

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.171 of 2018

BETWEEN: **SAREN PATEL**

PLAINTIFF

AND: **FIJI DEVELOPMENT BANK**

DEFENDANT

Counsel : **Plaintiff: Ms.Taki. J**
 : **Defendant: Mr. Sharma. D and Ms. Choo. N**

Date of Hearing : **01.3.2022**

Date of Judgment : **16.5.2022**

Catch Words

Detention and conversion- chattel- damages- common law – Bill of Rights- interference with property rights Section 12(2), 27, 6(2) and 7(4) of Constitution of the Republic of Fiji – Nominal damages- developing common law- the proper remedy- practical issues in special damages- General Damages- Torts (Interference with Goods) Act 1977 of UK.

JUDGMENT

INTRODUCTION

1. Plaintiff instituted this action for damages, against Defendant for conversion and detention of some household items including clothes, furniture, lawn mower, recreational and or sports items etc. These items were on the premises of a Farm House where Plaintiff was resident and manager of Toa (Fiji) Limited, which was livestock farm. Toa (Fiji) Limited had obtained a commercial loan from Defendant under few securities including a mortgage of land of the farm and deed of debenture. When Defendant entered and took possession of land , Plaintiff occupied the Farm House and her household items were in house and some were in three containers on premises. Defendant’s notice to vacate had specifically permitted that “possessions” be removed but acted in contrary at the handing over and subsequently. At the time of handing over of premises to mortgagee, items in farm house were also stored in one container. Plaintiff had left these containers on the premises, to be removed later by a side lifer- container carrier. Defendant’s representative had taken

possession of all containers in writing with list of items on it. Later, Defendant had refused to release the containers and requested “proof of ownership” of the items inside the container and also ownership of empty, containers. Defendant failed to release the containers left by Plaintiff on the farm which were locked by Plaintiff. Since these items were personal items no receipts or invoices were preserved hence not able to produce to as requested by Defendant. Out of the containers left in farm, one empty container was leased and it was opened by Defendant, and items were stored in the hatchery of the farm, without releasing them to Plaintiff. That empty container was released to third party who owned it. Plaintiff is seeking damages for conversion and detention of items held by Defendant. Apart from containers Defendant did not release a vehicle used by Plaintiff which was clearly not under any security to Defendant to restrain its movements. Defendant had committed a tort of conversion and general damages granted considering that it is not pragmatic to insist special damages .Nominal damages is not granted considering the infringement of property rights of Plaintiff and constitutional provision to develop common law to safeguard property rights.

FACTS AND EVIDENCE

2. The Defendant had given a loan to Toa (Fiji) Limited ("Toa"). It had defaulted the loan. Plaintiff's husband was major shareholder of Toa.
3. Plaintiff did not provide any security for the loan obtained by Toa from Defendant.
4. Plaintiff stated in her evidence that she was employed at Toa as resident manager and Toa was in livestock business.
5. The Defendant had no contractual relationship with the Plaintiff, but it is an admitted fact that when Defendant took possession of farm as mortgagee of Toa from Plaintiff who was in charge of the farm at that time of taking over.(seeP2)
6. Plaintiff was at the farm of Toa site and physical handover was done with going around the farm with her. According to undisputed evidence produced by hand written note contemporaneously made and with the handing over of premises by P2, it is proved that Plaintiff was in possession of her household items on the farm.
7. As pleaded in her Statement of Claim at paragraph Plaintiff, was married to the major shareholder of Toa, Anand Chandra. She said she lived on the farm at Uciwai, Nadi. She was not a director or shareholder of Toa.
8. In paragraph three, of her Statement of Claim, the Plaintiff had pleaded that she had difficulty in storing her personal effects at her residence at Fantasy Island, Nadi

and she had sought permission from Toa to use the farm at Uciwai to store four containers

on the farm to keep her personal and household effects.

