[2001–02 Gib LR 358]

MOR v. ATTORNEY-GENERAL (DETECTIVES AND SECURITY INTERNATIONAL LIMITED (Part 20 Defendant))

SUPREME COURT (Pizzarello, A.J.): August 14th, 2002

Civil Procedure—execution—writ of execution—indorsement—writ of fi. fa. to be indorsed by Sheriff with time and date of receipt even though Sheriff is same person as Registrar, who indorsed praecipe—writ invalid if not indorsed

Civil Procedure—execution—authorized execution—seizure invalid if by person merely contracted to and not employed by person authorized to carry out execution—Sheriff may not ratify wrongful seizure

Civil Procedure—execution—liability of Sheriff—Sheriff not protected by Crown Proceedings Ordinance, s.4(5) from liability in respect of execution because not part of "execution of judicial process"—runs from commencement to end of action and execution takes place after end of action

The claimant brought an action against the defendant for damages for the wrongful conversion of and subsequent damage to his car, and the defendant in turn sought to be indemnified by the Part 20 defendant.

The claimant allegedly bought a car for £12,000, partly funded by a loan from L, a very close friend. The registration certificate and insurance policy for the car were in the claimant's name, although he did not

actually sign the licence application form. L, who was involved in tobacco smuggling and therefore the subject of police surveillance, was frequently observed driving the car. At the time of the purchase, L's wife was seeking maintenance from him and she later instituted proceedings against him.

She asserted that L was in fact the beneficial owner of the vehicle, which had been registered in the claimant's name to mislead the authorities. L denied owning the car and stated that the claimant was indeed the owner, but the judge disbelieved him as against his wife. A maintenance order was made, which L failed to pay, and a writ of *fi. fa.* was subsequently issued by the Registrar for the seizure of L's property. Although the Registrar, who was also the Sheriff, indorsed the *praecipe* with the time and date, the writ was not similarly indorsed when received by the Sheriff.

The Sheriff appointed a security company as under-bailiff to execute the writ. She considered that L owned the car, despite the fact that the claimant was registered as the owner, and authorized the company to seize the car under the writ. The company contracted S, who was not their employee, to execute the writ. After an unsuccessful attempt to seize the car, the writ was returned to the court. Several months later, S seized the car purporting to execute the writ, although he did not have the document in his possession on that occasion.

The Part 20 defendant offered to store the car securely, which the Sheriff accepted. As the claimant had refused to hand over the key, the Part 20 defendant was unable to manoeuvre the car to store it under cover (as it had contracted to do) and instead it stood outside in a secure compound. The radio was reported as missing when the vehicle was delivered to the Part 20 defendant. Additionally, whilst it was parked in the compound it depreciated in value by £4,000 and vandals caused a further £3,388 damage. When the car was released to the claimant he sought damages against the defendant, who in turn sought to be indemnified by the Part 20 defendant under the contract.

The claimant submitted that (a) the writ of *fi. fa.* was invalid because the Sheriff failed to indorse it upon receipt and the car was therefore wrongfully converted; (b) the seizure of the car by S was also improper because he was an unauthorized person, being merely contracted rather than employed by the under-bailiffs; (c) moreover, S did not even have the writ in his possession when he seized the car; (d) he was in fact the owner of the car and the Sheriff had wrongly considered L to be the owner; and (e) he should not be held to his pre-trial admission because the matters at issue concerning the writ had only come to light during the trial.

The defendant submitted in reply that (a) as the claimant had admitted before the trial that the car had been seized under a writ of *fi. fa.* he could not now challenge the validity of the seizure; (b) there was ample evidence to suggest that L was the owner of the car, including Mrs. L's evidence in the matrimonial proceedings; (c) in any case, the Sheriff was

protected from liability by the Crown Proceedings Ordinance, s.4(5), which covered the execution of judicial process; and (d) as the claimant and L had themselves merely parked the car on the road, the defendant was not liable for the damage caused by vandals at the secure compound, which was a safer location than the roadside, and there was therefore no breach of duty of care.

Held, finding that the car had been wrongfully converted and awarding damages:

(1) The writ of *fi. fa.* was invalid as the Sheriff had failed to indorse it with the time and date of her receipt of it, as required by s.138(3) of the Supreme Court Act 1981. Indorsement was necessary despite the fact that in Gibraltar, unlike in England, the Registrar and Sheriff were the same person, pursuant to the Supreme Court Ordinance, s.6(1). As it had not been indorsed by the Sheriff, the writ was invalid and the car had therefore been wrongfully converted (paras. 50–51).

(2) Furthermore, the car had also been seized by an unauthorized person. The person executing the writ, S, being merely a contractor of the under-bailiffs rather than their employee, did not have the authority to execute the writ. The Sheriff was not able to remedy that defect by subsequently acquiescing in and ratifying the wrongful seizure (para. 52).

(3) In addition, it would have been desirable for S to have had the writ in his possession when he purported to execute it, in case his authority had been challenged. A writ of *fi. fa.* in the hands of the Sheriff could, however, have been properly executed if, at the time of execution, no objection was taken to its non-production and the goods were removed (para. 45).

(4) Although it was unnecessary for the purposes of these proceedings to decide the matter, the Sheriff had also erred in considering L to be the beneficial owner of the car. As the claimant was the registered owner, powerful evidence was required to rebut his legal right to the car because the registration certificate provided the best evidence of title. Indeed, if the certificate had been signed by the claimant he would then have been considered to be the owner. The Sheriff had wrongly relied on the self-serving evidence of the judgment creditor, Mrs. L, as to L's ownership of the car despite persuasive documentary evidence to the contrary. On the balance of probabilities, the claimant would be held to be the owner of the car and the seizure of it under the writ of *fi. fa.* issued against L had therefore been unlawful (para. 54; paras. 57–59; para. 63).

(5) It would not be appropriate to hold the claimant to his pre-trial admission that the car had been seized under a writ of *fi. fa.*, as the notice to admit was neutral on its face and the car had indeed been seized under what purported to be a regularly issued writ. The fact that the writ had not been indorsed by the Sheriff or that S had been merely a contractor of the under-bailiffs had only come to light during the trial and the claimant

could not reasonably have been expected to have ascertained these facts in advance (paras. 43–44).

(6) The Sheriff was not exempt from liability for the conversion of the car under the Crown Proceedings Ordinance, s.4(5), as the execution of the writ of *fi. fa.* did not fall within her responsibilities "in connection with the execution of judicial process." That provision exempted the Sheriff from liability from the commencement to the end of an action, but the execution of the writ occurred after the end of the matrimonial proceedings and she was therefore liable in conversion (para. 67).

(7) The defendant had breached its duty of care to the claimant to keep the car safely by storing it in the compound and it was irrelevant that the claimant and L themselves had not previously garaged the car but had merely locked it at the roadside. The defendant would therefore be ordered to pay £8,832 in damages to the claimant, which represented the depreciation in value of the car whilst stored at the compound, the damage caused to it there and the loss of the radio (para. 68; para. 72).

(8) The Part 20 defendant would be ordered to indemnify the defendant under the contract for £7,388, representing the damage caused to the car whilst stored at the compound and the depreciation in its value. It would not, however, be ordered to indemnify the defendant for the loss of the radio, which occurred prior to the delivery of the car to the compound (para. 77; para. 79).

Cases cited:

(1) *Bishopsgate Motor Fin. Corp. Ltd.* v. *Transport Brakes Ltd.*, [1949] 1 K.B. 322; [1949] 1 All E.R. 37, followed.

(2) *Cowan* v. *Blackwill Motor Caravan Conversions*, [1978] RTR 421, distinguished.

Legislation construed:

Supreme Court Ordinance (1984 Edition), s.6: The relevant terms of this section are set out at para. 47.

s.15: The relevant terms of this section are set out at para. 48.

Crown Proceedings Ordinance (1984 Edition), s.4(5): The relevant terms of this sub-section are set out at para. 66.

County Courts Act 1984 (32 & 33 Eliz. II, c.28), s.85(3): The relevant terms of this sub-section are set out at para. 49.

Supreme Court Act 1981 (29 & 30 Eliz. II, c.54), s.138(1): The relevant terms of this sub-section are set out at para. 39.

s.138(3): The relevant terms of this sub-section are set out at para. 39.

