IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 447/93

BETWEEN: COMPUTER SERVICES LIMITED a duly incorporated company having its registered office at Apia

First Plaintiff

A N D: LAUANO ATI ILAOA of Apia, Workman

Second Plaintiff

A N D: H.J. WENDT & SONS LIMITED a duly registered company having its registered office at Apia

Defendant

Counsel: L.R. Vaai for first and second plaintiffs
L.S. Kamu for defendant

Hearing: 6 & 10 March 1995

Judgment: 28 March 1995

JUDGMENT OF SAPOLU, CJ

Evidence:

From January to March 1993, the second plaintiff was operating a weekly newspaper, called Samoa Bulletin, from a room in the defendant's two storey building at Saleufi on a lease basis at a monthly rental of $600. So what we have here was a landlord and tenant relationship. Under the lease the second plaintiff as

tenant was also to pay for the electricity charges in addition to the rent. For the purpose of printing and publishing his weekly newspaper, the second plaintiff had in the room he used in the defendant's building, equipment, furnitures and fittings. Amongst the equipment was a computer and laser printer which the second plaintiff had obtained from the first plaintiff in September 1992. The price of the computer and laser printer was $8,700 and the second plaintiff had paid only $500 towards that price. It is clear that both counsel accept that at all material times ownership of the computer and laser printer was with the first plaintiff. So there is no dispute in that regard.

Unfortunately, the second plaintiff did not pay any rent from January to March 1993 for his use of the room in the defendant's premises. He did, however, make a payment by cheque at the commencement of the lease but that cheque is said to have bounced. So in the first week of March, the defendant locked up the room which was used by the second plaintiff and all the equipment, furnitures and fittings in the room and banned the second plaintiff from re-entering or using the room. The second plaintiff was also refused permission to remove any equipment or other chattel from the room. Then by letter of 30 March 1993, the secretary of the defendant company who also holds office as a director of the company, advised the second plaintiff that he owed the company a total amount of $2,012. It is clear from the evidence that that amount comprised of arrears in rent and unpaid electricity charges.

A request by the defendant in the same letter to transfer the ownership of the computer and laser printer to the defendant as security for the debt was not accepted by the second plaintiff.

After 30 March, an employee of the first plaintiff visited the secretary of the defendant company at his place at Alafua, and according to his evidence he told the secretary of the defendant company that he was there to get the computer and printer which had been used by the second plaintiff as they were the property of the first plaintiff. The reply by the defendant's secretary was that the computer and printer had been sold. On 19 June 1993, the solicitor for the first plaintiff called the defendant's secretary on the phone and put to him a proposal by the first plaintiff to pay off the rent and electricity charges owing by the second plaintiff for the return of the computer and laser printer to the first plaintiff. Then by letter of 23 June 1993, the second plaintiff wrote to the solicitors for the defendant with a proposal for paying off his unpaid rent and electricity charges and requesting the return of the computer, the printer and his personal belongings which had been taken possession by the defendant. The second plaintiff also pointed out in the same letter that the computer and printer were the property of the first plaintiff. Then by 22 July 1993, the same employee of the first plaintiff who had visited the defendant's secretary at Alafua says he went to Vaitele and offered to the defendant's secretary a cheque to cover the total amount of the unpaid rent and electricity charges.

However, the defendant's secretary simply looked at the cheque and gave it back to the first plaintiff's employee.

The evidence for the defendant which was given by its secretary, is substantially the same as that given for both plaintiffs as to the occupation on a lease basis by the second plaintiff of the defendant's premises and how that occupation came to an end. The defendant's secretary also seems to say that he did not accept the young man who visited him at Alafua as genuine as he had nothing to confirm his identity as an employee of the first plaintiff. Furthermore, he had no other computer in his house apart from his own two computers. He also says that the defendant still has the computer and printer in question. According to the defendant's secretary, the first time he became aware that the computer and printer belonged to the first plaintiff was when the solicitor for the first plaintiff called him on the phone in 1993 and offered to pay the second plaintiff's debt by cheque. The second time was through the letter of 23 June 1993 from the second plaintiff addressed to the solicitors for the defendant. As to the evidence about the cheque given to him at Vaitele in July 1993, the defendant's secretary says someone just came to his office and waived something at him; he did not know if it was a cheque. In any event he says that the second plaintiff is also liable for rent and electricity for the month of April. So the total outstanding amount for rent and electricity charges was $2,615.

That is the material evidence in this case and I turn now to the claims by the first and second plaintiffs.