9. The Plaintiff was questioned on this issue at trial and asked whether there was any agreement or documents to show that Toa had granted permission to her to store items on the farm and whether an inventory had been prepared to record the items that were stored in the Containers. The Plaintiff was not able to produce any such agreement or inventory. This was a matter between Toa and Plaintiff, and Defendant cannot rely on that to deny Plaintiff's goods and claim them under alleged security document.
10. Absence of any written confirmation for the Plaintiff to keep her personal items cannot prove that these items were under any security for Defendant to seize them.
11. Plaintiff in her evidence said that she was staying on the Farm property at Uciwai and was the resident General Manager of the farm. She admitted that she had another residence in Fantasy Island and household items were also stored in containers due to lack of space in the house at Fantasy Island.
12. In the evidence Plaintiff said that she obtained permission from Toa before placing the containers owned by her on the premises.
13. On 29.11.2017 the Defendant served a Notice on Toa informing the Directors of Toa that the Defendant would enter into possession of the Farm property as it was mortgaged to the Defendant and upon default of the loan granted.
14. The Defendant gave the Toa thirty days to vacate the property. The Plaintiff was aware of the Notice to Vacate, but clearly stated that a live farm cannot be closed like any other business due to live stock and other related issues.
15. On 30.12.2017 the Defendant entered the Farm to take possession. The Plaintiff was present on the property on that day.
16. There were personal and household items that were on the Farm House and she said she had them stored in Containers. The Plaintiff in her evidence agreed that the Defendant had allowed her on 31.12.2017 to take her container of personal and household effects.
17. The Plaintiff said that because it was the holiday season and she couldn't get a side lift truck she couldn't remove said Containers on premises. The Plaintiff relied on a document that she had handwritten on 31.12. 2017 to show what had happened on that date. A photocopy of this document was exhibited as Plaintiffs Exhibit P1.

18. Paragraph 1 of P1 stated:

The containers will remain on the site with all personal items stored inside it - (inflatable boats, tool boxes, beds, clothings (brand new), golf sets, tennis racquets, miscellaneous auto tools, welders, (Auto AVC) Auto- frame liner; Leased Containers will be released to the Owners.

My container near the main entrance contains my personal furniture and miscell items (washing machine, computer, couch, - list given to Va (FDB)

19. Defendant attempted to argue that there was only one container that belonged to Plaintiff. This is far from truth and P3 was clear that Plaintiff had produced a document to prove that Plaintiff had purchased two of the containers from a commercial entity. Same P1 started with the following sentence

“FDB representative will not release 3 of the personal container in spite of

In paragraph 2 of Plaintiffs of P1 2 it is stated that:

“Furthermore, the Container with my personal belongings will be left at the farm today and taken out next week as the side lifter which had come to site today was not allowed to take it out of the premises.

We will have these containers released after the holiday season”

20. Plaintiff was not successful in release of containers even late as April 2018. The Defendant then sent the Plaintiff the letter which is marked as P4. The Defendant wanted,

- a. Proper authorization from company directors of Toa for release of the items.
- b. Toa to provide proof of ownership of items
- c. Legal basis why Plaintiff’s items were kept on mortgaged property.
- d. Toa to sign indemnity to protect Defendant

21. Toa could not provide what was requested specially the proof of ownership which Defendant insisted as regards to the items inside.

22. It is not clear that what is meant by ‘legal basis’ as regard to any movable items on the property under a mortgage. This is not a requirement for Defendant to deny possession of items belonging to any third party such as Plaintiff.

23. It was clear from evidence Defendant had insisted proof of the items inside containers and this was not forthcoming.

24. After repeated refusals by Defendant, on 11.6.2018 the Plaintiff filed this action against Defendant for conversion and claiming damages.
25. Defendant did not release the items to Plaintiff and nearly after two years from this action Defendant had agreed to release the containers and items on the condition that case is withdrawn. This fact is stated in written submission of Defendant, too.
26. There was one leased container apart from three containers that belonged to Plaintiff, and on 24.01.2019, Defendant had emailed to get that container released and requested her to sign 'release' of the said container.
27. Plaintiff provided a letter marked P8 dated 11.2.2019 explaining the circumstances that had led to said leased container being taken over by Defendant. Plaintiff confirmed that the said freezer container was leased to Toa till November, 2018.
28. Upon confirmation that a third party owned Ref-container it was released and contents of that , shifted and stored in a room in the Toa Hatchery. There is no evidence as to the condition of these items in hatchery. Said container was opened without Plaintiff being informed.
29. Container was locked by Plaintiff and she held keys, and it is presumed that opening was done without her consent or her presence by Defendant before handing over of the empty container to its owner.
30. Defendant sold the Farm property but made it a condition that the items stored in the hatchery were not part of the sale. The Defendant's witness had not seen any items but stated that containers and other items stores in hatchery must remain so.
31. The Plaintiff in her evidence said, that she doesn't want the items, she is only seeking damages and costs as most of the items she had either bought new or useless for the purpose with the time passed. She said her children are now grown up and their toys and clothes are useless for them.
32. In the statement of claim special damages for items was an alternate claim to release of them.
33. The vehicle bearing registration EJ311 was not under a bill of sale and was not a security of Defendant. It was used by Plaintiff and was in possession of her at the time of taking over of the farm and was not released contrary to notice of vacation marked by D2.