C. Simpson and *Miss S. Pilcher* for the claimant;
K. Colombo, *Crown Counsel*, for the defendant;
Ms. J. Evans for the Part 20 defendant.

1 **PIZZARELLO, A.J.:** A Mercedes 350 was imported into Gibraltar by Mr. Gerada of Auto Spray on February 15th, 1993. There is a certificate of importation dated February 15th, 1993 in respect of this vehicle, which is numbered G73409. Mr. Gerada subsequently sold the car on and a receipt for purchase is made out in the name of Stephen Mor, dated March 9th, 1993. This is in the form of an invoice, but it is unnumbered and no purchase amount is stated. The car was sold with only one key.

2 An application for a motor vehicle licence was made on March 10th, 1993 in the name of Stephen Mor, but the application is unsigned. A certificate of insurance was issued in the name of Stephen Mor for March 9th, 1993 to April 4th, 1993, covering the policyholder and any driver over 25.

3 At about this time, Stephen Mor was unemployed but was waiting to receive a lump sum gratuity in respect of a redundancy payment from the M.O.D. The payment amounted to £7,372.41. Mr. Gerada received £12,000 or thereabouts for the car.

4 At about the same time, a great friend of Mr. Mor, a Mr. Lara, was having matrimonial troubles and was being pursued by his wife in the courts for non-molestation orders and maintenance. Mr. Lara was in the tobacco trade, a euphemism for being engaged in the smuggling of tobacco into Spain. On March 23rd, 1993, Mr. Lara's wife took out a divorce petition against him. Mr. Mor received £7,372.41 redundancy money from P.S.A. on June 30th, 1993.

5 On September 3rd, 1993, the police seized G73409 whilst it was in the possession of Mr. Lara, who was driving it. They suspected the car had been stolen. A Norwegian insurance company laid claim to it. At the time, Mr. Lara made a statement to the police (taken by P.C. McGrail) with regard to his possession and ownership of the car. He stated that he was interested in buying a new car or for the sale of a car in good condition and had paid £12,000 on March 9th, 1993 to Pablo Gerada. He told Pablo to register the vehicle in the name of Stephen Mor, a very good friend.

6 On October 4th, 1993, Mr. Pilley, a solicitor acting for Mr. Lara and Mr. Mor, wrote to the Commissioner of Police stating that Mr. Lara was the beneficial owner to the extent of an outstanding loan.

7 Proceedings were issued on behalf of the police by the Attorney-General in the magistrates' court to determine what was to be done with the car. Mr. Pilley, acting for Mr. Mor and Mr. Lara, told the court that Mr. Lara was the beneficial owner but the car was registered to Mr. Mor. The magistrates' court came to the conclusion that the car could not be held by the police and, on March 28th, 1994, ordered the car to be returned to the registered owner.

8 At the conclusion of those proceedings, Mr. Pilley wrote requesting the release of G73409 to Mr. Lara. Mr. Lara went to collect the car from the police but as he was not the registered owner Sgt. Goodman refused to hand it to him and actually went to Mr. Mor's place of work at Sandpits to hand over the car. There, Mr. Mor received the car. He signed a receipt which contained the following indorsement: "I take repossession knowing of possible standing civil claim against me" and thus drew attention to a claim from the Norwegian insurance company. He gave the key to Mr. Lara, who drove the car away. Sergeant Goodman and Supt. Wink both said that they had never seen Mr. Mor drive car G73409. Sergeant Goodman, in particular, gave evidence that Mr. Lara was the subject of police surveillance and hence the times he saw the car and Mr. Lara driving it were limitless (hundreds of times, he said).

9 A short time before March 23rd, 1994, Mr. Lara had approached Detectives & Security (the Part 20 defendant) for a loan and offered to pledge a Mercedes worth £18,000, a second Mercedes worth £15,000 and a Peugeot worth £6,000. He gave his occupation as Winstons. Mr. Payas, for Detectives & Security, said in evidence that he questioned the lack of registration numbers in respect of the three cars, but as it was company policy not to rely on pledged items but rather a guarantee, he sent Mr. Lara off to find a guarantor. Mr. Lara proposed Mr. Bado as guarantor and this was accepted. Mr. Lara left him a key purporting to be to G73409. Mr. Payas explained the loan was for £2,000 and with interest amounted to £2,500, at 25% interest, and that was the sum noted in the guarantee agreement. A document described as a bill of sale was drawn up in respect of G73409 and a corresponding blank transfer form for the licensing department was executed by Mr. Lara. The bill of sale was not registered. Mr. Payas said that these documents were in Mr. Lara's name, but there is no documentary proof now available because Mr. Lara's father subsequently paid off Mr. Lara's debt and insisted that these documents be destroyed and he did so.

10 Shortly after, in the matrimonial proceedings on August 14th, 1994, Mrs. Lara swore an affidavit referring to Mr. Lara's ownership of G73409 and Mr. Lara, in his affidavit of means, stated in reply that he did not own any car. Thereafter, at a hearing before the Chief Justice in the matrimonial proceedings, Mrs. Lara gave evidence to the effect that she was present when Mr. Lara paid Gerada for and bought G73409 in the name of Mor and the reason for this was to protect himself from any claims from her in respect of the matrimonial proceedings and also, given the nature of his employment, from the authorities or whoever.

11 When I read the Chief Justice's judgment, which was not handed down until 1996, it appears that Mr. Lara said—and he confirmed what the Chief Justice recorded him as saying when he gave evidence in the

present case—that it was not his car but that Mor had bought it, he having lent Mor £3,000 and the balance having been advanced to Mor by Mor's father. The learned Chief Justice disbelieved Mr. Lara as against his wife, but it is to be noted that Mor did not give evidence in those matrimonial proceedings. I am told that the Chief Justice was informed by Mr. Pilley that Mr. Lara had no hope of recovering the loan of £11,000 from Mr. Mor. The Chief Justice had this to say:

> "He [Mr. Lara] lent Stephen Mor £11,500 to buy it . . . it was now a blue one and Mor was having difficulty in repaying the £11,500 and he was not pressing him for it. He denied he owned any Mercedes, but he used this blue one with Mor's permission."

12 At some time (the exact date is immaterial for the purposes of the present action), an order was made for interim maintenance against Mr. Lara and, as it was not paid, a writ of *fi. fa.* was issued to recover the same. The writ was issued on July 28th, 1994. The *praecipe* to lead to its issue was indorsed by the Registrar, to the effect that the writ was sealed and issued on July 28th, 1994, at 1.30 p.m. The writ of *fi. fa.* was not indorsed by the Sheriff as to the date and time of her receipt of it. The Sheriff appointed Security Express (International) Ltd. as under-bailiff to execute the writ of *fi. fa.*

13 Miss Dawson, the Sheriff and Marshal, explained in evidence that before execution is levied she has to be satisfied as to the ownership of the goods involved. Miss Dawson told this court that after initial hesitation she was quite satisfied that G73409 was beneficially owned, without doubt, by Mr. Lara and she authorized her under-bailiff to seize that car under the writ. She was aware the car was registered in the name of Mr. Mor. She came to that conclusion, having read the affidavit of Mrs. Lara in the matrimonial proceedings, having spoken to Insp. (now Supt.) Wink on the telephone and having been put in the picture by him. She stated she did not feel any obligation to seek Mr. Mor's view since she was convinced of the ownership by Mr. Lara, and Mr. Mor was in the picture only to the extent that his name was on the register. She stated she would not have changed her view if it had been reported to her that Mr. Mor had said the car was his.

14 On August 4th, 1994, an attempt was made to seize G73409 in the neighbourhood of Lime Kiln Steps by Mr. Sedgwick, who had the writ with him. Mr. Lara was in the driving seat and refused to hand over the car and the key. He got out of the car in a temper, locked it and went off home with the key. Mr. Sedgwick, who was under contract but not in the employment of Security Express, called for assistance as he was afraid of violence. When Mr. Polson, a director of Security Express, arrived and asked Mr. Lara for the keys of the car, he refused to hand them over. The car could not be clamped due to the configuration of the wheel, so Mr.

