

BARBADOS

{Unreported}

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Magisterial Appeal No. 3 of 2007

BETWEEN:

FURNITURE LIMITED

Appellant

AND

VIRGINIA MAPP

Respondent

Before: The Hon. Frederick L. A. Waterman, C.H.B., Justice of Appeal, the Hon. Sherman R. Moore, Justice of Appeal and the Hon. Elneth Kentish, Justice of Appeal (Ag.)

2008: May 6, July 14, October 2, 24, November 20

2011: March 24

Mr. Satcha Kissoon for the Appellant.

Mr. Theodore Walcott Q.C., with Ms. Anita Rampaul for the Respondent.

JUDGMENT

History of Proceedings

- [1] **KENTISH J.A. (Ag.)** This appeal has its genesis in earlier proceedings in the Magistrate's Court before Her Worship Magistrate Marva Clarke on 29 November 2000 in which she dismissed the appellant's claim for \$2,461 being the price of parquet floor tiles sold and delivered to the respondent by the appellant. That sum included \$82.80 representing bank charges on a cheque payment of which was stopped by the respondent.
- [2] The learned Magistrate found that the respondent was entitled to reject the tiles on the ground that they did not correspond with either the sample provided, or the quantity ordered.
- [3] On 16 July 2003 the appellant's appeal against that decision was dismissed by the Court of Appeal on the grounds that it saw no reason to interfere with the findings of the Magistrate who saw and heard the witnesses and that the decision of the Magistrate was amply supported by the evidence.
- [4] However, as a consequence of the comments of **Sir David Simmons C.J.** at para [10] of that appeal that:

"There was no claim for the return of the tiles but to the extent that there was a total failure of consideration it can only be right that the appellant should send and recover the tiles,"

Counsel for the appellant by letter dated 18 July 2003 wrote to Counsel for the respondent informing that the tiles would be collected on 22 July 2003. That letter is reproduced below.

July 18, 2003

Mr. Theodore Walcott

Attorney-at-Law

Chancellor House

Pinfold Street

Bridgetown.

Dear Sir,

Re: Furniture Limited v Virginia Mapp

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In the judgment of the Court of Appeal, it was ordered that the Appellant should collect the tiles in question, which remained in the possession of the Respondent.

In this regard, my client proposes to collect these tiles on Tuesday, the 22nd July 2003 at 2.30 p.m. in the afternoon.

I shall be obliged if you will make the appropriate arrangements for the receipt of those items as proposed.

Yours faithfully

.....

C.E. LASHLEY, Q.C.

CEL:sl

cc Mrs. Ram Mirchandani."

- [5] On the same day Counsel for the respondent replied informing Counsel for the appellant that the tiles had been "destroyed by termites". That letter is also reproduced below:

"18th July 2003

Mr. Clement E. Lashley, Q.C.

Epworth Chambers

Attorneys-at-Law

Pinfold Street

Bridgetown.

Dear Sir:

**Re: Magisterial Appeal No 18 of 2000 - Furniture Limited v
Virginia Mapp**

I acknowledge receipt of your letter dated today's date (18th July 2003).

I do not agree that the comment made in the judgment of the Court of Appeal referred to in your letter is an order of the Court of Appeal.

My client instructs me that on numerous occasions she spoke to Mr. Ram Mirchandani by telephone who agreed to collect the tiles in question. At the end of the hearing in the Magistrate's Court and in the presence of my client, I requested Mrs. Ram Mirchandani on instructions from my client to collect the tiles of Furniture Limited.

In spite of the many requests, your client has failed to take action and as I indicated in the Court of Appeal the tiles were destroyed by termites because of the refusal of your client to collect them within a reasonable time.

I must advise you that should your client proceed with any further legal action, my client will rigorously contest such action and will counterclaim for storage of the tiles which sum will far exceed the value of the tiles.

