Case No: 1 UC 71244

**IN THE OXFORD COUNTY COURT**

Combined Court Centre
St. Aldates
Oxford
OX1 1TL

Date: Wednesday, 9th May 2012

**Before**:

**HIS HONOUR JUDGE CHARLES HARRIS QC**

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**Between:**

**A RETAILER**

**Claimant**

**- and -**

**(1) MS. B**
**(2) MS. K**

**Defendants**

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**MR. MUNRO** appeared for the **Claimant**
**MR. HODSON** appeared for the **Defendants**

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# Approved Judgment

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## HIS HONOUR JUDGE CHARLES HARRIS QC:

1. In this case both parties, after the evidence had been called, asked to be anonymised and I acceded to those requests.

2. The claimant is a well-known multiple store with a presence in most cities and large towns. The defendants, two young women, were shoplifters who admit that on 18th January 2010 they stole items from the claimant's Milton Keynes branch. They were seen and filmed taking things and leaving without paying. They were apprehended by security staff and brought back. A third girl got away. The police were called and stolen items were recovered undamaged.

3. In small claims proceedings being tried on this occasion by the Designated Civil Judge because of their unusual and perhaps significant nature, the claimant contends that the defendants caused it to suffer loss and damage particularised in the following way:

> "(a) Staff and/or management time investigating and/or dealing with the tort, £82.50;
>
> (b) Administration costs resulting from the tort, £24.75; and
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> (c) A proper proportion of general security and surveillance costs, £30.50, a total of £137.50."

The causes of action relied upon were trespass and conversion.

4. These figures were described by the company's Loss Prevention Manager, Mr. Colin Tennant, as "a pre-determined and nominal contribution to the actual losses". His written statement (from which I shall read a substantial extract) indicated as follows:

> "The claimant has exercised its right to use civil law remedies against individuals who commit wrongful acts for its store for approximately seven years. When a person commits a crime at the claimant's stores it usually gives rise to civil liability too. Typically, as in this case, a shoplifter gives rise to a cause of action for conversion of trespass."
>
> "In some areas of the UK the police do not attend our stores for an alleged incident of shoplifting; in others they may attend. The most common position is that the police do not attend unless certain circumstances apply such as violence or non co-operation … Even when the police do attend the criminal prosecution rarely follows … Overall about 5% of shoplifting offences result in a criminal conviction leaving no sanction or deterrent for the remaining 95% …
>
> "The claimant, as with many other retailers and businesses therefore has no option other than to engage security personnel. They are engaged at around one-third of the claimant's stores. Some stores are patrolled full time and some are patrolled

during certain times. The cost to engage security at every store would simply not be commercially viable for the claimant's business. The claimant has 2,500 stores currently."

"The claimant's security personnel apprehended 34,649 individuals last year in its UK stores. … In addition to those apprehended, far more are deterred by the presence of the security personnel engaged by the claimant to patrol the shop floors. Nationally, 29,473 deterred incidents were reported in the last month … Unfortunately, when security personnel are apprehending somebody and detaining them thereafter, they are removed from the shop floor and are not therefore present to deter crime. … In addition to this, when a shoplifter is apprehended on the shop floor and causes a scene it puts the claimant's honest customers off from shopping in the store …

"In the late 1990's retailers began to exercise their rights to use civil remedies in an attempt to deter crime such as shoplifting and to recoup some of the vast losses incurred as a result. The deterrent factor is very effective as there tends to be only a 3% repeat incident rate in those cases reported for civil recovery, which is somewhat lower than the repeat offence rate of those processed through the civil justice system. …

"The reason the claimant and, I understand, other businesses seek a fixed contribution to the losses is because of the volume of cases … If the claimant's management and security personnel were to take the time to schedule every detailed action, time and cost on every one of the 34,649 incidents per year the process would not be viable as they would not be free to undertake any other work such as security patrolling the shop floor and management undertaking profit-making activities for the claimant.

"By seeking a pre-determined nominal contribution to the actual losses a reasonable and proportionate balance is formed for both the claimant and the defendants. Whilst a significant amount of time of the claimant's staff and security personnel are diverted their whole time is not diverted. The claimant bears the remainder of the losses caused by the shop theft itself …

"The claimant's solicitors take the issue of proceedings very carefully at our meetings and careful consideration is given to each case taking the circumstances of each into account. I also recall that when the claim is issued they are often settled or are not even defended …

"The claimant incurs significant expenditure on security personnel, overheads and equipment. The claimant would not have any requirement to engage security personnel at its stores