Polson arranged for a tow truck to take the car away. This took a couple of hours and by the time the tow truck arrived, car G73409 had gone and so on that occasion the attempt to execute the writ of *fi. fa.* was aborted. The writ of *fi. fa.* was returned to the court.

15 On October 10th, 1994, car G73409 was seized pursuant to the writ of *fi. fa.* at Flat Bastion Road. Mr. Sedgwick was again involved. He could not recall if he had the writ of *fi. fa.* in his possession at the time but believed that he had some papers. Mr. Mor lived in that area. There was no one present when he arrived but, shortly after, both Mr. Mor and Mr. Lara appeared on the scene. Mr. Sedgwick could not recall who was the first to arrive. He could not recall who had the key to the car. He said that both Mr. Mor and Mr. Lara laid claim to the car, and Mr. Lara was aggressive but Mr. Mor behaved impeccably. It was Mr. Mor who unlocked the car, took out the radio console and then put it back when Mr. Sedgwick assured him that the car would be kept in a safe place. Mr. Sedgwick says he asked Mr. Mor for the key. Mr. Mor agreed, when he gave evidence, that he was asked for the key but, on making enquiries (he tried to communicate with Mr. Pilley, his lawyer, but he was away from Gibraltar that day), he was advised that while he should not obstruct, there was no duty on him to help, so he locked the car and kept the key. The steering wheel was also locked.

16 In those circumstances, the car was towed away by G.S.S.L. During the seizure, there were a couple of police officers present in discharge of their duty to assist the Sheriff in the execution of the warrant under s.8 of the Supreme Court Ordinance. G.S.S.L. were hired to do the job, the car being in the custody and possession of the Sheriff through Security Express, which had impounded the car through Mr. Sedgwick. The car was taken to I.C.C., according to Mr. Sedgwick, who affirmed that he visited the location on several occasions to ensure the car was well, as he had promised Mr. Mor that it would be looked after. When the car was seized, it was, on a visual examination, well kept and in good all-round condition on the exterior and he saw it in the same condition while it was at I.C.C. There was nothing wrong with the interior that he saw.

17 There is a discrepancy between Mr. Sedgwick's evidence and the correspondence which has been put before me and that is that the correspondence suggests the car was kept in the G.S.S.L. compound. That would seem the obvious choice, but I find it hard to credit Mr. Sedgwick with that mistake having regard to the certainty with which he gave evidence describing the I.C.C. car park as being situate at Line Wall Road and generally finding him to be a truthful and accurate witness. I find as a fact that the car was taken and kept at the I.C.C. car park.

18 On October 14th, 1994, Mr. Pilley wrote to the Sheriff to claim the car on behalf of Mr. Mor. He referred to the matrimonial proceedings

where "the question of ownership of this vehicle is something which has been ventilated before the Honourable Chief Justice" and also mentioned the "claim for the vehicle from the Norwegian authorities."

19 On October 19th, 1994, Ms. Evans, who was at that time acting for Mrs. Lara, copied a letter from the Part 20 defendant, addressed to her, to the Sheriff. The Part 20 defendant offered to store the car and the letter reads:

> "Our company has been conducting repossession and consequent storage of property for a considerable number of years and in this connection we have two garages and tremendous storage capacity facilities at North Gorge, formerly the cold stores of the M.O.D.
>
> We are prepared, in an attempt to attract further business from you, to offer you the storage of a Mercedes vehicle and the stated 'few pieces of furniture' for the daily fee of £2.00.
>
> Initially, we would house the Mercedes and furniture in a store within our cold storage facilities but within the next few days, when one of our proper garages is vacated from kitchen equipment repossessed by us from another establishment and taken to our cold storage facilities, we will then get the Mercedes in the garage.
>
> Whilst in our possession, both the Mercedes and the furniture will obviously be under cover and we accept responsibility for any damage or loss whilst items are in our possession.
>
> I take the opportunity of informing you that, should you have reason for requiring big storage facility, no matter how big, in the future, do not hesitate to contact us and we can agree to a mutually acceptable competitive price."

20 On October 19th, 1994, the Sheriff agreed with the Part 20 defendant regarding the store of the car. Her letter reads:

> "Ms. Evans of Stagnetto & Co. has passed to me a copy of your letter to her of October 18th, 1994, the contents of which I have noted.
>
> It is of course my decision as Sheriff and Marshal, and not that of Ms. Evans, as to whether I use the facilities which you offer, the car having been seized by me in the same way as the furniture will be seized.
>
> Having said that, it would be acceptable to me to use these facilities in this particular instance on the terms which you have offered and I shall make arrangements to have the Mercedes moved from G.S.S.L. to North Gorge some time today.

I shall also instruct the Bailiff to make the necessary arrangements for the seizure of the furniture and its removal to your North Gorge premises. I cannot put an exact date or time on this."

21 Mr. Payas replied on October 20th, 1994, as follows:

"We acknowledge, with many thanks, receipt of your letter dated October 19th, 1994, regarding the above matter and confirm that we did receive the Mercedes in question on October 19th, 1994 in our custody, possession and control and we will hold it in accordance with the terms and conditions which we outlined in our letter to Ms. Evans until such time as you order its release.

It pleases us to know that you have, on this occasion, accepted our very competitive offer.

On July 20th, 1994, we did write a short note to you in which we attached a package of security matters, some of which are rather irrelevant to your needs.

We take the opportunity of informing you that we are in a position to provide, at very competitive rates, a full service of serving writs, repossessing property, vehicles and, in fact, any other item, and providing the necessary storage until matters are legally resolved."

22 G73409 was towed to the premises of the ex-M.O.D. cold stores by G.S.S.L. and was left in the compound. The reason given by Mr. Payas in his evidence is that the steering wheel was locked and the car could not be manoeuvred into the cold store. Mr. Payas also reports that the front door of the car was open and the radio was missing. He did not have a key to the car.

23 The car was left in the open in the compound and it is the evidence of Mr. Chidgey, which I accept, that the car was placed in the compound in such a position that it was likely to get damaged by traffic passing and re-passing into the meat factory, which was where he worked. The meat factory was owned by the Fischers, who were worried about damage to the car. Mr. Chidgey, who knew Mr. Mor, tried to get him to provide a key so that the car could be moved, but with no success. In addition, the compound on which the car stood was to be tiled and that also incommoded these works. In the event, the tiles were laid around the car and there remains to this day an untiled patch where the car had stood. The complex was the property of the meat factory and not the Part 20 defendant, although Mr. Payas had an interest in the meat factory.

24 At about this time, on October 18th, 1994, the Sheriff was informed of the claim of Forostoring A/S, a Norwegian insurance company, by their solicitors, Louis W. Triay & Partners. Mr. Pilley, on behalf of Mr. Mor, wrote to the Sheriff on October 25th, 1994, reiterating Mr. Mor's

claim and referring to an interpleader summons by the Sheriff, with a suggestion that the car be released to Mr. Mor on suitable undertakings acceptable to the Sheriff and the Norwegian insurers.

25 The Sheriff had a continuing concern as to the disposal of the car and was in touch with Louis W. Triay & Partners. At the same time, Mr. Pilley was urging the Sheriff to tell him what she intended to do and on November 16th, 1994, the Sheriff's quandary is expressed in a letter to Mr. Pilley which reads:

> "I hope to be in a position to take a decision in this one within the course of the next day or two.
>
> I have asked the clerk to the magistrates' court to confirm to me the nature of the undertakings which were given (not that I doubt your word for a moment!) and as soon as I hear back from him I shall contact you.
>
> However, if either your client or Mr. Lara failed to comply with the undertakings, it would seem to me that there is very little I could do about it!
>
> I understand that at one of the hearings in *Lara* v. *Lara*, Insp. Wink confirmed that, in his opinion, Mr. Lara was the true owner of the car.
>
> It seems strange to me that the vehicle was released by the police and that the Norwegian insurance company does not seem to have proceeded with the claim; and until such claim is proceeded with I am not sure how the court can be held responsible in the event of the car being disposed of. What would happen if they never proceeded?"