Yours faithfully,

Theodore Walcott

Attorney-at-Law

p.c. Mrs. Virginia Mapp"

- [6] The non-return of the tiles by the respondent sparked new proceedings before Her Worship Magistrate Cooke-Alleyne in which the appellant again claimed the price of the tiles and for the first time damages in negligence or in the alternative damages for wrongful conversion.

The Background

- [7] In August 1998 the respondent was undertaking repairs to the floors of her house. She needed a specific tile. On 12 August 1998 she went to the business place of the appellant, 'The Liquidation Centre' in search of that tile. There she saw three patterns of parquet tiles on display. Of those patterns she recognized one as the pattern she needed.
- [8] She then spoke with "Mr. Ram" an officer of the appellant. She told him she was looking for a specific tile that she had seen one on display which was possibly what she was looking for and enquired whether they had 400 tiles of that pattern in stock. She waited for approximately 1½ hours while an attendant searched in the warehouse. When that search proved unsuccessful, the respondent went home and returned the same day with a sample of the tile she required. She again spoke to Mr. Ram and gave him the sample.
- [9] At the suggestion of Mr. Ram she wrote a cheque dated 12 August 1998 for \$2,461 to cover the cost of the 400 tiles and a bucket of adhesive leaving the sample.
- [10] The next day 14 boxes of tiles were delivered to the respondent's home. She was not there. The tiles were received and signed for by a workman at the respondent's home. On inspection by the respondent the tiles were short by two boxes and they did not correspond with the sample left by the respondent. She so informed Mr. Ram that very day. She told Mr. Ram that she would return the tiles. He told her that was not necessary. He would send the right ones and collect the wrong ones at the same time on the next day.
- [11] As the tiles ordered by the respondent had not been delivered on 14 August 1998 the respondent stopped payment on the cheque previously issued to the appellant.
- [12] The correct tiles were not delivered to the appellant. The incorrect tiles were not collected by the respondent. Over the ensuing months and years the tiles remained in the possession of the respondent.
- [13] **Evidence before Magistrate Cooke-Alleyne:**

In her evidence in chief before **Magistrate Cooke-Alleyne** the respondent testified that she spoke to Mr. Ram maybe more than a dozen times about collecting the tiles over six weeks to two months and he kept promising to send for the tiles and replace them with correct ones; that on completion of the refurbishment she put the tiles in a tool shed and that she detected wood ants in the boxes that contained the tiles around July 2003. She sprayed the tiles and called pest control. She also testified that during her absence from the Island her gardener had burnt the tiles as they were 'pestered' in wood ants; that her Counsel had informed the Court of Appeal during the hearing that the tiles were infested with wood ants. Under cross examination by Counsel for the appellant the respondent stated that she stayed at home on the date specified in the letter from then Counsel for the appellant Mr. Clement Lashley for collection of the tiles; that the tiles were destroyed by termites by July 2003 and that they were burnt by her gardener, Mr. Stephen Bowen alias "Rusty", in December 2003.

Under cross-examination by Counsel for the appellant, Mr. Bowen stated, *inter alia*:

"I know [the] store room ... I know she had tiles in the room in 2003 December. The tiles get burn. Mrs. Mapp call me and tell me she see a rat and tell me come and check on [the] rat and see if it building a nest. This was in December. Mrs. Mapp said she was going away. I check tool shed. I open shed and start to clean it and came across some wood ants in boxes in the corner. I open boxes and saw tiles which were wooden with wood ants. I took them outside. I put diesel on them. When I finish cleaning shed, I put newspaper on tiles and burn them. I burn tiles. There was some rat down. I tell she when she came back that I burn them. She say, 'oh shoot you should not burn them. They belong to Mrs. Ram and she is to come back for [the] tiles."

He further indicated:

"Early in year I dismantle [the] dog pen and burnt it. Ms. Mapp tells me anything I see [with] wood ants I could destroy it."

The Magistrate's Decision

[14] Before Magistrate Cooke-Alleyne three issues arose for determination:

- (i) was the respondent a bailee simpliciter of the tiles as contended by the appellant or an involuntary bailee as contended by the respondent?
- (ii) was the respondent negligent in her care, custody and control of the tiles so as to render her liable in damages to the appellant? and
- (iii) was the respondent liable in damages for conversion of the tiles?