Plaintiffs claims:

The first and second plaintiffs claim in conversion and detinue against the defendant. There has been no single formulation of what constitute the tort of conversion but there are a number of formulations which seem to convey its essential nature. One such formulation is that stated by Somers J when delivering the judgment of the New Zealand Court of Appeal in **Cuff v Broadlands Finance Ltd** [1987] 2 NZLR 343 a case cited by counsel for the plaintiffs. At p.346 of that judgment Somers J said :

> "The tort of conversion is constituted by the interference "with the use and possession of a chattel of another, "wilfully and without lawful justification. It requires a "dealing with the chattel in a manner inconsistent with the "plaintiff's right and with an intention in so doing to deny "that right, or to assert an inconsistent right. See e.g "**Salmond and Heuston on Torts** (18th ed., 1981) p.292. It "commonly arises when the plaintiff's chattel taken by the "defendant with the intention of exercising dominion over "it whether permanently or only for a time. Conversion may "also arise in other ways, as where a defendant who innocently "obtains possession of a chattel is shown to have an intention "to retain it against a plaintiff who has the immediate right "to possession. In such a case a demand by the plaintiff and "a failure to comply with the demand by the defendant is the "usual, but not the only means, of establishing the "defendant's intent and the plaintiff may sue in detinue for "the return of the specific chattel, or in conversion for "damages".

This passage, apart from being a statement of what constitutes the tort of conversion, also points out that if a plaintiff seeks the

return of a chattel which a defendant has refused to return upon demand, then the action is in detinue.

Another formulation of the tort of conversion is that provided in Street on Torts, 8th ed., pp 36-37 where it says :

> "Conversion may be defined as an intentional dealing with "goods which is seriously inconsistent with the possession "or right to immediate possession of another person.
>
> "That tort protects the plaintiff's interest in the "dominion and control of his goods; it does not protect "his interest in its physical condition. It follows, "therefore, that the tort is much concerned with problems "of title to personal property. Indeed, many cases on "conversion are in essence disputes on title which often "involve complex rules of commercial law".

And in Salmond and Heuston : Law of Torts, 12th ed., p.101, it is there said :

> "A conversion is an act, or complex series of acts, of "wilful interference, without lawful justification, "with any chattel in a manner inconsistent with the "right of another, whereby that other is deprived of the "use and possession of it. Two elements are combined in "such interference: (1) a dealing with the chattel in a "manner inconsistent with the right of the person entitled "to it, and (2) an intention in so doing to deny that "person's right or to assert a right which is in fact "inconsistent with such right".

At p.100 of Salmond and Heuston : Law of Torts, there are three distinct methods stated, whereby one person may deprive another of his property; and these are (1) by wrongly taking the property, (2) by wrongly detaining the property, and (3) by wrongly disposing

of the property.

In The Law of Torts in New Zealand by Todd, Burrows, Chambers, Mulgan and Vennell, it is stated at p.489 that :

> "'The wrong of conversion consists in any act of wilful
> "'interference with a chattel, done without lawful
> "'justification, whereby any person entitled thereto is
> "'deprived of the use and possession of it'. Conversion
> "is, thus, a wrong to a possessory right in goods.....The
> "action of trover covered three distinct situations in
> "which a person might deprive another of his goods, and
> "thus be guilty of a conversion and liable in an action
> "of trover. He or she might wrongfully take the goods,
> "wrongfully detain them or wrongfully dispose of them.
> "In the first case, the defendant has gained possession
> "by wrongful appropriation. In the second case, posses-
> "sion of the goods is acquired rightfully but is retained
> "wrongfully. In the third situation, the goods are neither
> "taken nor wrongfully detained, but the defendant has dealt
> "with or disposed of the goods in such a way that they are
> "lost to the true owner. Originally trover was limited
> "to the third situation, but the modern tort of conversion
> "has been extended to cover all three situations".

Having referred to these formulations of what constitutes the tort of conversion, I will now turn to relief in detinue as the second plaintiff's action is in detinue.

As printed out in the passage cited from Cuff v Broadlands Finance Ltd [1987] 2 NZLR 343, an action in detinue will lie where a plaintiff seeks the specific return of a chattel which a defendant has refused to return on demand from the plaintiff. In General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 2 All E.R. 314, 318; another case cited by counsel for the

plaintiffs, Diplock L.J (as he then was) said :

> "the action in detinue partakes of the nature of an action "in rem in which the plaintiff seeks specific restitution "of his chattel. At common law it resulted in a judgment "for delivery up of the chattel or payment of its value as "assessed, and for payment of damages for its detention".

Thus the action in detinue is essentially for the recovery of a chattel which has been withheld by one person despite a demand for its return by another. Judgment may not only be given for the return of the chattel to the claimant where that is the appropriate action in the circumstances, but also for damages for the detention of the chattel.