LAW AND ANALYSIS

34. Plaintiff in her evidence stated that she was General Manager of Toa and did not produce any letter of employment, but this fact is not relevant as there were undisputed evidence that she lived in the farm house at Toa and her goods were stored in the containers that were on premises.
35. Form that was filled at the time of 'Hand over of Toa (Fiji) property to Fiji Development Bank' marked P 2, it is proved that even Defendant had taken possession of the farm from Plaintiff as a representative of Toa. So her employment letter is not relevant to this claim as her possession relating to seized household items and three containers was not in dispute.
36. Toa was a farm with livestock till the date of handing over of premises to mortgagee, hence a need of a responsible person to manage it till handing over, whether Plaintiff was appointed as General Manager by Toa is not relevant to the claim on conversion.
37. The Defendant stated that it was entitled under its Debenture from Toa to seize and sell all property belonging to Toa to recover its debt. Defendant failed to produce this document at hearing, hence failed to prove any legal basis for failure to release containers or vehicle EJ 311.
38. The Defendant argues that it had to consider the fact that it could open itself up to liability from Toa if it released Toa's property to a third party. This was not an issue as this could have easily verified from a letter, rather than insisting, for proof of ownership of household items (see P4).
39. In any event according to evidence of P2, the farm was handed over to Defendant's representatives named Litia and Va by Plaintiff and now Defendant is estopped from denying Plaintiff's possession.
40. At the same time, Defendant by its Notice to Vacate had specifically requested to "remove all your possessions". So Defendant is estopped from claiming all the possessed items of Plaintiff and or any other third party.
41. If the Defendant was not certain as to ownership of any item that Plaintiff claimed as hers, it could have examined any asset register of Toa or released the items after proper inventory and or with suitable security such as personal bond for the value from a person acceptable to the Defendant.
42. Defendant could have done this at its earliest rather than asking Plaintiff to prove ownership of household items as it was the Defendant who needed to prove that it can take possession of the items in terms of any security they held with Toa.

43. It is clear that the items that were stored such as children's clothes and television and could lose its value or utility with time and may not be usable at all if kept for a long time.
44. Document marked P1 also proves that Plaintiff had stayed on the farm till its physical possession was taken over by Defendant, and she had finally walked with officials of Defendants before it was handed over to Defendant. So, at least she was *de facto* manager of the farm at the time of handing over and had lived in it. So there was no doubt that her household items should remain on property, unless removed earlier. Plaintiff said that before taking over of property there were security personnel employed by Defendant and did not allow removal of items.
45. Even if she was not employed by Toa, the fact remained that she had lived on the farm house and had managed the livestock farm at the time of handing it over to Defendant as mortgagee, this was sufficient to prima facie proof that the personal items belonged to her.
46. Toa had not stopped its farming activities when it was taken over and Defendant obtained possession of the farm from Plaintiff. This is clear from had written letter marked P1 where it stated "final walk through was done with FDB". This proved that even Defendant had accepted that Plaintiff was at the property for handing over of it by walking with her around the farm.
47. Defendant did not produced any document to prove that they were entitled to take possession of all the items on mortgaged property including personal items of people who lived on the farm, including Plaintiff.
48. No debenture would allow all the movable items on premises and if it stated so the **burden was with Defendant and it had failed to prove such a draconian provision** that will affect property rights of third parties on a premises such as a farm land.
49. If there was such a document, it could be **unenforceable for illegality, as public policy** on such a seizure. Defendant as a lender cannot resort to unlawful act to recover its debt, and it had not special status as regards to property belonging to third parties such as Plaintiff.
50. Even if I am wrong on the above, Plaintiff in the reply had specifically denied that Defendants could rely on security documents to detain Plaintiff's goods in paragraph three of Reply to Statement of Defence.
51. Defendant's notice to vacate the property dated 29.11.2017 which is marked as D2 state

"You are to vacate the said property and remove all your possessions."