26 By letter dated November 25th, Mr. Pilley expressed a confusion concerning an apparent reluctance to issue a Sheriff's interpleader summons. There were two claimants to ownership of the car. One, Mr. Mor, the other, the Norwegian insurers. He wrote:

> "It is in such a forum that the appointed judge can make a determination as to ownership. In the meantime, if the opposing claimants were to agree on a set of conditions which would allow you to release the vehicle and thereby mitigate or obviate any damages claims which may follow interpleader proceedings, the parties could simply await a date for hearing and negotiations could continue between the parties."

27 That is roughly the same conclusion arrived at by Louis W. Triay & Partners. On November 29th, 1994, they sought time to try and come to an amicable arrangement because of the expense involved in their clients' pursuing a claim and stated:

"In the event that we are unable to arrive at an agreement with any other potential claimants, and you are unwilling to release the vehicle, you will no doubt wish to consider applying for interpleader relief under the provisions of O.17."

28 The Sheriff, by letter of November 30th, expressed no reluctance to issue interpleader proceedings. She wrote to Mr. Pilley:

"There is no reluctance to issue an interpleader summons at all!

I have been trying to find out from Louis Triay Jnr. what the state of play is regarding his issuing proceedings, which of course he is slightly reluctant to do in view of the costs of bringing witnesses to Gibraltar from Norway, *etc*.

He tells me that he is hoping to reach an amicable settlement between the competing claimants and he may have already been in touch with you in this respect.

I have today written to Janis Evans saying to her that I am seriously considering releasing the vehicle against suitable undertakings and applying for interpleader relief. As soon as I receive her comments, I shall let you know what I am going to do.

With the state at the frontier at the moment, I doubt if there is any need for an undertaking that the car may not leave the jurisdiction!"

29 The Sheriff wrote to Ms. Evans:

"I am rather concerned about retaining the Mercedes. It is becoming clear that it is most unlikely that, in the event of my selling the car, I could give a clear title to it.

As I think you are already aware, the Norwegian insurers compensated the owner after the theft (I have seen the correspondence comprising the offer and acceptance and settlement).

Louis Triay Jnr. is contemplating instituting proceedings for recovery of the vehicle, but given the vehicle's likely present value and the cost of going to trial (bringing foreign witnesses here) he would like to try and reach an amicable settlement if possible with all those with competing claims.

I could apply for interpleader relief and release the vehicle subject to undertakings relating to insurance and retention in the jurisdiction, and this might be the answer. To retain the vehicle could render me liable to a claim for damages and moreover, storage of the vehicle is costing your client money on a continuing basis. As it could be some time before the matter is heard, the storage costs could be considerable.

> I am, therefore, seriously considering trying to obtain the required undertakings and releasing the vehicle back to Mr. Mor.
>
> With regard to the contents of Mr. Lara's flat, the Bailiff removed various items on November 23rd, 1994, but has been unable to gain entry again to remove the furniture. It seems to me that it is unlikely that he will in fact be able to gain entry, as of course he is not entitled to break in. As the result of a scuffle with the police at the last attempt, Mr. Lara has been charged and has appeared in the magistrates' court, and the case has, I understand, been adjourned."

30 On December 1st, 1994, the Sheriff informed interested parties that she would seek interpleader relief. However, the parties were in touch with her regarding undertakings and, on February 3rd, 1995, she wrote to Mr. Pilley as follows:

> "I am not quite sure whether you are still acting for Mr. Lara or for Mr. Mor.
>
> As you know, I have the Mercedes impounded at present until the dispute over ownership is resolved. What I do not have is the key to the vehicle and I wonder whether you could obtain one from Mr. Mor (who I understand holds the keys).
>
> The problem is that in the event of a fire at the compound, a locked vehicle presents a major risk."

31 On February 10th, 1995, A.M. Capurro & Sons Ltd. valued the car at £6,000. The correspondence shows that the Sheriff was holding off interpleader proceedings to allow time for negotiations, which in the event proved fruitless, and there was a suspicion that Mr. Pilley might no longer be acting for Mr. Mor. On February 27th, 1995, the car was damaged while it was sitting out in the compound.

32 On March 1st, 1995, the car was towed by Mr. Hernandez against the one-way system to the Part 20 defendant's garage at Rock Tunnel car park at Flat Bastion Road. On March 14th, 1995, the Sheriff released the car on the instructions of the judgment creditor (Mrs. Lara). The car was released to Mr. Mor on March 15th, 1995. The Norwegian insurance company dropped its claims.

33 On or about March 16th, 1995, Mr. Mor attended the counter at the Registry of the Supreme Court and complained that the car had suffered damage as follows: (a) bonnet buckled; (b) a window smashed; (c) radio/cassette missing; and (d) seats slashed.

34 On March 17th, 1995, Mr. Payas wrote to Mr. Lara asking him to remove the vehicle from the garage at Flat Bastion Road. Mr. Payas dealt with Mr. Lara because he believed, and still believed, that Mr. Lara was

the beneficial owner of the car, so he was not paying Mr. Mor anything. He held this view because Mr. Lara held himself out to be the owner at the time Mr. Lara pledged the car and that throughout the period the car was in the compound Mr. Lara, he says, was visiting the compound and kept a watchful eye on it. Subsequently, his view was strengthened when he came to learn about Mr. Lara's statement to the police of September 3rd, 1993 and as a result of enquiries he made arising from this matter. On March 21st, 1995, Mr. Payas also wrote to Mr. Mor requesting him to take the car away and on Mr. Mor's instructions he had the car delivered to Pablo Gerada at the Europa Business Centre.

35 On April 12th, 1995, the acting Registrar forwarded a claim to the Part 20 defendant from Mr. Mor for damages to the car and Mr. Payas wrote to Mr. Mor as follows:

> "When we first accepted responsibility for the care, custody and control of the above described Mercedes, which was brought to us by the G.S.S.L. from their compound on October 18th, 1994, we clearly stated to the Bailiff and Marshal of the Supreme Court, that we would accept responsibility and exempt him from any liability in respect of damage or loss.
>
> Now we have learned that you are making a claim to the Bailiff and Marshal of the Supreme Court.
>
> As you can see, if anyone is liable it is our company and not him, therefore, I suggest that you take this matter up directly with our company.
>
> Pending our establishing contact, I wish to remind you that I have Mr. Lara's signature claiming that the Mercedes was his when he sold it to our company as security against a loan.
>
> You yourself know, from my telephone conversations with you and also with your solicitor, Mr. Pilley, how the situation has developed to its present state."

36 Mr. Payas was reluctant to meet any liability until the whole episode had been investigated. He understandably pointed to Mr. Lara's statement of September 3rd, 1993, to show that Mr. Mor has no beneficial interest. The police appear to have closed their files on the matter by June 7th, 1995, but I am uncertain, in view of a subsequent letter, whether that remark was relevant only to the police investigation with regard to the theft of the car, which had led to the application in the magistrates' court under s.49. It seems that the police arrested Mr. Mor and Mr. Lara as a result of Mr. Payas's complaints. The long and short of it is that on June 7th, 1995 the acting Sheriff asked the Part 20 defendant to pay damages to Mr. Mor in the sum of £6,000, as valued on February 10th, 1995.

Notwithstanding, the Part 20 defendant has not paid any damages, although he has offered to put the amount of the claim in escrow.

37 The car was taken from Europa Business Centre to the G.S.S.L. compound at Queensway, where, I am told, it is still incurring storage charges. It appears that the management of Europa Business Centre gave the instructions to move the car to G.S.S.L. On this, I note a letter of February 8th, 1998, from the Line Manager, Queensway Compound (M. Azzopardi) saying that car G73409 was towed there on June 11th, 1996, from Europa Business Centre, on instructions from the court. M. Azzopardi cannot be right because, in the corresponding documentation, the person who requested the removal of the vehicle was recorded as a warden and towed on instructions from Europa Business Centre Management. On the evidence in the present case, and noting that neither the Line Manager, Queensway Compound nor Europa Business Centre Management are parties in this action, nor have they given evidence, I hold that the car was moved from Europa Business Centre on the instructions of Europa Business Centre Management and not at the request of the Sheriff. It follows that there is no liability on the part of the Sheriff to pay for the storage of the car at the Queensway Compound. If there is any liability to pay, it will be Mr. Mor's as a result of my findings in the present action at paras. 68–72 below.