Defendant's lawful justification:

The matter of lawful justification or defence raised by the defendant to both actions in conversion and detinue is the landlord's right to distrain or levy distress for arrears of rent due under a tenancy. Self-help by the landlord to the chattels of the tenant is the essence of this right. It is explained by R Connard in an article entitled "The Landlord's Right to Distrain" published in Studies In The Law Of Landlord and Tenant edited by Professor Hinde where the learned author says at p.228 :

> "Broadly, the right to distrain is a right possessed by "a landlord by virtue of the landlord and tenant relation- "ship to enter the demised premises whenever the rent has "not been paid by the due date and to seize sufficient of "the tenant's chattels as will cover the amount owing. "Once the landlord has what may loosely he called 'earmarked'

"the chattels the subject of the distress (i.e. 'impounded' "them), they are said to be 'in the custody of the law' and "no person with knowledge of this may thereafter remove them "without rendering himself liable to treble damages to the "landlord 'for pound breach'".

It is to be noted that this statement of the law represents the legal position in New Zealand and it specifically provides that the landlord under the right to distrain or levy distress may seize sufficient of the tenant's chattels to cover the amount of the rent arrears. This is because of section 3(1) of the New Zealand Distress and Replevin Act 1908 which provides that no person shall distrain in respect of chattels other than those of the tenant or a "person in possession of the premise".

The English position in this regard is different. In Abingdon Rural District Council v O'Gorman [1968] 3 All E.R. 79, 82; another case also cited by counsel for the plaintiffs, Lord Denning MR said :

"At common law the rent issued out of the land. The land- "lord was entitled to distrain on any goods or chattels "that were on the premises to whomsoever they belonged".

So under English common law the landlord may seize any chattel he finds on the premises, including chattels not owned by the tenant, when he distrains for arrears of rent. There is thus, a difference between the New Zealand and English positions as to the chattels which can be the subject of a landlord's distress. Both such

positions are not of course binding on the Western Samoa Courts.

In my view, however, the New Zealand position has more to commend itself in this regard. The right to distrain for arrears of rent should apply only to the chattels of the tenant which are found on the leased premises. The tenant is the person who owes rent to the landlord and it is only right and good sense that only his chattels as found on the leased premises can be subject to distress. Chattels which belong to others and found on the leased premises are not so liable. I am reinforced in this view by the fact that the landlord may sell the chattels he has impounded if after the lapse of a reasonable time the tenant has still not paid the arrears of rent. So if the landlord can impound and subsequently sell the chattels of an innocent person to pay up a tenant's arrers of rent, that will be a grave injustice to the innocent person who owes no rent to the landlord. So the Western Samoa common law position is similar to the statutory position under the New Zealand Distress and Replevin Act 1908 and the English Statute (Distress) 2 Will. & Mar. c.s, which give the landlord a power to sell chattels the subject of distress, and different from ancient English law where the landlord had no power of sale in respect of chattels the subject of a distress.

There is one other point that I need to refer to in respect of the landlord's right to distrain for rent because of its relevance in this case. The landlord should only seize and impound what is

reasonably necessary of the tenant's chattels to cover the amount of the arrears of rent due to him. What is reasonably necessary is a question of fact depending on the circumstances of each case. If the landlord seizes and impounds chattels which are more than reasonably necessary to cover the arrears, then he may be liable to the tenant for an excessive distress. As was said by R Connard in his article "The Landlord's Right to Distrain" in Studies In The Law of Landlord and Tenant at p.243 :

> "The distress must be reasonable in amount, i.e the landlord "is only entitled to distrain on such chattels as are "reasonably necessary to cover the rent accrued due for which "the distress is made. Failure to do so does not make the "distress illegal, but will render the landlord liable to "the tenant in damages for an excessive distress".

And at p.248, the learned author went on to say :

> "a distress is excessive where the chattels seized are "of a value greater than is reasonably necessary to "satisfy the amount of rent for which the distress was "made. The measure of damages in this instance is the "value of the chattels seized less the rent due and "expenses. The person aggrieved is entitled to recover "for any special damage that he has suffered through "being deprived of the use of the chattels taken "unnecessarily".

What is reasonably necessary is a question of fact in each case. Simply because the chattels seized are greater in value than the total amount of the arrears of rent due does not necessarily make the distress excessive, for the chattels seized may be the only chattels that the landlord can distrain on and there is no cheaper

chattel on which distress can be levied. It may also not be possible for a landlord to find a tenant's chattel whose value is exactly the same as the amount of the rent arrears.

The final point which needs to be mentioned in relation to the landlord's right to distrain is that this right is implied in all leases. Under section 107 of the Property Law Act 1952 (NZ) the power of the lessor (landlord) to distrain for rent is implied in all leases with certain exceptions which do not apply in this case. This New Zealand statutory provision is still applicable in Western Samoa by virtue of the Reprint of Statutes Act 1972.