52. This is contrary to what Defendant's contention in the court that, Defendant can take all movable properties that were in possession of Plaintiff. Plaintiff said even prior to handing over on 31.12.2017 there were restrictions by security personnel engaged by Defendant. This was not denied.
53. Hence, the burden of proof was with Defendant to prove that it was, able to detain any movable properties that were in possession of Plaintiff, at the discretion of Defendant's representatives who refused the movable items that were in possession of Plaintiff who was the representative of Toa at the time of handing over of possession of farm.
54. Court of Appeal in *Kalabo Investments Ltd v Bank of Baroda* [2020] FJCA 24; ABU 30 of 2019 (28 February 2020)
- “[4] In the circumstances, the burden was on the respondent bank to prove that the items it seized were covered by the mortgage documents. Only the respondent possessed this special knowledge which was not available to the plaintiff/appellant.”
55. The above mentioned case was a seizure of an unregistered vehicle on the premises by mortgagee. The contention of Defendant that Plaintiff has to prove ownership in order to remove the items seized on the mortgaged property cannot be accepted in terms of ratio of Court of Appeal judgment.
56. According to Defendant any item on the premises mortgaged is presumed to belonged to Toa, and this is a misconceived legal concept. Defendant pleads that it could take any item on the farm and this is contrary to their notice of vacation marked D2.
57. I do not need to say more that such a provision cannot be practically implemented due to nature of livestock farm. There will constantly be third parties and goods belonging to third parties, for logistical support of a farm, and Defendant cannot take possession of all items on premises as mortgagee. This includes items belonging to employees or any other person who reside or work or manage it or provided animals, goods or services to it.
58. If such a seizure was allowed Defendant will infringe property rights of third parties as in this instance. This is the reason that Court of Appeal in *Kalabo Investments Ltd v Bank of Baroda* [2020] FJCA 24; ABU 30 of 2019 (28 February 2020) granted damages for conversion of unregistered vehicle that was in the garage of a mortgagor under debenture where other vehicles were under a debenture.
59. Defendant had seized three containers which were in Plaintiff's possession it was an unlawful act and was contrary to D2. In that Defendant had specifically asked to

remove “possessions”, but later insisted ownership of household items on three containers and a vehicle.

60. Defendant had failed to prove that the goods seized were, not under any security to Defendant.
61. Plaintiff in her oral evidence proved that she lived in farm house and due to lack of space had stored some of her personal items on three containers and these containers and the goods belonged to her. The nature of items proves that they belong to Plaintiff.
62. Plaintiff through P3 had proved that she had purchased two of the empty containers from Premiere Apartments when they sold them and for the other container there were no such receipts, but her oral evidence proved that that those empty containers belonged to her.
63. Defendant’s position was that they had a debenture over all the properties of Toa, but this debenture was not produced at the trial to prove that they could detain goods of Plaintiff contained in three containers.
64. Even if Defendant had doubts as to ownership, this could easily have been cleared with the nature of things inside the containers. P1 was a hand written document made on 31.12.2017 that was prepared when representative of Defendant had also signed and agreed that the containers will be released when requested by Plaintiff after holiday season.
65. Defendant in written submission stated that there was only one container with personal items referring to P1 which is incorrect.
66. Document marked, P1 was not a carefully drafted document, so it should not be interpreted out of context and circumstances in which it was made. At the time of handing over of farm there was no doubt that Defendant was not going to give the containers including items in that to Plaintiff. This was written to confirm that three containers with household items were left on the farm due to reasons stated in the said letter.
67. This letter was a proof that they were in “possession” of Plaintiff as per D2 but were not removed at the time of handing over of possession of the farm property.
68. P1 is clear enough that there were three containers and all had personal items as it stated “The containers will remain on the site with all personal items store inside it.(a list of items follows)’. Even the said list was not exhaustive and had not stated each and every items on three separate containers.
69. Document marked P1 needs to be understood in the context it was written. At that

time there was no fear of any container being seized by Defendant. So there was no need to state each and every item inside containers and at that time all containers were locked by Plaintiff and keys were with her. These facts were not disputed even in cross examination.