[15] On the issue of Bailment, Magistrate Cooke-Alleyne found that the respondent was an involuntary bailee of the tiles. On realizing that the tiles were short and the wrong pattern, the respondent placed a stop on the cheque. The tiles remained in her possession. The Magistrate accepted as a fact that the respondent requested Mr. Ram to come and collect the tiles on several occasions. Mr. Ram promised to do so but this was never done.

[16] On the issue as to whether the respondent was negligent in her care, custody and control of the tiles while in her possession, the Magistrate held that the uncontested evidence was that the respondent stored the tiles in a covered shed attached to her home, and that she periodically had her home and the shed treated for termites. Further, on the discovery of termites on the tiles, she sprayed them and had them treated by pest control. The Magistrate held that the respondent exercised all reasonable care in her custody of the tiles. She concluded:

"It was unfortunate that the property was lost but I do not find that it was due to any negligence on the part of the defendant."

[17] On the issue of conversion the learned Magistrate found that there was never an intention by the respondent to assert any right which was inconsistent with the appellant's right.

[18] The Magistrate accepted that the respondent did tell "Rusty" on discovering that he had burnt the tiles, that he should not have done so but found that the respondent was not a participant in the destruction of the tiles and the Magistrate opined that:

"It may be argued that [the tiles] were destroyed by termites even before Rusty's action, but the point is moot".

[19] In her decision the Magistrate referred to the dicta of ***Maule J. in Heald v Carey 138 ER 762 at 769*** where it was said that:

"There is no doubt that a negligent dealing by a bailee with goods is not a conversion; and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him ..." and that

"... there is no unlawful taking of possession, or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion, unless the bailee is a participator in the act which causes their destruction."

[20] Guided by that dicta, the Magistrate held that the respondent is not liable in conversion for the tiles. She therefore dismissed the appellant's case with costs to the respondent.

Amended Notice of Appeal

- [21] In its amended notice of appeal filed on 23 May 2008 the appellant seeks orders that:
- (i) the decision of the learned Magistrate be set aside and judgment entered for the appellant;
 - (ii) the respondent be ordered to pay the sum of \$2,378.20 as damages for wrongful conversion or alternatively damages for negligence together with interest thereon; and
 - (iii) costs.
- [22] These orders are sought on the basis of four grounds of appeal. Those grounds will be dealt with sequentially as they appear in the Amended Notice of Appeal.

Ground 1

- [23] The Magistrate erred in law in her finding of fact that the Respondent was an involuntary bailee of the goods belonging to the Appellant in failing to appreciate that the delivery of the goods to the Respondent came about in pursuance of a contract entered into between the parties notwithstanding that the contract was later held unenforceable.
- [24] Counsel for the appellant argued that the evidence before the Magistrate is replete with contradictions and inconsistencies which the Magistrate failed to appreciate or take into account. He contended, therefore, that the Magistrate erred in finding that the respondent was an involuntary bailee of the goods. He argued that the respondent was a bailee in so far as the goods were not unsolicited and the respondent had sought and obtained the goods from the appellant.
- [25] He argued that the issue of the bailment being involuntary does not arise on the instant case as the goods had in fact passed to the buyer under a contract even though this was later held unenforceable. In essence he submitted that a valid and enforceable contract was not essential to the creation of a bailment. And he relied on the learning in the text "*Bailment*" by *N.E. Palmer 2nd ed. pp 19-23* that the possessor of a chattel may be liable as a bailee for its safety although the chattel was delivered in pursuance of a contract which is unenforceable through the failure of some stipulated anterior event.
- [26] Citing *Chitty on Contracts 28th ed. Vol 2 Specific Contracts at para 33-002* he submitted that bailment may arise notwithstanding that the contract from which it arises is subsequently held to be unenforceable.
- [27] In further support of his contention, Counsel relied on *Benjamin's Sale of Goods 6th ed. para 1-062* and **section 20(1)** of the *Sale of Goods Act, Cap. 318*. That section provides that the property in goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
- [28] There is nothing in the Record of Appeal to suggest that the provisions of **section 20(1)** of the *Sale of Goods Act* were argued before the learned Magistrate. Not surprisingly, therefore, there is also no evidence in the Record from which it can be deduced that the property in the goods had not passed to the respondent because the appellant had by the terms of the contract reserved the right of disposal until certain conditions were fulfilled.
- [29] It seems to the Court that Counsel has raised **section 20(1)** of the *Sale of Goods Act* to buttress his argument that the respondent was a bailee of the goods given the learning at para 1-062 of *Benjamin's Sale of Goods* that:

"The decision in **South Australian Insurance Co. Ltd. v Randele** shows that where there has been a sale of goods and the property has passed to the buyer, it is not possible to regard the transaction as a bailment ..."

- [30] In so far, however, as this argument was not advanced before the learned Magistrate we are of the opinion that it is not now open to the appellant to advance for the first time an argument based on **section 20(1)**.
- [31] Relying on the case *Industrial Chemical Co. (Jamaica) Ltd v Ellis (1986) 35 WIR 303*, Counsel urged this Court to reverse the Magistrate's findings of fact and to hold instead that the respondent was a bailee.
- [32] In response Counsel for the respondent submitted that there was no enforceable contract between the respondent and the appellant because the tiles did not conform to the terms of the contract for sale. They were both the incorrect type and quantity. The respondent was therefore entitled to reject the goods. Counsel argued that the evidence disclosed that the appellant company had agreed to collect the tiles but had failed to do so. He submitted that the respondent was at most an involuntary bailee of the tiles, and where there is an involuntary bailment and the owner refuses to collect the goods in a reasonable time, the owner loses the right of recovery. In support of his contention, Counsel cited **section 36 of the Sale of Goods Act, Cap. 318; Cheshire, Fifoot and Furmston's Law of Contract, 14th ed. at 189** and *Bailment, N.E. Palmer, 2nd ed. at 683*.

Did the Magistrate err in her finding of involuntary bailee?

- [33] In his text *Bailment 2nd ed. at p 677*, the author **N.E. Palmer** defines an involuntary bailee as:

"[A] person whose possession of a chattel, although known to him and the result of circumstances of which he is aware, occurs through events over which he has no proper control and to which he has given no effective prior consent." (P.677)

- [34] The learned Magistrate found as a fact that the tiles as delivered correspond neither with the sample nor quantity ordered by the respondent. There was ample evidence before the Magistrate to support that finding. We therefore see no reason to reverse the Magistrate's finding.
- [35] That being the case, the respondent was entitled to reject the tiles delivered to her home. We consider that she did so in two ways. First, she telephoned Mr. Ram, informed him that the tiles were incorrect both as to type and quantity and offered to return them. Mr. Ram told her that was not necessary and said the incorrect tiles would be collected upon delivery of the correct tiles. Second, she stopped payment on the cheque two days later when the appellant failed to deliver, as promised, the correct tiles.
- [36] We consider in so far as the respondent had not ordered tiles either of the description or quantity delivered she came into possession of the tiles in circumstances over which she truly had no control and to which she had not given any effective prior consent.
- [37] It is the unchallenged testimony of the respondent that she contacted Mr. Ram on several occasions requesting that he collect the tiles. This he agreed to do. It was never done.
- [38] In our opinion the respondent was an involuntary bailee of the tiles. We therefore concur with that finding of the Magistrate and find no merit in this ground of appeal.

