IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

BETWEEN: SIMME SCHOONDERWOERD, Builder and SANDRA SCHOONDERWOERD, Housewife both of Motootua:

Plaintiffs

A N D: RAY HUNT of Apia, c/- Nelson Mackenzie Co. Ltd, Landlord:

Defendant

Counsel: R. Drake for Plaintiffs
R.S. Toailoa for Defendant

Hearing: 30th September & 4th October 1993

Judgment: 3rd May 1994

JUDGMENT OF SAPOLU, CJ

This is a claim for damages arising out of a bailment. The claim is brought by the plaintiffs as tenants and bailors against the defendant as landlord and bailee for damages alleged to have been caused to the plaintiffs' chattels as a result of the defendant's negligence as bailee of those chattels.

The plaintiffs are a husband and wife. They lived as tenants in a two-storey house at Vaoala from 25 January 1991 to 7 December 1991 pursuant to a tenancy agreement with the defendant. This tenancy agreement is admitted by the defendant. Dealings between the plaintiffs and the defendant in relation to the Vaoala house appears from the evidence to have been on the basis that the plaintiffs were tenants and the defendant was landlord and owner of the house. At no time did the defendant indicate to the plaintiffs that he was

not the landlord or the owner of the Vaoala house. In his evidence, the defendant says that the property at Vaoala belongs to him but is registered under his wife's name. Perhaps this means that the land on which the Vaoala house is built is registered under the name of the defendant's wife. However I am satisfied that the Vaoala house is the property of the defendant. He also does not contend otherwise. I am also satisfied that in relation to the Vaoala house, the relationship between the defendant and the plaintiffs was one of landlord and tenant.

Now in the first week of December 1991 cyclone Val struck Western Samoa and American Samoa with most devastating winds. It caused enormous devastation to both countries. A great number of houses were destroyed while some houses suffered reparable damage. The Vaoala house where the plaintiffs were living as tenants did not escape the fury of cyclone Val. It too suffered reparable damage but was not completely destroyed. Parts of the top storey and the ground floor were damaged. The extent of the damage was such that the plaintiffs had to leave the Vaoala house and moved to a house closer to Apia on the last day of the cyclone.

The plaintiffs being expatriates left Western Samoa before the hearing of this case and are now working in Tonga. Only Mr Schoonderwoerd, but not his wife, came back to give evidence in this case. According to Mr Schoonderwoerd, when he and his wife left the Vaoala house, it was on the basis that they were to return and continue living in the house after the damage caused by cyclone Val had been done. He says that he and his wife left behind in the house their chattels. Amongst these were a waterbed, ironing board, Dutch dresser and a box of tools. All these chattels were in good condition and placed in a safe place inside the house. He and his wife also

paid a next door neighbour to keep watch on the house during their absence.

After the cyclone, the plaintiffs agreed and undertook to engage builders to carry out the repairs to the house. There was some delay in carrying out the repairs because the insurance money was not immediately forthcoming. But after that delay, the repair work undertaken by the plaintiffs got underway. Then around the beginning of April 1992 whilst repairs were still being carried out by the plaintiffs, Mr Schoonderwoerd was advised by his employer not to move back to the defendant's house as there will be another house for the plaintiffs. The plaintiffs then stopped the repairs they were carrying out to the defendant's house. It appears that Mr Schoonderwoerd's employer suggested to the defendant another builder to complete the repairs. Subsequently the defendant engaged another builder to complete the repairs.

Mr Schoonderwoerd says that he then requested the defendant if they, the plaintiffs, could leave their chattels in the Vaoala house until they remove them and the defendant agreed to that request. He also says that he specifically requested the defendant to look after the plaintiffs' chattels especially the waterbed and the defendant also agreed to that request. Then towards the end of May 1992, the defendant told the plaintiffs of his intentions to move into the Vaoala house and that in the meantime his wife's nephew was moving up to Vaoala to look after the house. Mr Schoonderwoerd says that he does not recall any discussion between himself and the defendant at that time about the removal of the plaintiffs' chattels. What the defendant said to him towards the end of May 1992 was, as soon as you can, remove your chattels from the house. Some of the plaintiffs chattels were removed but it appears the waterbed, Dutch dresser, ironing board and the box of tools were left behind. Mr Schoonderwoerd also says, as shown in the plaintiffs letter of

13 July 1992 to the defendant, that when the defendant informed the plaintiffs of his intention to move back into the Vaoala house, the plaintiffs were led to believe that their chattels were quite safe until they could organise their removal. At the same time the plaintiffs emphasized to the defendant the need to phone them if the waterbed was required to be removed sooner but the defendant felt that was unlikely. In the same letter of 13 July 1993, Mr Schoonderwoerd says that when he visited the Vaoala house to remove the plaintiffs chattels the defendant's builders told him that it was the defendant who told them to move the plaintiffs waterbed out onto the roof where it was exposed to all the natural elements. I am reluctant to act on this piece of evidence because of its hearsay nature even though it is a cogent piece of evidence to support the allegation of negligence against the defendant. I am really puzzled as to why the plaintiffs did not call the builders to testify as to what the defendant might have told them to do with the waterbed.