38 I consider that all the foregoing provides the context in which I have to address the submissions of the parties. The first matter I should determine is whether the car was properly seized by the Sheriff. In considering this aspect, Mr. Simpson sought to question all matters relating to the issue of the writ of *fi. fa.* and the manner of its execution. Mr. Colombo submitted that Mr. Simpson could not range freely because, for the purpose of this action, he had served Mr. Simpson with a notice to agree facts. The pertinent request was item 5 of the notice: "That on October 10th, 1994, the vehicle was seized in execution of a judgment debt against Mr. Lara by writ of *fieri facias*" and the reply was: "Paragraph 5 is admitted." Mr. Simpson raised the question following on from an observation I had made to the effect that the writ had not been indorsed after its execution. No one seems to have had sight of the writ in these proceedings until I called for it on July 19th, towards the end of the trial, when Mr. Simpson was addressing me.

39 Stemming from my observation, Mr. Simpson contended that the writ was of no effect because it had not been indorsed by the Sheriff with the date and time of receipt by her. This is necessary for two reasons, first because the writ of *fi. fa.* should be delivered to the Sheriff for execution and, secondly to ensure that all the goods of the judgment debtor are seizeable by the Sheriff as from that date and time. He refers to O.45 and s.138 of the Supreme Court Act 1981. Section 138(1) provides that the

writ of *fi. fa.* "shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed." Section 138(3) provides:

> "For the better manifestation of the time mentioned in subsection (1), it shall be the duty of the sheriff (without fee) on receipt of any such writ as is there mentioned to endorse on its back the hour, day, month and year when he received it."

40 The situation is similar in the county court: the Registrar must indorse on the back of the warrant of execution the hour, day, month and year when he received the application for it. When she receives a writ, the Sheriff is a public functionary having, indeed, duties to perform towards those who set her in motion, analogous in many respects to those of an agent towards his principal: but she also has duties towards others and particularly towards those against whom the writ is directed. So, on this basis, Mr. Simpson submits there has been wrongful seizure.

41 Another matter which nullifies the execution, he submits, is that in the present case the writ was actually executed by someone who was never authorized by the Sheriff and who did not have the writ with him at the time of execution. The Sheriff had employed Security Express (International) Ltd. as her under-bailiff and that meant that any of its employees, and only its employees, could properly execute the writ. However, Security Express (International) Ltd. chose to contract Mr. Sedgwick, who was not in their employment. Mr. Sedgwick was never authorized by the Sheriff and neither could, because they are not so empowered, Security Express (International) Ltd. appoint Mr. Sedgwick as under-bailiff. Another aspect of wrongful seizure, submits Mr. Simpson, lay in the fact that the Sheriff, in the knowledge that the car was registered in the claimant's name, chose to treat Mr. Lara as the beneficial owner. She did not investigate the matter and indeed said that she did not consider Mr. Mor to be a proper person to be consulted and that even if it had been reported to her that Mr. Mor was protesting that the car was his, she would not have taken that into consideration.

42 Mr. Colombo stood on his submission that the claimant had admitted that the car had been seized under a writ of *fi. fa.* and could not now raise the issue. As for Mr. Sedgwick not being a properly appointed person, that also came within the scope of the admission, especially as it was clear from Mr. Sedgwick's witness statement that he had been contracted—not an expression which lends itself to the relationship of employer and employee—and so Mr. Simpson should have been alerted to the difficulty and, if he were going to raise the point, he should not have admitted para. 5. Mr. Simpson's retort to this was that matters had cropped up during the trial and until the evidence was heard and the writ seen no one could have been alert to the problems raised. In any case,

justice demands a fair trial and these matters ought not to be swept away under cover of technicalities. He would seek leave to withdraw his admissions. He submitted that the matters had been fully and adequately argued, so that the defendant cannot in any way be said to be prejudiced.

43 I do not think it would be right to hold the claimant to the admission in the manner submitted by Mr. Colombo. The notice to admit is neutral on its face and it is a fact that the vehicle was seized under what purported to be a regularly-issued warrant. So, that much of the admission is correct. As to the detail regarding the Sheriff's indorsement of receipt, that was evident only when the writ was produced. Was there a duty on counsel to have ascertained that before the trial began—a duty on counsel for the claimant in preparing for the claimant's case and the other counsel for their defence? I think not. They are entitled to assume that the Sheriff has complied with her duties if that indeed was her duty.

44 On the submission that Mr. Sedgwick was not properly appointed, that, it seems to me, could only have been appreciated when he gave his evidence. I do not think that the claimant would have picked up the nuance, suggested by Mr. Colombo, arising from the word "contracted." There are, as Mr. Simpson suggested, such things as contracts of employment. So I do not accept Mr. Colombo's submissions on this.

45 That the writ was not in possession of Mr. Sedgwick when it was executed by him could not have been envisaged until the evidence unfolded in court, nor does it seem to me to have been relevant in the context of the case as pleaded. In my view, it is likely that Mr. Sedgwick did not have the writ in his possession. And I say this for these reasons: (a) he certainly did not show it to Mr. Mor as such and the most he could say was that he had papers with him. In my view, he who executes a warrant ought to have it with him because he would not be able to show his authority if challenged and would then have to desist. But a writ of *fi. fa.*, properly in the hands of the Sheriff, would be properly executed if, at the time of execution, no objection is taken for its non-production and the goods are taken away; (b) the writ had been returned to the court, the Sheriff had asked for the bill and there is no evidence that the Sheriff re-engaged Security Express: the circumstances in which the car was found, quite by chance, makes it unlikely that Security Express had gone back to the Sheriff to retrieve the writ and obtain further instructions; and (c) there was a police presence to assist in the execution of this writ. Had it become necessary to show the writ, these officers would have been the first to want to see it and that would not have been forgotten by Mr. Sedgwick, Mr. Mor or Mr. Lara and none referred to any such incident, despite the dispute as to ownership between Mr. Mor and Mr. Lara. I hold Mr. Sedgwick did not have the writ in his possession at the time of the execution on October 10th, 1994. I had raised the point that the writ was

not indorsed: the answer is contained in O.46, r.8 of the old Rules of the Supreme Court (now Civil Procedure Rules, O.46, r.9(1)). The Sheriff is bound to indorse the writ only when requested.

46 What then is the position where the Sheriff has failed to indorse the writ? I must confess that I do not remember whether, when I held the appointment of Registrar and Sheriff, I used to indorse a writ of execution. Be that as it may, if I acted wrongly I assume I was acting in the same manner as my predecessors, and those who have followed me, including Miss Dawson, will I assume have done the same. There has, therefore, grown up a practice in the Supreme Court of Gibraltar which is different to that in England. It has to be remembered that the Sheriff in England is not a court official and is quite separate from the court. He is appointed under the Sheriffs Act 1587. The court issues the writ and it is then taken to the Sheriff for execution, so it is sensible that he should indorse his receipt on the writ. But here in Gibraltar, the Registrar and Sheriff are the same person, pursuant to the provisions of the Supreme Court Ordinance. Can that make a difference?

47 The Supreme Court Ordinance, s.6(1) provides that "the Registrar shall be the Sheriff of Gibraltar . . ." Section 6(2) provides that—

> "in the exercise of his powers and duties as Sheriff of Gibraltar, the Registrar may exercise such powers and shall perform such duties as are from time to time exercised or performed by a sheriff in England in accordance with the law from time to time in force in England with respect thereto."

48 Section 15 of the Supreme Court Ordinance provides:

> "The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Ordinance or by such rules as may be made pursuant to this Ordinance or any other Ordinance and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

49 The rules relating to execution are those contained in the Civil Procedure Rules, which have been introduced into Gibraltar by the Supreme Court Rules. These are the same now (Civil Procedure Rules, O.46) as they were as O.45 of the old Rules of the Supreme Court, in force at the material times in the present action. The law relating to sheriffs is, in my view, properly described by Mr. Simpson. The position in the old county court is more akin to the position of the Registrar in Gibraltar, for there the Registrar issues "the warrant of execution in the nature of a writ of *fieri facias* whereby the Registrar shall be empowered to levy . . ." So that the same officer is engaged with two hats. Section 85(3) of the County Courts Act 1984 provides that "the precise time of

the making of the application to the registrar to issue such a warrant shall be entered by him in the record prescribed for the purpose under section 12 and on the warrant."