Ground 2

- [39] The Magistrate erred in law and in her finding of fact by holding that the respondent was not liable for conversion in that the Learned Magistrate failed to appreciate that:
- (i) the return of the tiles was first formally demanded on July 18, 2003 by way of a letter from C. E. Lashley, Q.C.;
 - (ii) by letter dated July 18 2003, Mr. T. Walcott, Q.C.. indicated that the tiles had been destroyed by termites;
 - (iii) the respondent admits in her viva voce evidence that the tiles were not destroyed until December 2003; and
 - (iv) the respondent was in possession of the tiles after the lawful demand and refused to return the same.
- [40] Counsel for the appellant contended that the respondent is liable in damages for the wrongful conversion of the tiles.
- [41] In this regard he argued that the letter of 18 July 2003 set out at para [5] above from the respondent's counsel which states that the tiles were destroyed by termites was in conflict with the evidence of the respondent herself and her handyman 'Rusty' that the tiles were burnt in December 2003. That letter, he submitted, must have been written on the instructions of the respondent and the Magistrate failed to appreciate that that conflict rendered the evidence of the respondent unreliable.
- [42] He submitted, therefore, that the refusal of the respondent to return the tiles when demanded in July 2003 and the deliberate burning of the tiles in December 2003 amounted to conversion.
- [43] In support of this contention Counsel referred to ***Morris v C.W. Martin & Sons Ltd [1966] 1 Q B 716; Richardson v Atkinson (1723) 1 Stra. 576 and Bailment 2nd ed. pp 212 and 215.***
- [44] Counsel for the respondent maintained that the correspondence between the attorneys dated 18 July 2003 had been misconstrued. He argued that the tiles were in fact destroyed as they were rendered useless and spoilt utterly due to the termite infestation. The sworn evidence of the respondent and 'Rusty' that the tiles were not burned until December 2003 was therefore not inconsistent with the contents of his letter to Clement Lashley, Q.C. He further argued that counsel for the appellant's allegation that the respondent refused to return the tiles to the appellant was inconsistent with the evidence that she contacted the appellant company on several occasions to request collection of the tiles and that she remained at home on 22 July 2003 to facilitate the collection of the tiles. Counsel submitted that where there is an involuntary bailment and the owner fails to collect the goods within a reasonable time, the duty of care owed by the bailee ceases and the owner loses the right of recovery. The bailee was also under no burden to prove that she would have been in a position to deliver up the goods to the bailor at any time after the expiry of a reasonable period. In support of his arguments, Counsel cited the ***Oxford Concise Dictionary 8th ed., Bailment, N.E. Palmer, 2nd ed. At 189 and 707, Pedrick v Morning Star Motors Ltd Unreported Court of Appeal (UK), 14 February 1979, Davis v Henry Birks & Sons Ltd (1983) 142 D L R (3d) 356 and Jerry Juhan Developments SA v Avon Tyres Ltd 1999, The Times, 25 January 1999.***

Was there conversion of the tiles?

- [45] A good definition of the term 'conversion' is that of **Atkin J.** cited by **N.E. Palmer** in the text ***Bailment (op cit) at p. 212 that conversion is:***
- "dealing with goods in a manner inconsistent with the rights of a true owner ... provided that it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right."

