IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 64/01,56/01
132/00,302/01,
CA 01 / 02, OA/2002,
MISC 31/02,22/02,39/02

BETWEEN **COOK ISLANDS DEVELOPMENT BANK** a trading bank having its office at Avarua
Plaintiff

AND **NORMAN MITCHELL** of Aitutaki, Cook Islands, Retired
First Defendant

AND **TERRY MITCHELL** of Aitutaki, Cook Islands, Occupation unknown
Second Defendant

Mr A McDonnell for Plaintiff
Mr J Ka for First and Second Defendants
Date of Hearing: 26 November 2002
Date of decision: 26 November 2002

DECISION OF GREIG CJ

This is an action for conversion or in other words the taking of chattels which had become fixtures in land which is mortgaged to the Plaintiff. According to what is undisputed in this matter the Plaintiff which is established and

operates under the Cook Islands Development Act 1978 lent money to Paemotu Marsters. It took security over an Occupation Right which Paemotu Marsters had over part Okau S153B Arutanga, Aitutaki. In terms of the rights under the Act a charging order was made over the Occupation Right in favour of the Plaintiff. The borrower fell into arrears and steps were commenced by the Plaintiff to recover the monies and to exercise the mortgagee's rights under the securities.

In the year 2000 application was made to the Court under Misc. 132/2000 for leave to enforce the security and appoint a receiver. The Plaintiff under s.36 of its Act has a particular right for the purpose of enforcing the charge to appoint a receiver in respect of a property so charged. The receiver is to have all the rights, powers, duties and liabilities as may be expressly conferred or imposed by the Court and to have further incidental powers as may be reasonably necessary for the exercise of the power so conferred.

The application made to me was granted, the order for the appointment of a receiver did not specify any particular rights or duties at all but merely said that the Plaintiff be appointed receiver of the Occupation Right. The Plaintiff then proceeded further with action to exercise its power of sale and in or about October 2001 received an offer from one Lesley James to purchase the property. On or about 8 November 2001 it is alleged and admitted by the defendant that the bank delivered formal notice addressed to the First Defendant Mr Norman Mitchell and his family to vacate the property. A copy of that document has not been produced in this hearing.

By this stage and there has been some dispute about this, the Marsters, the original borrowers, had gone; it seems in or about 1999. And they have been absent from the property and it seems indeed from the Cook Islands since about then. Their present whereabouts are unknown at least to the Plaintiff.

On 27 November 2001 in an ex-parte application by the Plaintiff an interim injunction was granted. The proceedings were brought against Mr Norman Mitchell and the order that was made granting the injunction was to restrain him and his agents, servants or contractors from interfering with the occupation of the applicant, the Plaintiff, and/or their assignees. In fact the Plaintiff was not and was never in occupation of the property. I accept and it has been satisfactory proved to me that the property was occupied by the Second Defendant Mr Terry Mitchell, his wife and children from about 1999 until about 14 or 15th of December 2001.

Mr Norman Mitchell and his wife, Terry's father and mother (and mother in law and father in law of his wife and grandparents of the children) visited the premises on numerous occasions; stayed from time to time; slept overnight and took part in tidying up the place. According to Mr Mitchell Senior's evidence, he has a considerable attachment to the property as a part of ancestral land of his family. He and his wife however have a permanent home elsewhere on Aitutaki, they travel frequently to New Zealand and Rarotonga. I accept that they live at their own home which had been also the home of Terry and his family until 1999 and then became the home of Terry and his family again in December 2001 when they left the property in question.

As I said that original interim injunction was made ex-parte, perfectly properly and without notice of course to Mr Mitchell. He obtained notice of it when it was served or otherwise brought to his attention. He did not take any steps to challenge the order to seek its amendment or rescission. What he seems to have done is to apply for leave to appeal. That on its face has been done without assistance from any lawyer. There were three grounds for the appeal namely: that the application was ex-parte and the appellant was not given an opportunity to present his side of the case: that the appellant was not given a

fair and reasonable opportunity by the Plaintiff of a right of first refusal to purchase the property in question: and thirdly that it is "in the best of justice", (those are the words used), that this application be granted. It does not at any stage allege or challenge as a fact that, as is now his case, that he was never in occupation and never had anything to do with the occupation of the property.

That appeal came before Justice Smith at a hearing which was done over the telephone. Mr McDonnell appeared for the Plaintiff on the appeal and Mr McFadzien appeared for Mr Mitchell. He claimed that he had been instructed very recently and sought an adjournment. Having heard the matter and heard Mr Mitchell himself explaining the matter the Judge came to the conclusion that the ground that he had not been given a reasonable opportunity of first refusal to purchase the property was not supportable and that in his explanation he had in effect refuted the grounds relied upon. In the result the Judge refused the application to appeal and made an order for a final injunction prohibiting the occupier under the Occupation Right, that is to say the Marsters I presume, and or Mr Mitchell their respective agents, servants or contractors from interfering with the occupation of the land in dispute. That was ordered to stay in Court until the 19th of December 2001 to allow the appellant Mr Mitchell to file an application for a re-hearing. No such application was made.