Now it appears that in the beginning of June 1992 the plaintiffs were stranded at Aleipata and could not come to Apia because of a landslide at Aleipata. Then that was followed by the sudden death of Mr Schoonderwoerd's father and the plaintiffs had to go to New Zealand for ten days. When the plaintiffs came to the Vacala house to remove their chattels the waterbed and Dutch dresser were damaged. The waterbed was ruined and drained of water. The bladder and baffle of the waterbed were lying in a heap on the roof of the house, its mahogany base had deep scratches, and the heating element had been snapped and dismantled. As for the Dutch dresser, it was separated in two halves with the bottom half sitting outside of the house being used by the builders hired by the defendant as a bench for their work. It was covered in sawdust and scoured with scratches. The plaintiffs tool box which had been locked was also opened and a number of tools were missing. The plaintiffs ironing board was found outside of the house lying in a pile of timber with a broken stand.

Now according to the defendant, the Vaoala house was badly damaged during cyclone Val and the plaintiffs moved to a house closer to Apia taking some of their chattels with them but leaving some of their chattels behind in the house. He says that apart from the waterbed he was not aware of what other chattels the plaintiffs left behind in the house. He discussed with the plaintiffs the reconstruction of the house and the plaintiffs agreed to do the reconstruction of the house. But the reconstruction work was delayed for some weeks as they had to wait for the insurance money. The plaintiffs later on carried out the reconstruction work but about the Easter holiday in April 1992 the work stopped as Mr Schoonderwoerd's employer wanted the plaintiffs to move out of the defendant's house. The defendant then hired another builder to complete the reconstruction work to his house.

The defendant also says that the discussion between himself and the plaintiffs was held when the plaintiffs first moved out of his house at Vaoala. In that discussions the plaintiffs requested him if they could leave their chattels in the house but he did not ask the plaintiffs to leave their chattels in the house. The arrangement he made with the plaintiffs was for their chattels to be left in the house until the reconstruction work started. After the reconstruction work started, he asked the plaintiffs twice to remove their chattels from the house. His wife also asked the plaintiffs once to remove their chattels from the house. On all three occasions the plaintiffs did not remove all their chattels. It was not until eight to ten weeks after the plaintiffs were asked to remove their chattels that they finally did so. The defendant also says that Mr Schoonderwoerd was aware that the waterbed and his other chattels were in the way of the builders working on the house as he came to the house several times and took away some of the small items that he and his wife had left behind.

In cross-examination by counsel for the plaintiffs, the defendant says that when he informed Mr Schoonderwoerd that he would be moving back into the house and that his wife's nephew would be looking after the house in the meantime, Mr Schoonderwoerd replied to leave the plaintiffs chattels in the house until the plaintiffs had found another place. The defendant says he replied that was fine but there was no agreement on the matter. When referred by counsel for the plaintiffs to the plaintiffs letter of 13 July 1992, the defendant says he discussed the letter with the plaintiffs and denied any responsibility for the damage to the plaintiffs chattels. He says that the damage was caused by the builders he hired to do the reconstruction work to his house and therefore he takes no responsibility for the damage caused by the builders. He also says that he was not present at the house at all times but did go to the house whilst the builders were carrying out repairs during lunch hours and after work.

I must say here that I do not accept the suggestion that the plaintiffs chattels were damaged by the cyclone. Not only do the plaintiffs deny that their chattels were damaged by the cyclone but the defendant himself says in cross-examination that it was the builders he hired who damaged the chattels. Even the nature of the damage to the chattels contradict any suggestion that the damage was caused by the cyclone. For instance it is incredible that the cyclone drained the waterbed and then dismantled it and placed parts of the waterbed in a pile on the roof of the house and left other parts of the waterbed inside the house. It is also incredible that the cyclone split the Dutch dresser in halves and then took the bottom half outside of the house leaving the top half inside the house. It is even more incredible that the cyclone unlocked the tool box which was inside the house and then removed some of the tools which were inside the box. I also do not believe that the cyclone broke the stand of the ironing board and then blew the ironing board out of the house