- [46] So the question is whether the evidence in this case shows that the respondent dealt with those goods in a manner inconsistent with the rights of the appellant as the true owner? We think that it does not. Indeed on the contrary, the incontrovertible evidence is that the respondent on discovering that the tiles delivered did not correspond with the tiles ordered she immediately brought this to the attention of the appellant.
- [47] She offered to return them and Mr. Ram told her that they would be collected when the correct tiles were delivered. She requested Mr. Ram on several subsequent occasions to collect the tiles. Despite that the tiles were not collected. Moreover, as late as 22 July 2003 after the tiles had been in her possession for almost five years she remained at home to facilitate collection of the tiles by the appellant. Indeed, even in December 2003 when she discovered that her handyman had burnt the tiles she said to him “You should not have burnt the tiles”.
- [48] It seems to the Court that at all times the respondent consistently acknowledged by her conduct the right of the appellant to the return of the tiles. That conduct itself shows that she had no intention to deny the appellant’s rights or assert any right inconsistent therewith.
- [49] Despite the respondent’s unequivocal rejection of the tiles and her entreaties that the appellant collect the tiles they remained in the respondent’s tool shed for almost five years. In fact the appellant’s demand for the return of the tiles was first made only after the conclusion of the Court of Appeal proceedings on 16 July 2003, and even then prompted by the observation of **Sir David Simmons C.J.** in the judgment of the Court.
- [50] There was much argument before the Court as to what meaning should be attributed to the phrase used by Counsel for the appellant that “the tiles were destroyed by termites” it being part of the argument of Counsel that as the tiles were still in existence in December 2003, months after their return had been requested, the burning itself constituted conversion.
- [51] It is not in dispute that in July 2003 the respondent detected termites in the boxes with the tiles and had them sprayed. Nor is it in dispute that the Court of Appeal at the time of giving its decision was informed that the tiles were destroyed by termites.
- [52] Two of the meanings of the word ‘destroy’ as given by *The Concise Oxford Dictionary 8 ed.* are to “make useless” and “spoil utterly”. The reality is that those tiles, infested by termites, were useless and no longer fit for the purpose for which they were intended. We therefore reject counsel’s argument in this regard as an exercise in semantics.
- [53] We are satisfied that there was no conversion of the tiles and affirm the Magistrate’s finding that the respondent is not liable for conversion thereof.

Ground 3

- [54] The Magistrate erred in law and in her finding of fact by holding that the respondent was not liable in negligence as a bailee of the appellant’s goods in that the respondent did not return the goods to the appellant in as good condition as she received them, notwithstanding that they were in existence at the time of demand. In so holding, the Learned Magistrate failed to appreciate:
- that the onus of proof was on the respondent to show that the loss or destruction of the chattel was not caused by failure on her part and that this included the duty to prevent damage to the chattel by the deliberate act of a third party or by the negligence of the respondent’s employees or agents acting within the course of their employment.
- [55] Counsel for the appellant submitted that the respondent was a bailee of the goods and was therefore responsible for safeguarding and redelivering the tiles to the appellant. He further argued that the loss of a chattel while in a bailee’s possession places the burden of proof on the bailee to show it was not caused by failure on his part to take reasonable care. He argued that the tiles were burnt deliberately and that the burden of proof was therefore on the respondent to prove that the loss or damage to the tiles was not caused by her fault. In support of his contention, Counsel cited *Chitty on Contracts 28th ed.* At *para [33-046]*; *Building & Civil Engineering Holidays Scheme Management Ltd v Post Office [1966] 1 Q B 247*; *Coldman v Hill [1919] 1 KB 443*; *Brook’s Wharf & Bull Wharf Ltd v Goodman Brothers [1937] 1 KB 534* and *Levison and Another v Patent Steam Carpet Cleaning Co. Ltd. [1977] 3 WLR 90*.
- [56] On the other hand, Counsel for the respondent argued that in so far as the respondent was an involuntary bailee she was not liable for mere negligence and that the respondent was under no duty to return the goods. He submitted that where a bailor breached an implied term of a bailment by failing to take delivery of goods within a reasonable time, there was no burden on the bailee after the expiration of that reasonable time and thereupon the bailor lost any right to claim the goods. In support of his contention, he cited **section 36** of the *Sale of Goods Act, Cap. 318*; *Chitty on Contracts 26th ed. at 118* and *Jerry Juhan Developments S A v Avon Tyres Ltd., 1999, The Times, 25 January 1999*.
- [57] We have earlier upheld the Magistrate’s finding of fact that the respondent was an involuntary bailee. The learning suggests that an involuntary bailee is only liable for gross negligence or deliberate injury to the goods bailed. Mere negligence is insufficient. (See *Chitty on Contracts 28th ed. paras. [33-033]*.)
- [58] In this case, the tiles were stored in a covered shed attached to the respondent’s home. The respondent employed a gardener and periodically had her home and premises treated for termites. The undisputed evidence of the respondent is that on first discovering termites in the tiles, she sprayed the tiles and had them treated. In this regard we refer to the case of *Elvin & Powell Ltd v Plummer Roddis Ltd (1933) 50 TLR 158* where it was held:

“If persons were involuntary bailees and had done everything reasonable they were not liable to pay damages if something which they did resulted in the loss of the property.”.