> if it were not for the actions of those such as the defendants in its stores. More importantly, whilst the security personnel are dealing with the incident and all of the necessary administrative steps thereafter, they are diverted from doing what they are engaged to do: to deter theft, damage and harm on the shop floor. Whilst off the shop floor detaining, interviewing, liaising with the police, shop floor staff, management, police and others, preparing evidence which involves the CCTV not being directed on the shop floor while recording incidents on to disk, they are not able to detect and prevent crime such as other thefts, damages or assaults to customers and staff. That is the primary purpose for which they are engaged and for which they are paid …
>
> "The annual costs of the security which can be apportioned to incidents of shoplifting and of a similar nature where there is an apprehension at the claimant's stores is £32,492,360. Incorporated into this figure is expenditure such as CCTV installation and maintenance, tagging, barriers and maintenance radio equipment, starbox monitoring, data mining and stock control systems. When this figure is divided by the number of incidents of this nature (being 34,649 last year) the actual cost of security overheads is £100.79. The claimant seeks a proportion of that. …
>
> "The administrative costs apportioned to the claim are sought by way of a nominal contribution of £24.75. Such costs incorporate the costs of the Security Departments and other departments involved in dealing with the case. Such costs include the costs of the lease of premises, rates, lighting, heating, insurance, salaries, maintenance, rental and purchase of IT and telephone equipment, furniture and other equipment, stationery, postage, signage, health and safety equipment, training provisions and any other overheads …
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> "Because of the volume of crime committed against the claimant, the claimant cannot bear all the costs of crime itself. It would be unfair to pass the costs of crime on to the honest customers who shop at the claimant's stores. It would not be fair to pass the costs on to shareholders and investors. It would not be fair to pass the costs on to the taxpayer. It is therefore considered by the claimant, and indeed other businesses which exercise their civil rights in an attempt to deter crime, to seek some of those losses from those who cause it."

5. Mr. Tennant also indicated that the claimants issued some 11,000 civil recovery cases a year. This is not in fact done by the claimant itself, but by a company called Retail Loss Prevention with which the claimant has a contract. This company wrote to the defendants in the instant case as follows:

> "Your wrongful actions entitle our clients to pursue a civil claim against you for damages to cover their losses from this incident." [There followed a short schedule setting out the sums described in paragraph 3] "Failure to respond … will result in further action being taken against you for the full undisclosed value of the claim."
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> This was followed by another letter when no payment was made stating:
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> "Our client is determined to make full use of civil law remedies … To avoid this action and further increased costs, you must deal with this claim within 14 days … You were advised that basic personal information regarding your wrongful act may be held on a national database … This information is available for prospective employers within client companies."

6. The security staff involved in the incident in question were Mrs. Kent, Security Manager at the Milton Keynes branch and Mr. Cummings, a Security man there. Both of them were in fact employees of another company, Total Security Services Ltd., the company which the claimants engaged to provide security personnel. By the terms of their Agreement, TSS paid an agreed wage to the security staff, £11 an hour to Mrs. Kent and £7.46 to Mr. Cummings, and the claimants paid a higher figure to TSS: £14.60 re Mrs. Kent and £10.27 re Mr. Cummings. No extra charges were incurred by the claimant when the security staff apprehended anybody.

7. Some time at trial was employed in trying to establish how much time was actually spent by the two security people in dealing with the defendants. In the end it appeared fairly uncontentious that, at the most, one to one and a quarter hours was the appropriate period. Some time was spent on documenting the defendants so as to be able to take civil proceedings against them. The value of this time would, if recoverable, be a matter of costs and not damages.

8. Shoplifting is clearly a major problem in the retail world. It is notorious that there is substantial "shrinkage", to use the euphemism often adopted. The figures spoken to show that this claimant spends a significant amount of money on security intended both to deter and to apprehend thieves who come to its premises. Because of the incidence of theft, costs are incurred which, unless recouped in some other way, will have to be met either by customers or by the shareholders. It is argued on the claimant's behalf that it is appropriate and fair, and may be some deterrent, for the company to recover something from the shoplifters who are caught. This is a stance with which it is possible to have some sympathy. Why, it is urged, should not criminals pay the costs associated with their crimes?

9. But the question is whether there is a legal entitlement to damages arising out of the circumstances of this case.

> "It is a basic principle of the law of tort that the claimant will only have a cause of action if he can prove, on balance of probabilities, that the defendant's tortious conduct caused the damage in respect of which compensation is claimed." Per Lord

> Phillips in ***Sienkiewicz v .Greif*** [2011] 2 WLR 523 SC at paragraph 16.

It was not easy for the claimant to demonstrate what loss or damage these defendants, or other shoplifters who are caught, have caused to it on this or on any particular occasion. In certain circumstances I am satisfied that there would be recoverable amounts, for example: (a) If the defendants had managed to deprive the claimants of the goods they took then there would clearly be a claim for the loss of value and/or profit upon the items in question. (b) If the claimants had incurred specifically directly referable costs in apprehending the defendants, there also would be recoverable. To take an illustrative, though perhaps unrealistic, example: if one of its security men had jumped into a taxi to pursue the fleeing shoplifters, then that taxi fare would, in my judgment, be recoverable. (c) If the defendants, in the course of their stealing or apprehension, caused physical damage, for example, breaking a display cabinet or tearing a security man's uniform, then the expense attributable to those acts would be recoverable. (d) If a shoplifter injured a security person he or she would be liable in an action for personal injury. Although there was some struggling in the instant case there was no reported injury. (e) It is also possible to see that if a member of staff, perhaps a cashier, has been diverted from his or her post in order to chase and capture the defendants, then that person would not have been performing normal duties while chasing the defendants and the claimant would have lost, for a time, the value of the services in the task for which he or she was employed. The figure referable to the wage might be recoverable for that, together with any other consequential loss such as a loss of sales or takings in respect of customers who could not pay for items and so left without a purchase. The latter would be difficult to establish in a shop with multiple check-outs, but it could apply, for example, to a small corner shop with only one cashier. This, I think the defendants did concede or came close to doing so.