What has been said is the evidence placed before the Court. It is now for the Court to make findings of facts relevant to its decision in this case. As already stated it is clear that the relationship between the defendant and the plaintiffs was one of landlord and tenant pursuant to a tenancy agreement entered into by the parties. When cyclone Val struck Western Samoa causing damage to the Vaoala house, the plaintiffs left the house on the basis that they were to return and continue living as tenants in the house after it had been repaired. They undertook to repair the house and actually carried out repairs to the house with the agreement or at least the tacit agreement of the defendant. They also left behind in the house at least most of their chattels including their more important chattels like their waterbed and Dutch dresser. The defendant says that when the plaintiffs first left the house, an arrangement was made between himself and the plaintiffs for the chattels that remained in the house to be removed when the reconstruction work started. When the reconstruction work started he asked the plaintiffs twice to remove their chattels and his wife also asked the plaintiffs once to remove their chattels but it was some eight or ten weeks later that the plaintiffs finallly removed their chattels. I must say that I do not accept this part of the defendant's evidence. In the first place, when the plaintiffs left the Vaoala house, it was on the basis that they were to return to the house after repairs had been done. That is confirmed by the fact that the plaintiff with the agreement of the defendant were to carry out the repairs caused to the house by cyclone Val and they actually carried out those repairs. It is also supported by the fact that in April 1992 during the Easter holiday the plaintiffs informed the defendant that Mr Schoonderwoerd's employer wanted the plaintiffs to move out of the defendant's house. Why should the plaintiffs so inform the defendant unless the understanding between the parties up to Airl 1992 was that the plaintiffs were to move back into the defendant's house. What the defendant says about asking the plaintiffs when they first left the house to remove their chattels when the reconstruction work started, is somewhat inconsistent with

the understanding that the plaintiffs were to return and continue living in the house after repairs had been done. I also do not overlook the fact that the first repairs were to be carried out by the plaintiffs themselves and one would expect the plaintiffs to be naturally concerned about the safety of their own chattels. At least there is no evidence that the plaintiffs chattels needed protection from the plaintiffs themselves whilst the plaintiffs were carrying out repairs to the house. In fact up to the point in time when the plaintiffs stopped doing repairs to the house in April 1992 the plaintiffs chattels were still in good condition. It was only when the defendant took up the completion of the repair work by hiring different builders that the plaintiffs chattels were damaged. It also does not appear from the plaintiffs evidence that the defendant asked them when they first left the Vaoala house to remove their chattels when the reconstruction work started. Nor does it appear from the plaintiffs evidence that the defendant or his wife asked the plaintiffs to remove their chattels whilst repairs were being done to the house by the plaintiffs.

I accept the evidence of Mr Schoonderwoerd that when the plaintiffs stopped doing repairs to the house in April 1992, the defendant agreed to his requests to leave the plaintiffs chattels in the house until they removed them and for the defendant to look after the chattels especially the waterbed. I also accept Mr Schoonderwoerd's evidence as to what transpired between himself and the defendant towards the end of May 1992 in relation to the plaintiffs chattels when the defendant informed him of his intention to move back into the Vaoala house.

It is also to be noted that when the defendant was cross-examined by counsel for the plaintiffs, the defendant says that when he informed Mr Schoonderwoerd towards the end of May 1992 of his intention to move back to the Vaoala house, Mr Schoonderwoerd's reply was to leave the chattels in

the house and the defendant said that was fine. This is inconsistent with the defendant's evidence that he and his wife told the plaintiffs to remove their chattels from the house. Even the defendant's evidence in reply to questions by counsel for the plaintiffs about the letter of 13 July 1992 from the plaintiffs to the defendant did not impress me.

There is also the evidence of the defendant that Mr Schoonderwoerd should have known that the plaintiffs chattels were in the way of the builders hired by the defendant. The evidence of Mr Schoonderwoerd was that the plaintiffs placed their chattels in a safe place when they left the house. Even if the defendant's evidence is true, the nature of the damage to the waterbed, Dutch dresser and ironing board together with the fact that parts of the waterbed were found on the roof and parts were found in the house, and the bottom half of the Dutch dresser was found outside of the house being used as a bench by the builders and the top half inside the house, and the ironing board was found in a pile of timber outside of the house, clearly show that the damage was caused deliberately without any real effort to safeguard the plaintiffs chattels. Likewise the unlocking and removal of tools from the plaintiffs tool box can hardly be explained on the basis that the tool box was in the way of the reconstruction work carried out by the builders.

In all, I accept the evidence for the plaintiffs. I also do not accept the defendant's evidence about him and his wife telling the plaintiffs on three separate occasions to remove their chattels from the Vaoala house.