50 In other words, two entries, the one in the court's record (*i.e. praecipe*, as in the present case), the other on the warrant. So it seems to me that the practice that has grown up in Gibraltar is not in accord with the law and the fact that the Registrar and Sheriff are the same person does not cure the defect. The words of the Supreme Court Act 1981 are mandatory: "It shall be the duty of the Sheriff . . . to endorse on the back the hour, day, month and year when he received it." I am heartened in my view by the position in the county court.

51 What is the effect of this finding in relation to the claimant's claim? It is clear that the only sensible conclusion is that if the Sheriff has taken possession under an invalid writ, invalid because the lack of indorsement is fatal to it, she has wrongfully seized the car.

52 The car was also wrongfully seized by Mr. Sedgwick. He had no authority to act as he did. He was not a properly appointed under-bailiff or under-sheriff of the Sheriff and consequently he did not have lawful authority to seize anything in execution. Furthermore, I agree with Mr. Simpson's submission that, having been delivered back to the Sheriff after the abortive attempt to seize it on August 4th, 1994, the writ was no longer in the hands of Security Express (International) Ltd. and it was, on the facts, no longer in the employment of the Sheriff. Insofar as its original employment was concerned, that was done with and finished. I am of the opinion that the Sheriff has no power to put right the situation by acquiescing to it and ratifying it. So, in my view, there can be no doubt that there was a wrongful conversion of the car by the Sheriff.

53 Lest, however, this matter goes further, I shall consider the other aspect of wrongful seizure put forward by Mr. Simpson, namely, that the Sheriff was wrong to have concluded that Mr. Lara was the beneficial owner of the car because she did not investigate properly. The matter can be put shortly in this way: Who was the owner of the car, Mr. Lara or Mr. Mor? The Sheriff gave consideration to this question. At the risk of repeating para. 13 above, she considered the affidavits in the matrimonial proceedings sworn by Mrs. Lara and Mr. Lara. She had the evidence of Supt. Wink on the telephone and she had information from the execution creditors' solicitors. She did not have the advantage of Kneller, C.J.'s judgment, but she knew that Mr. Mor was the registered owner of the car. Nevertheless, that did not seem to weigh with her and she said she would not have changed her view if it had been reported to her that Mr. Mor had said the car was his.

54 My view is that the Sheriff, on the facts known to her, came to a wrong conclusion. There has to be powerful evidence to rebut the

claimant's legal right to the car, as the person who was registered as the owner of the car, before he could be pushed to one side. That may not be too difficult a matter where there are different claimants to the car in the same action, but in the matrimonial proceedings *Lara* v. *Lara*, Mr. Mor was a third party entirely uninvolved with it, except through his connection with Mr. Lara. The Sheriff did not know then, and there is no evidence that she did, that Mr. Mor had not signed the application form for registration at the licensing department, which might have put a different complexion on the situation. But, in my opinion, the conclusion she came to was not one which she could properly have come to when she ordered the seizure of the car, as the car was registered in Mr. Mor's name. I can understand that with the information which was given she might have come to the conclusion that it was Mr. Lara who was the beneficial owner, but she relied on the evidence of the judgment creditor and so relied on evidence which was self-serving. In this respect, too, the car was wrongfully seized.

55 I think here is where I should take the opportunity to deal with the ownership of the car. Mr. Simpson submits that insofar as the claim for conversion is concerned, Mr. Mor does not have to go as far as showing ownership, but, as I see it, as the action has developed Mr. Mor's claim stands on ownership and Mr. Simpson makes a powerful submission on the claimant's behalf. He points to the fact that the car was seized when it was at Buena Vista Road, which is where Mr. Mor lives; that Mr. Mor insisted to Mr. Sedgwick that the car was his; and that while Mr. Sedgwick could not say which of Mr. Mor or Mr. Lara arrived with the key, it was Mr. Mor who stayed with it and who locked the car. Mr. Mor took out the radio console and then left it in after being assured by Mr. Sedgwick that all would be well and he was the person registered as the owner. All these matters reflect ownership.

56 On the other hand, the other parties point to a variety of factors which they submit show that Mr. Lara is the beneficial owner. There is evidence which they submit shows that Mr. Lara was the man always seen driving the car. When it was seized by the police, on September 3rd, 1993, it was Mr. Lara who was driving it. In the statement he made to the police at the time, he said he had paid £12,000 to Pablo Gerada and told him to put the car in Mr. Mor's name. They point to an interview reported in the *Gibraltar Chronicle* of January 6th, 1994 with Mr. Lara, who alleged the car was his. When the matter was taken to the magistrates' court, Mr. Pilley is recorded as saying the "owner is Lara." When the car was returned to Mr. Mor after the magistrates' court had ordered its release, they pointed out that the evidence was that Mr. Mor gave the keys of the car to Mr. Lara immediately thereafter. When, shortly before that, Mr. Lara pledged the car to Detective & Securities (International) Ltd., he held himself out as owner and handed Mr. Payas a key purporting to be

the car's key. They point out that Mr. Lara was driving the car on August 4th, 1994 when Mr. Sedgwick attempted to execute the writ of *fi. fa.* They rely on the evidence of Mrs. Lara. They rely on the submissions of Mr. Pilley, where he has told the courts that Mr. Lara was the beneficial owner. They rely on the fact that it was Mr. Lara, and only Mr. Lara, who attended at the cold store compound to keep an eye on the car while it was in the charge of the Part 20 defendant. They take comfort in Kneller, C.J.'s judgment. They point out that Mr. Lara was in the sort of business and in matrimonial circumstances which would encourage him to put his belongings into someone else's name to avoid seizure. Insofar as concerns the evidence of Mr. Mor, they submit that it should not be accepted as true. So far as concerns the money raised to pay for the car, there are several stories told. The evidence, they say, of Mr. Mor and his father lacks conviction. On credibility, the attempt to inflate damages by Mr. Mor shows the manner of the man, the purported receipt of Mr. Gerada is but an invoice, which is unnumbered and does not state a price, and is clearly something which has been generated at a later stage. It is not a receipt and the evidence shows Mr. Mor did not have money. Besides, Mr. Mor already had a car. The father, particularly, was unsure as to how much he lent his son and how it was paid back.

57 As I have said, it requires strong evidence to set aside the registered owner's legal rights. I am not minded to rely at all on Kneller, C.J.'s judgment because: (a) Mr. Mor did not give evidence; (b) it seems to me that all Kneller, C.J. did was to express the opinion that where Mrs. and Mr. Lara disagreed, he preferred to believe Mrs. Lara; and (c) Kneller, C.J. did not in any way set out what it was that Mrs. Lara said which he accepted as fact.

58 I am not minded either to accept Mrs. Lara's evidence where it is most relevant and that is the purchase of the car by Mr. Lara. The reason is that in this court Mrs. Lara made it abundantly plain that she did not have any relationship with Mr. Lara after she took out the non-molestation orders in 1992 and said that she had been with Mr. Lara to buy the car from Mr. Gerada before the non-molestation orders. In view of the fact that the car was not imported until March 1993, that cannot be accurate. The importance of the registration certificate (logbook) is reflected in Lord Denning's judgment in *Bishopsgate Motor Fin. Corp. Ltd.* v. *Transport Brakes Ltd.* (1) ([1949] 1 K.B. at 337):

> "The protection we have granted to-day to the buyer of a motor car in market overt protects him, of course, only in so far as he buys in good faith and without notice. It seems to me that the system of registration books for motor-cars, if properly worked, should do a great deal to protect both the true owner and the innocent purchaser. The registration book of a car, or the logbook as it is called, may not

itself be a document of title, but it is the best evidence of title. The transfer of the logbook does not itself transfer the property in the car. The property, as a rule, is only transferred by sale and delivery, but a transfer is open to suspicion unless the logbook is handed over. The wise buyer insists on it in order to be sure that the seller is the owner and that the car may lawfully be on the road. If the logbook is not produced or if it contains the name of a third person as the owner, or if it has been obviously tampered with, the buyer is immediately put on inquiry. If he should complete the purchase without getting the position cleared up, he does so at his own risk. So, also, a logbook may be produced which is good on the face of it, but the number on the motor-car may have been obviously altered to correspond with the logbook by the use of a number-plate which is faked. Such a fact should put the buyer on inquiry. If he makes none, he does so at his own risk. Assuming, therefore, that the true owner keeps his logbook safe in his own name and in his own hands, it is unlikely that any stranger will get a good title to the car. A thief can only dispose of the car by forging some other logbook so as to give it the same number as the car, or by altering the number-plate so as to correspond with the number of another logbook; each of which is difficult to do in a way that is not noticeable to a careful purchaser."