On or about the 14th or 15th of December 2001 a Friday and a Saturday, Mr Terry Mitchell and his family left the property. It seems that they accepted the inevitable and went. Almost immediately after, and there is a dispute and confusion about these dates, Mr Arona Arona the clerical manager for the Plaintiff went around to the property and found that it was not just empty but had almost everything removed from it except curiously enough what appears to be an electric stove. He had on previous occasions attended the house but there was no clear evidence from the bank as to what chattels or fixtures were actually in the house during the occupation of the Marsters or the

Mitchells Junior. Mr Arona in his visits earlier talked to Mr Mitchell Senior who was on both occasions it appears present at the property. On at least one of those occasions it seems that Mr Arona was able to obtain some view inside the house but that was a fleeting view. It may not matter all that much because Mr Terry Mitchell and his wife and indeed Mr Norman Mitchell have really frankly accepted and agreed that they removed from the house a kitchen sink and bench. It seems to have been a relatively small one, but nonetheless a kitchen sink and bench. They have accepted also that they removed the toilet bowl which had been in the house, and that they removed shower fittings and in particular a shower rose. There were a number of glass louvre leaves which were damaged or broken. Mr Mitchell Snr accepted that these had been damaged by grandchildren, that he had a number of leaves available but he had never got around to repair them. I have no doubt that the Mitchell family was upset and resentful of the fact that the Plaintiff was proceeding to undertake the forced sale of this property and to eject them from their occupation of it. I have no doubt that in removing their own possessions and chattels they were not careful to leave the premises as they might have been otherwise.

The evidence from the Mitchells is that the toilet bowl and the shower had been supplied by them. There is some confusion about the sink bench and a bench table which was made by Terry and Anapa out of material which Mr Mitchell Snr had supplied. That bench table cannot come into the picture at all. That clearly is a chattel like the beds, the furniture, the clothing which belong to the Mitchells and which they were entitled to remove. They were however not entitled to remove what had been fixed to the buildings in a permanent way.

This is one of the peculiarities of law that when a chattel a toilet bowl, a sink bench, a shower is purchased from the supplier, it is a chattel. It is like any other chattel, a pair of shoes, a pareu shirt, or any other thing which is available to be possessed and owned by anyone and can be handed over by

hand. But when the articles that I first mentioned which are normal fittings in the house are fitted into the house then they become part of the house itself and they cannot be removed by the person who first supplied them. They are not chattels anymore, so that it was wrong for Terry to remove these.

On the basis of what I have heard I am satisfied that Mr Norman Mitchell did not take part in the removal of these items. He did not by his own hands remove them and from the evidence that has been given to me, there is no evidence to show that he promoted the removal; encouraged or told Terry or his wife to do that. In light of his understanding he did not disapprove of their removal because he thought they belonged to the family.

The right of a Plaintiff to sue in conversion depends on possession or the immediate right to possession of the items. Once these three items had been fixed and fitted into the house, they were part of the security property secured to the Plaintiff. Surely the Plaintiff was not in actual possession of the property of these items; it had not taken possession as mortgagee. Indeed its actions in relation to the injunctions it had obtained are simply inconsistent with taking possession. They were merely warning off, restraining, or telling other people not to be in occupation or not to interfere in the occupation of the premises. However the Plaintiff whilst proceeding to exercise its rights of the power of sale, had at that stage received an offer for purchase and it had obtained an order for its appointment as a receiver. The result is that I find that it had the immediate right to possession even though it had not exercised it and it was therefore entitled to sue for conversion for the taking of these items out of the property and for damages thereto.

The Plaintiff has claimed the sum of $14,500 for its losses in this matter. That is based upon an assessment which is an estimate of the cost of returning the house to good order; to what I believe must have been better order than it was at the time the Mitchells were in occupation or when they left. Apart from the removal of the three items, the house was clearly in an

unfinished state with wall linings incomplete, doors incomplete and various other matters which to put the house in a good saleable order might well have to be done, but which on the basis of the evidence before me cannot be the liability or the responsibility of either of the defendants.

There are three items that are referred to and agreed. The toilet and cistern and associated plumbing removed; the estimate on that is $240 for material and $200 for labour, that is a total of $440. There is an item of shower taps removed; the estimate for that is a total for materials of $210 and $120 for labour. That is a total of $330. The estimate that was put forward in respect of the kitchen relates to a kitchen cabinet, a sink and associated plumbing removed and walls damaged during removal of cabinet. In fact there were no cabinets, all there was, was a sink and small bench. Some reference has been made to that being home made. There was confusion as to whether that referred to the table bench or the other bench. It could not be of any great value. I have no figures for that but it is appropriate I think to make a figure which might be reasonable for purchase or to make it and to install such a bench and I will put a figure of $500. There are other items referred to in the claim but there is no evidence that they were in the premises at the time or that they were removed.

There are these three items however and that comes to a total of $1270. My conclusion then is that the Plaintiff is entitled to recover for the taking of the items a figure which I fix at $1270. Mr Terry Mitchell has fairly accepted that he took them. I find that he did that unlawfully and that he must therefore be responsible to the Plaintiff for that.

There will therefore be judgment for the Plaintiff against the Second defendant in the sum of $1270. There will be judgment for the First Defendant against the Plaintiff. The Plaintiff is entitled to costs as against the Second Defendant. The First Defendant is entitled to costs against the

Plaintiff. The amount of the costs disbursements and other necessary expenses of each side is to be fixed by the Registrar.

CHIEF JUSTICE