This brings me to the legal issues in this case. The claim for damages in this case alleging negligence against the defendant as bailee is founded on a special class of bailment. It is a gratuitous bailment and not a bailment for reward or valuable consideration. And the kind

of gratuitous bailment we are dealing with here is a bailment by deposit. Such a bailment is defined in 2 Halsbury's Laws of England. 4th ed., para 1505 where it says :

"Bailment by deposit may be defined as a bailment of a "chattel, to be kept for the bailor gratuitously, and "returned upon demand. This definition is sufficient "for most purposes, and is complete, if it is under- "stood that a return to the bailor covers delivery "over to his nominee, for in some cases the primary "object of the bailment may be that the bailee delivers "over the chattel upon demand for a third party, and "not to the actual bailor himself. This kind of "bailment must always relate to a specific chattel. "As the bailee is to receive no reward for his services, "there can never be an executory contract of deposit, "for there can be no action upon an unsupported "agreement, and until there is actual delivery and "acceptance of the subject matter of the trust, there "is no obligation on the bailee's part to carry out "his promise. As soon, however, as the bailee actually "accepts the chattel, he becomes in some degree responsible "for it whilst it remains in his possession or under his "control, and is also bound, upon demand, to redeliver "it to the true owner or his nominee, unless he has good "excuse in law for not doing so".

In this case, the plaintiffs by leaving their chattels in the house of the defendant after informing the defendant about it and the defendant agreed

or at least tacitly agreed, gave rise to the existence of a bailment. The plaintiffs being the bailors and the defendant becoming the bailee of those chattels. As there was no reward of any kind moving from the plaintiffs as bailors to the defendant as bailee or any mutual advantage accruing to both parties, this is clearly a bailment by a gratuitous deposit of chattels. It is also clear that when the plaintiffs left their chattels in the defendant's house with the agreement of the defendant, those chattels were in the possession or under the control of the defendant as bailee. Both counsel in this case also accept the existence of a bailment between the plaintiffs and the defendant. Where counsel part company from one another is when the defendant says that the bailment was terminated when he and his wife informed the plaintiffs to remove their chattels so that the defendant should not be liable as bailee for the damage subsequently caused to the plaintiffs chattels. I have already decided not to accept that part of the defendant's evidence for the reasons already given.

For the plaintiffs to succeed in their present claim, the defendant must have been guilty of negligence as bailee. It is clear from 2 Halsbury's Law of England, 4th ed., para 1515 that the standard of care required of a gratuitous bailee is that demanded by the circumstances of each case. Thus in the case of a gratuitous bailee the measure of care that is required is as a rule the degree of care which men of common prudence generally exercise about their own affairs. The fact that a chattel was lost or injured whilst in the possession of the bailee raises prima facie a presumption of negligence against him, but the bailee may rebut that presumption by proving with evidence that he was not to blame for the loss or injury, even if he is unable to show how it happened.

Applying these principles from 2 Halsbury's Laws of England, 4th ed., to this case, the fact that when the plaintiffs as bailors came to claim their

chattels left in the defendant's house those chattels were damaged raises prima facie a presumption of negligence against the defendant as bailee. I am satisfied the defendant has not rebutted that prima facie presumption. The damage to the chattels was caused by the builders hired by the defendant. There is no evidence whatever that the defendant took any care of the plaintiffs. No instructions were given by the defendant to the builders to take care of the plaintiffs chattels or not to use the chattels for the purpose of their work. The chattels seemed to have been abandoned to the mercy of the builders. Even though the defendant was not present on site at all times, he did visit the house during lunch hours and after work. He could not have failed to see that the plaintiffs chattels were at risk from the builders. He also could not have failed to see that the waterbed was damaged and parts put in a heap on the roof, and that the bottom half of the Dutch dresser was being used as a bench outside of the house by his builders. For the defendant to say that the chattels were damaged by the builders and therefore he takes no responsibility is immaterial, as he was in possession of those chattels as bailee and therefore he is liable in negligence for any breach of the standard of care required of him as bailee in the circumstances of this case : see for instance Blount v The War Office [1953] 1 All ER 1071. It is quite clear to me from the circumstances of this case that the defendant took no care whatsoever of the plaintiffs chattels.

The waterbed, Dutch dresser and ironing board were so badly damaged that they are beyond repair. There is no dispute as to the replacement costs of those chattels furnished by the plaintiffs but I think some deduction should be made for the damaged chattels which the plaintiffs are entitled to have. I will allow a reduction of $400. As for the missing tools, I will allow the full amount claimed by the plaintiffs.

In all then I will give judgment for the plaintiffs in the sum of $4,676.17 which is the balance of the amount claimed less $400. I will also allow to the plaintiffs the costs of return airfares from Tonga for Mr Schoonderwoerd to come and give evidence in this case. Costs are also awarded to the plaintiffs to be fixed by the Registrar plus any disbursements.

TFM Sifolo

CHIEF JUSTICE