- [59] Reviewing all the circumstances as disclosed by the evidence in this case we find that the respondent had at all times acted reasonably to preserve the tiles. We do not find that the respondent was negligent in her care or custody of the tiles. On the contrary we concur with the finding of the Magistrate that she exercised all reasonable care during that custody.
- [60] The learning in the text **Bailment** (earlier referred to) at 707 is instructive. The author writes:
- “It may be possible to derive from the transaction an express or implied term that the bailor will collect the goods by a certain date. If so, a breach of that undertaking may thereafter entitle the bailee to regard his custodial obligations as extinguished”.
- [61] We are satisfied on the facts as found by the Magistrate that the appellant as bailor had expressly agreed to collect those tiles from the respondent’s home.
- [62] However, we are of the opinion that it was not reasonable for the appellant to allow almost five years to elapse before even a request was made for the return of the tiles despite the several requests from the respondent to collect them.
- [63] That conduct entitled the respondent to regard her obligations as an involuntary bailee as wholly extinguished particularly as the infested tiles now posed a threat to her property.
- [64] We are fortified in our opinion by **section 36 of the Sale of Goods Act, Cap. 318** which provides:
- “Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.”
- [65] The argument, advanced by the appellant’s counsel that the failure to collect the tiles was attributable to the fact that in the original proceedings the appellant was bringing an action on the contract for the contractual value of the goods and was not concerned strictly speaking with the goods, lacks merit. It does not take into account the fundamental principle against a multiplicity of actions where one action would suffice to bring to an end to litigation between the parties.
- [66] There is no reason why the claims advanced for the first time before Magistrate Cooke-Alleyne could not have been pleaded in the alternative and/or in addition to the original claim before Magistrate Marva Clarke.
- [67] We find that any duty of care imposed on the respondent as an involuntary bailee had ceased at the time of the appellant’s demand for the return of the tiles in July 2003. Accordingly there was no burden on the respondent to prove that the loss or damage to the tiles was not caused by her negligence.
- [68] This ground of appeal also lacks merit.
- Ground 4**
- [69] The Magistrate’s decision was against the weight of the evidence in that:
- (i) The Learned Magistrate failed to give sufficient weight to the evidence of Mr. Stephen Bowen where in his evidence he states that there were tiles in the respondent’s storeroom in December 2003.
- (ii) The Learned Magistrate failed to give sufficient weight to the evidence of the respondent where she states in her evidence that the tiles were in existence in July 2003 and could have been returned to the Appellant.
- [70] We find that this ground cannot be supported. The Magistrate did, in her decision consider the evidence of “Rusty” and the respondent. That evidence was not contradictory in any way as to whether the tiles were still in existence in July 2003 or were burnt in December 2003.
- [71] The Magistrate accepted the evidence of the respondent and “Rusty” as she was entitled to do as to the infestation by termites in July 2003 and as to the circumstances under which they were burnt in December 2003.
- [72] Having regard to our earlier finding that the appellant’s duty of care had been extinguished as of July 2003, nothing turns on the fact the tiles were subsequently burnt in December 2003.
- [73] It is a well established principle that an appellate court will only upset findings of fact by a court of first instance if it is satisfied on the evidence, the reliability of which it was for the court to assess, that the court clearly erred in reaching conclusions of fact. (See **Industrial Chemical Co (Jamaica) Ltd v Ellis (op cit.)**)

Conclusion

[74] We see no reason to interfere with the findings of Magistrate Cooke-Alleyne. We hold that there was ample evidence before her upon which she could make a finding in favour of the Respondent.

[75] In the result, the appeal is dismissed. The order of Magistrate Cooke-Alleyne is upheld. The appellant will bear the respondent's costs here and in the court below to be agreed or taxed.

Justice of Appeal

Justice of Appeal

Justice of Appeal (Ag.)