59 Had Mr. Mor signed the application for a motor vehicle licence, I should not waste time in considering the matter any further, the logbook being the best evidence of title. But that omission does leave it open to this court to consider the competing submissions and for that purpose I shall state that I consider that Mr. Lara is not a witness who can be relied on to tell the truth. Mr. Mor has shown himself to be willing to deceive (a) in having Mr. Lara's car in his name for insurance purposes; (b) in that he did not disclose to the Registrar change of means with regard to legal aid; and (c) in never having sought to correct the *Chronicle* report if, as he says, the car was his. Mr. Mor Snr. came across as a man who would do anything to aid his children. I find it hard to accept, even after all this time has passed, that he did not know to the last penny how much he had lent his son for the purchase of this car. So what is there? Mr. Gerada, who might have been able to clear the matter of the sale and registration of the car, did not give evidence. That he put the car in Mr. Mor's name, I have little doubt, having seen a photocopy of the application form, which makes me believe Mr. Gerada had some input into it. But whether Mr. Mor's name was given because Mr. Mor bought the car or because Mr. Lara told him to put it in Mr. Mor's name, is precisely the question.

60 The key to the car does not offer much help, as both Mr. Mor's and Mr. Lara's evidence was that they gave the only key to each other as and when they drove car G73409. I find it odd that an owner of a car would not have had a duplicate key cut when he buys a substantial and

expensive car with only one key, but neither Mr. Mor nor Mr. Lara appear to have done that. So there is no act which would show ownership there. I should observe that when Mr. Lara purported to give Mr. Payas the key to the car when he pledged it, he gave Mr. Payas a false key, knowing it was false, but I do not feel I can draw any implication from this fact that the car was or was not Mr. Lara's because at that time the car was in the custody of the police, who had the key until it was handed over to Mr. Mor by Sgt. Goodman on March 28th, 1994. Likewise, the documents said by Mr. Payas to have been signed by Mr. Lara do not take the matter much further, Mr. Lara being a liar and cheat. The most that can be said is what Mr. Sedgwick has reported: that the key remained in Mr. Mor's possession after the seizure.

61 The submission is made that Mr. Mor's calm behaviour in contrast to Mr. Lara, which Mr. Sedgwick reports, is also a clue as to ownership. Mr. Mor was calm because the car was not his: Mr. Lara was not because the car was his. Thereafter, the key was sought from Mr. Mor by Mr. Chidgey and from Mr. Mor by the Sheriff and Mr. Payas. The evidence of the police, on analysis, adds up to no more than that Mr. Lara was the only one seen driving the car, which coincides with the evidence I have heard.

62 On the other hand, the documentary evidence generated at the time indicates a far stronger claim made on behalf of Mr. Mor than Mr. Lara. Of course it can be said that these two would be ganging up together to ensure the car was not auctioned off as something belonging to Mr. Lara, but there are three significant facts. One is the insurance policy referred to in para. 2 covering the policyholder (Mr. Mor) and any driver over 25 (Mr. Lara was under that age at the time). I acknowledge the submission made that the reason for that was to avoid paying a higher insurance premium, but the subsequent policy obtained covered anyone driving with the policyholder's permission and so I find the rationale behind that submission hard to accept. The second, the receipt signed by Mr. Mor when the police handed the car to him in March 1994. Thirdly, that as early as October 4th, 1993, Mr. Pilley wrote to the Commissioner of Police that "I am instructed by Mr. Lara and Mr. Mor. Mr. Mor is the registered owner of the vehicle and Mr. Lara the beneficial owner, to the extent of an outstanding loan in his favour." Now, that is not what Mr. Lara had said in his written statement of September 1993, but in my opinion it is difficult to attribute the change of story at that stage to the suggestion that Mr. Lara was trying to protect his own interests. This could have been argued with more vigour when he was put on notice that a writ of *fi. fa.* existed by the abortive attempt by the Sheriff to carry out execution on August 4th, 1994, although it is true a petition for divorce had been presented in March 1993.

63 Mr. Pilley's letter coincides with the story now put to the court and what cannot be denied is that when the car was seized by the Sheriff, the car was, as I find on the facts, in the possession of the claimant in that it

was near his house, parked where one would expect the car to be close to its owner and he retained the key. Mr. Sedgwick's statement, as evidence-in-chief, to the effect that Mr. Lara produced the key is incorrect and was cleared in cross-examination to my satisfaction. Standing back, I have come to the conclusion that as between Mr. Mor and Mr. Lara, Mr. Mor has satisfied me on a balance of probabilities that he was the owner of the car and was in possession of the car when it was seized.

64 Mr. Colombo submitted that even if the Sheriff had wrongfully converted the car, the claimant might not succeed because on the facts it is clear that the Sheriff never intended permanently to deprive the claimant of it. The car was and is still there. It continues to exist as a car and any damage done to it is a trespass and nothing more: *Clerk & Lindsell on Torts*, 18th ed., para. 14.34, at 740 (2000). Furthermore, the claimant can get back what he claims and he should collect it: *ibid.*, para. 14.25, at 737. Further, the Sheriff was in the process of interpleading, again showing no unconditional refusal to the claimant and for interpleading the Sheriff is allowed some latitude to take the necessary steps, which she did in the present case. The time taken was due wholly to the negotiations which were begun between all interested parties, including Mr. Mor, to settle the interpleader situation and when the negotiations finally fizzled out, the Sheriff immediately handed back the car through the Bailiff to Mr. Mor. The fact that the Sheriff delayed interpleader is not unconditional refusal.

65 I do not accept Mr. Colombo's submissions on the facts of the present case. The car was wrongfully seized and retained and the Sheriff held on to it despite an immediate request for its return. Had the seizure been lawful, there would be some merit in the argument, although it seems to me that the Sheriff would have been wiser to have issued interpleader proceedings as soon as possible and left the parties to negotiate among themselves thereafter.

66 Is the Sheriff by her action protected by the Crown Proceedings Ordinance, s.4(5) as Mr. Colombo argued, as I understood him, in respect of her actions as a judicial officer? She has faithfully discharged her responsibilities of a judicial nature, *i.e.* the issue of the writ, but what is meant by "discharging responsibilities" in connection with the execution of judicial process? Section 4(5) reads:

> "No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

67 I confess to having some difficulty in construing this section and I have not had the advantage of hearing counsel address me on it. But on

reflection, judicial process embraces the commencement to the end of an action. The execution of a writ of *fi. fa.* comes after the end of an action and so is not judicial process within the meaning of this expression, otherwise the Sheriff or Marshal would never be liable for any wrongdoing on her part. I should think it quite wrong that an action does not lie against the Crown in respect of goods wrongfully detained by its servants in such circumstances as I have found in the present case. I hold the defendant liable in conversion.

68 What is the damage in this case? Notwithstanding that the car has sustained damage, it was submitted that the duty of care owed by the Part 20 defendant and also by the defendant was no greater than is expected of a prudent owner, who takes steps to protect his vehicle in some way. Reliance is placed on *Cowan* v. *Blackwill Motor Caravan Conversions* (2), where a car was left on the road when it was immobilized and was nevertheless stolen. The court held that the garage owner was not negligent for having left the car on the road. It is argued that, on the facts of the present case, both Mr. Mor and Mr. Lara said they did not garage the car but left the car in the roadway and merely locked it. Therefore, it was submitted that what happened to the car would have happened at any time while in their care. The two defendants could not be faulted merely because the car was damaged in February 1995. It was in a safer place than on the road, the compound being a protected area with a closed gate at night. The car was damaged by vandals cutting through the wire at the top of the gate. There is no negligence. The Part 20 defendant could not do more and the damage was unforeseeable. I do not agree; the facts of *Cowan* are quite different. Immobilization was the issue there. Safety to the car is the issue in the present case and to have left the car in a compound, albeit a secure one, does not discharge the two defendants' duty of care, to be accurate, the defendant's duty of care. The Part 20 defendant's liability is to the defendant on its contract.