10. The difficulty which it seems to me is in the way of the claimants in the present claim is this. The claimants (indirectly) employed two people at its Milton Keynes shop to carry out security duties. This was the state of affairs at the time the defendants entered the shop. What Kent and Cummings did thereafter was simply to act as the security staff they were. They had, it was agreed, four tasks: (a) watching the security television cameras; (b) patrolling the aisles; (c) apprehending anyone found or suspected of stealing; and (d) processing them thereafter, which sometimes involved calling the police. This was the work for which the security personnel were employed, whether or not any shoplifters appeared on a particular day. If there were no shoplifters they would do tasks (a) and (b). On the day material to this case they were performing all their functions: they watched the young women via the camera or cameras; they went down on to the shop floor and watched them leave; they apprehended them and they took them back to a holding room for questioning, for identification, to await the police and to complete some paperwork. In short, they did exactly what they were paid by TSS to do and exactly what the claimants paid TSS for them to do. In these circumstances it seems to me difficult to establish that the defendants caused any identifiable loss. Security staff would have been paid and present whether or not the defendants were shoplifting. The security equipment was already installed, operational and, presumably paid for.

11. What was argued on the claimant's behalf in the end is that while dealing with the defendants the security staff were diverted from their "other duties" and focused upon the tortfeasors, and this could be said to constitute a loss to the claimant.

12. I was helpfully referred to a number of authorities. Two were of particular assistance, ***R + V Versicherung AG v. Risk Assurance and Reinsurance Solutions SA*** [2006] EWHC 42 and ***Aerospace Publishing Ltd. v. Thames Water Utilities Ltd.*** [2007] EWCA Civ 3. In the former case Gloster J (as she then was) said this:

> "In my judgment, as a matter of principle, such head of loss (i.e. the cost of wasted staff time spent on the investigation and/or mitigation of the tort) is recoverable, notwithstanding that no additional expenditure 'loss', or loss of revenue or profit can be shown. However, this is subject to the proviso that it has to be demonstrated with sufficient certainty that the wasted time was indeed spent on investigating and/or mitigating the relevant tort; i.e. that the expenditure was directly attributable to the tort – see per Roxburgh LJ in ***British Motor Trades Association*** at 569. This is perhaps simply another way of putting what Potter LJ said in ***Standard Chartered***, namely that to be able to recover one has to show some significant disruption to the business; in other words that staff have been significantly diverted from their usual activities. Otherwise the alleged wasted expenditure on wages cannot be said to be 'directly attributable' to the tort."

13. In ***Aerospace***, a case involving many months of work done by staff to salvage a flooded library archive, Wilson LJ observed that the claim was made on the basis that the staff engaged would otherwise have concentrated on their preventional activities. He reviewed the principal authorities including ***Standard Chartered Bank v. Pakistan National Shipping Corporation*** [2001] EWCA Civ 55 (in which a claimant sent an executive abroad for four months in an attempt to mitigate a loss and failed to recover his salary). Wilson LJ said at paragraph 86:

> "I consider that the authorities establish the following propositions:
>
> (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established.
>
> (b) The claimant also has to establish that the diversion caused significant disruption to its business.
>
> (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been

> thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."

14. The claimant in the instant case has not established either that the staff in question were "significantly diverted from their usual activities" or that there was "any significant disruption to its business" which, in this type of case, may amount to the same thing. Nor was there any loss of revenue generation.

15. The two security people, far from being diverted from their usual activities, were in fact actively engaged in them. They were doing just what the claimants paid for them to do. I do not think that it avails the claimants to say that because they were busy apprehending, they could not be patrolling or doing camera invigilation. It might just as well be observed that when they were patrolling they could not be looking at the security cameras anyway. They could not carry out all aspects of their job simultaneously in any event. The shop continued to trade undisturbed and there is no evidence that any non-security staff were involved with these defendants.

16. So the claim in respect of staff time cannot, in my judgment, be established. I was not clear if, at the end of the case, the other two alleged heads of loss – administrative costs and security equipment costs – were still being sought. But, if so, these claims too cannot succeed. Neither can be shown to be attributable to the defendants' activities. The amounts spent by the claimant would have been identical had the defendants stayed at home or limited their shoplifting to other establishments.

17. It follows that the claims must be dismissed but I do not want it to be thought by the claimant company that there is any lack of sympathy for its understandable desire to recoup, if it can, something from those who prey on it by shoplifting. It is, of course, no part of the purpose of this judgment to advise in this connection though it may be that some different approach akin to that used against motorists who park too long in excess of the contractual licence might work better.

18. But, in the circumstances there must be judgment for the defendants.

**(For continuation of proceedings: please see separate transcript)**