Application of law to evidence:

Dealing first with the claim in conversion by the first plaintiff, it is clear to me that when the defendant locked up the room which was rented by the second plaintiff and detained therein all the items of property which were in the room, it had no right to detain the computer and laser printer which were the property of the first plaintiff. The reason is that if the defendant was purporting to distrain for the second plaintiff's arrears of rent and unpaid electricity charges, then he could not have seized the computer and laser printer for they were not chattels which belonged to the second plaintiff as tenant. The same may be said of the fax machine which did not belong to the second plaintiff as tenant.

Secondly, after the defendant was informed through its secretary in discussions with the solicitor and then with counsel for the first plaintiff and by a letter from the second plaintiff to the solicitors for the defendant, that the computer and laser printer belonged to the first plaintiff, the defendant did not hand over the computer and printer. And that was so despite the offer from the first plaintiff's solicitor to pay up the second plaintiff's outstanding arrears of rent and electricity charges. In addition there is also the cheque sent to the defendant's secretary to cover the second plaintiff's indebtedness but was not accepted by the defendant's secretary.

From all that evidence, I am of the view that the elements of the tort of conversion have been established by the first plaintiff against the defendant. The defendant's right to distrain as landlord does not extend to the first plaintiff's chattels as the first plaintiff was not a tenant at the defendant's premises. I will give judgment for the first plaintiff in the sum of $8,200 being the balance claimed of the purchase price of the computer and printer. I will also award general damages of $750 to the first plaintiff. Costs are also awarded to the first plaintiff to be fixed by the Registrar.

As to the claim by the second plaintiff, I must first of all say that I have to disallow the defendant's claim that the second plaintiff should also pay for the rent of April 1993. There is no

legal basis for this claim. The second plaintiff's claim in detinue is for the return of certain items of property taken by the defendant. Now the fax machine has been given back to its real owner. So that part of the claim is disallowed. Likewise the claim for the return of the computer and printer is also disallowed as that has already been dealt with under the judgment for the first plaintiff. That leaves only the claim for the return of the bicycle, desk, two chairs and electric jug.

In spite of some ambiquities in the evidence in relation to the claim by the second plaintiff, I am satisfied that his claim in detinue for the return of the specified items of property should not succeed. In fact I have been wondering whether the proper course of action for the second plaintiff to take was to 'replevy' the chattels in question by seeking a 'writ of replevin' for their recovery rather than to sue in detinue or conversion.

Be that as it may, it appears to me from the circumstances of this case that the defendant's action in locking up the room used by the second plaintiff and detaining therein the chattels which were used by the second plaintiff in his newspaper business, was tantamount to distraining for arrears of rent owing by the second plaintiff by impounding the chattels locked up in the room. And it does not matter whether the defendant as landlord distrains for rent arrears during the existence of the tenancy or within a reasonable time after the determination of the tenancy. In this

case there is some uncertainty in the evidence as to whether the defendant was also determining the tenancy with the second plaintiff when he distrained for rent arrears. However, as I have said the right to distrain or to levy distress may be exercised either during the existence of the tenancy or within a reasonable time after the determination of the tenancy. There may be some question as to the manner in which the chattels were seized and impounded in this case as the value of all chattels impounded by the defendant was clearly excessive considering the amount of the rent arrears and electricity charges. However, that concern has been resolved as it is clear that the computer and printer as well as the fax machine detained by the defendant were not the properties of the second plaintiff. And the fax machine has been returned to its true owner and judgment has been given to the first plaintiff for the value of the computer and printer.

In my view then, the defendant in the exercise of his right to distrain was entitled to impound the second plaintiff's bicycle, desk, two small chairs and electric jug. The total cost of those chattels would appear to be within the range of the total amount of the arrears owing by the second plaintiff. One disquieting feature of this case was the defendant's refusal to accept the offer by the first plaintiff to pay off the second plaintiff's arrears of rent. I have given much thought to that factor, however, I have come to the view that the offer to pay off the full indebtedness of the second plaintiff at once was not from the second plaintiff but the

first plaintiff, and it is clear that the first plaintiff was only concerned about the return of its computer and printer and not with the return of the second plaintiff's chattels.

The second plaintiff's action in detinue is therefore dismissed. However some adjustment should be made to the amount owing by the second plaintiff to the defendant as the computer and printer are now with the defendant but the second plaintiff had paid $500 towards the price of those chattels. I would also have to make some allowance for depreciation for the period of six months during which the second plaintiff had the use of the computer and printer. I will allow $300 for depreciation taking into account local conditions. That leaves $200 to be deducted from $2,012.42 which is the total amount of the rent arrears and outstanding electricity charges. That leaves a balance of $1,812.42.

In conclusion, I would thank both counsel for their well prepared and researched written submissions.

T F M Sakah
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CHIEF JUSTICE