69 My view is that the damage to the car is that sustained while it was in the control of the Sheriff, that is, from the time it was seized to the time the Bailiff released it to Mr. Mor on March 15th, 1994. The note from Mr. Mendez to the Registrar, dated March 16th, 1995, stated that Mr. Mor said he would not accept the vehicle in its present condition and would not take the car back until the damage was made good. But in the event, he did take the car and caused it to be delivered to Paul Gerada at the Europa Business Centre, having made arrangements for a survey. The car was surveyed in March 1995 by Mr. Garro, whose report is dated March 28th, 1995, and was, I am satisfied, not worth repairing at that stage. The estimate of the cost of repair was prepared by Mr. Gerada and came to nearly £10,000, which was out of proportion to the value of the car in respect of which, on February 10th, 1995, an estimate had been given by A.M. Capurro & Son Ltd. that the car was worth £6,000.

70 When the car was seized it was in good condition and had a value of approximately £10,000. That is the value put on it by A.M. Capurro & Son Ltd. in their report of April 16th, 2002 and that accords more or less with the price that was paid to Mr. Gerada. The car had been out in the open in the middle of a compound and open to the elements there, and looked to all intents and purposes abandoned. So, clearly, the car would have depreciated markedly and the value of £6,000 is not surprising. That would be the defendant's liability, subject to contributory negligence, estoppel or mitigation. The defendant would also be liable for the damage sustained as reported to Mr. Mendez on March 16th, damage which had been sustained on or about February 27th, 1995, while it was at the compound. It was taken to the Part 20 defendant's garage on March 1st, 1995, where it was unlikely to receive further damage. After March 16th, 1995, the Sheriff is not liable for any damage.

71 I do not accept Mr. Simpson's submission that Mr. Mor took the car under duress, in the sense that the car was put into his lap and he had to do something about it. He had the key to the car and if he did not want to accept the car and had wanted the Sheriff to remain with it, he would have handed over the key to her and left it in her domain. But he made the arrangements for the car to be taken there by the Part 20 defendant and employed Mr. Garro to survey and Mr. Gerada to estimate costs. In his statement, which I accept, Mr. Payas said he took the car to Gerada's on March 23rd, 1995, on Mr. Mor's instructions. There it was surveyed by Mr. Garro (March 28th, 1995) and there the costs were estimated by Mr. Gerada, both matters on Mr. Mor's instructions, as is reflected by the report of Mr. Garro, the surveyor, on appointment to Mr. Mor and by the estimate of Mr. Gerada, which is billed to Mr. Mor. I do not accept as accurate para. 9 of Mr. Mor's statement. It is my view and I so hold that the damage reported by Mr. Garro which was over and above that reported to Mr. Mendez by Mr. Mor and inflicted on the vehicle after the car was left at Gerada's by the Part 20 defendant is not the responsibility of the defendant or the Part 20 defendant.

72 In the circumstances, I am of the opinion that neither contributory negligence nor estoppel apply. Mr. Mor made no representation of any fact to anybody. I think these are the damages for which the defendant is responsible:

Bonnet	£350
Window	£20
Radio cassette	£1,444
Seats	£2,018
Depreciation	£4,000
Total	**£8,832**

73 There was no evidence produced to rebut the figures in respect of the radio cassette and the seats. It is my view, too, that the claimant is entitled to a sum to represent loss of use. I am mindful of the evidence that Mr. Mor did not appear to make much use of the car and both he and Mr. Lara made much of the fact that they exchanged cars with frequency. I take into account that for much of the time the car was impounded, Mr. Mor acquiesced in the situation (at that time no one knew the car had been wrongly seized) where negotiations were taking place to avoid an interpleader and he never then complained that he could not use the car. I have also found that the car had been left at the Europa Business Centre at a time when the car was in the possession of the claimant.

74 It also seems to me that before the damage was done to the car at the Europa Business Centre the car would not have been the write-off it was when Mr. Garro reported on it. The damage which I have accepted and which I reiterate is that reported by Mr. Mor on March 16th, 1995, is high in terms of money but hardly affects the driving capabilities of the car. Mr. Mor had a duty to mitigate. I cannot think that a car of this class would have had much difficulty in starting up, notwithstanding its abandoned state at the compound, with a new battery and petrol. One can drive without a radio and from the photographs that were produced to me the car's front seats have no visible damage and there is no photograph of the rear seats, so while that has to be put right, it does not affect the car's performance—a loose cover would have done the trick as a temporary measure. I do not think it would take more than a month to have had those matters put right.

75 Mr. Simpson made a plea that Mr. Mor was unemployed and could not afford the cost, but there would have been no difficulty in raising money from his father who, I understood him to say, had plenty of money and kept it in his house. In my view, Mr. Mor is entitled to those damages from the time the car was taken into possession until April 16th, 1995, but for most of that time, for the reasons I have just stated, that can only be a nominal amount. I fix that amount at £10 up to March 15th, 1995, and rule that Mr. Mor is entitled to substantial damages for one month thereafter. I fix those at the amount it would cost to hire a similar car and hazard that £200 would be sufficient. This sum of course to be subject to inflation as per a recognized inflation calculator.

76 The defendant claims against the Part 20 defendant to be indemnified in respect of all the claimant's claim. The arguments of the Part 20 defendant as to why Mr. Mor should not succeed I have dealt with. As against the defendant, the Part 20 defendant submits that the car would have been put in a safe place had it been given the key. At the very least, Mr. Mor had contributed to the damage to the car, in that he failed to give Mr. Payas the key to it so that he could have put it in a safe place

and Mr. Mor had been warned by Mr. Chidgey that the car was in a bad place and should be moved. It was, says Ms. Evans, the duty of the Sheriff to have given the Part 20 defendant the key. The Sheriff should have procured one and any breach of contract was the result of the lack of key, so the Sheriff cannot claim a breach of contract because the Part 20 defendant did everything possible. Again, Ms. Evans relies on *Cowan* (2). As against the defendant, the Part 20 defendant had the car in a locked and secure place, as any prudent owner would do and more than what Mr. Mor and Mr. Lara said they would do. It was not foreseeable that vandals would break into the compound. One cannot guard against everything and there is no negligence in the manner the Part 20 defendant discharged its duty to the defendant.

77 In my view, the defendant is entitled to be indemnified by the Part 20 defendant under the terms of the contract. I do not consider that the lack of key played a significant part. The car was towed to the I.C.C. and parked there, it was taken to the Flat Bastion garage and then to the Europa Business Centre and it was not explained to my satisfaction why the car could not have been put into the old M.O.D. cold store, where the Part 20 defendant had contracted that it would be kept safely under cover. The Part 20 defendant never complained to the Sheriff (as Mr. Payas might have done in his letter of October 20th, 1994, referred to in para. 21 above) and indeed sought to get a key from everyone except the Sheriff. I take the view that if there was no key, there was an ever greater duty on the Part 20 defendant to ensure that the car was safely stored under the terms of its contract with the Sheriff. The Part 20 defendant is, however, not liable to indemnify the defendant in respect of loss of use of the radio.

78 That is one matter which I leave unresolved, how did the car arrive at the compound with the door open and radio missing when it had been locked by Mr. Mor and he kept the key and there was no other key? Mr. Simpson suggests that is a made-up story by Mr. Payas and is entirely self-serving. Of course, if it is true, Mr. Payas is not responsible for the loss of the radio and I see no reason why I should not accept Mr. Payas's evidence and leave the mystery unresolved.

79 There is judgment for the claimant against the defendant in the sum of £8,832 with interest thereon at the rate of 7% from October 10th, 1994 to date for conversion of the car and a further sum of £250.86 for loss of use. There is judgment for the defendant against the Part 20 defendant in the sum of £7,388 with interest thereon at the rate of 7%.

80 There will be costs for the claimant against the defendant and costs for the defendant against the Part 20 defendant. Costs are to be taxed unless agreed.

Order accordingly.