parties, the damages will have to be reassessed.

[44] The existing evidence shall stand. The High Court shall have discretion to allow witnesses of fact or expert witnesses to be recalled for cross-examination, but only on any issue which the High Court considers is not sufficiently clear from the affidavit evidence or from the transcript of the oral evidence already taken. It will also be for the judge reassessing the damages to determine whether it would be in accordance with the justice of the case to permit the parties to adduce further evidence. It may also be appropriate for the parties to be allowed to amend their pleadings in relation to damages. We do not in this judgment purport by anything that we have said to fetter the judge's discretion in trying to arrive at a fair assessment of the damages in the exceptional and difficult circumstances of this case.

[45] In the result, we allow the appeal and discharge the order of ***Inniss J***, except that made in respect of the award of $1,500.00 and interest thereon and we order that unless damages are agreed between the parties on or before the 18 December 2008 the matter be referred to a High Court judge for damages to be reassessed. The respondent is ordered to pay the appellant's costs of the appeal and of the High Court action.

Justice of Appeal

Justice of Appeal Justice of Appeal