70. So all the three containers were left with physical possession with Defendant while Plaintiff retaining constructive possession through locking the container and holding keys.
71. The conversion happened subsequent to 31.12.2017 when Defendant refused to release the three containers relying on undisclosed security document.
72. “Halsbury's Laws of England - Wrongful Interference with Goods¹ 211. Conversion by detention of chattel” stated,

“A defendant who has possession of a claimant's chattel, and **without lawful authority**² prevents the claimant from retaking possession, then the defendant can be liable in conversion³. A typical example of this is where a defendant is lawfully in possession of the claimant's chattel⁴, **but subsequently refuses to hand it over** when requested. This sometimes happens when, for instance, the defendant mistakenly believes that he has a valid security interest such as a pledge or lien⁵. The conversion consists not in the failure to redeliver the chattel⁶, but in the refusal to allow the claimant to take it away⁷.”(emphasis is mine)

From the above conversion happened when Defendant insisted proof of ownership as against possession of household items and three containers.

73. Accordingly, the basic elements of conversion are proved in this case and they are,

¹ (Volume 97A (2021)) Tort, (2) Conversion (i) The Basis of Liability for Conversion

² If the defendant has a valid pledge or a lien over the chattel, then he will have lawful authority to detain the chattel. Similarly, where the defendant has a statutory power to be in possession of a chattel (eg under police powers), then he cannot incur liability for the detention: see eg *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 3 All ER 150, [2001] 1 WLR 1437 (where police had power under the Police and Criminal Evidence Act 1984 s 22 to detain the claimant's chattel for a period, they were only liable for the retention of the claimant's chattel beyond this period).

³ The basic elements of conversion (as to which see PARA 202) are all present in this case:

- (1) there is an interference, in that the defendant has physical possession of the chattel;
- (2) it is deliberate, in that the detention is a conscious act; and
- (3) there is an exclusion, as the claimant is prevented from taking his chattel

⁴ Eg where the claimant has bailed goods to the defendant

⁵ See eg *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA; *Howard E Perry & Co v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375

⁶ A failure to redeliver is no more than a failure to lend assistance to the claimant, which cannot attract liability in the tort.

⁷ *Capital Finance Co Ltd v Bray* [1964] 1 All ER 603, [1964] 1 WLR 323, CA. This is also apparent from the type of remedy that is granted in such cases: see eg *Howard E Perry & Co v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375, where the claimant was granted an injunction entitling him to collect his goods, not demanding that the defendant redeliver them

- (1) there is an interference, in that the defendant has physical possession of the chattel;
 - (2) it is deliberate, in that the detention is a conscious act; and
 - (3) there is an exclusion, as the claimant is prevented from taking his chattel.
74. Defendant's representatives had not allowed Plaintiff to take "possessions" in terms of D2, before handing over of the farm and subsequently Defendant had detained the goods requesting proof of ownership and prevented the three containers being taken away.
 75. The tort of conversion was committed by Defendant when it refused to release the items and containers, without proof of ownership to Plaintiff. There was no additional proof needed as Plaintiff was the only person who claimed the items as hers, when Defendant took possession of the Farm. There was no evidence of Toa claiming it.
 76. Plaintiff in her oral evidence described circumstances that led her to store her household items that shipped when she came to Fiji. She said those items were used abroad and these items included some new clothes too.
 77. It is also clear that Plaintiff had produced letter of purchase regarding two containers to representatives of Defendant, but they had not released it.
 78. In *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 3 All ER 209 held,

"To constitute conversion there must be a concomitant deprivation of use and possession. In support of this submission Mr Donaldson fastened upon a statement in Clerk and Lindsell on Torts (17th edn, 1995) p 636, para 13-12: 'conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it.' (My emphasis.) A similar passage appears in Salmond and Heuston on the Law of Torts (21st edn, 1996) pp 97-98...."
 79. According to statement of defence Defendant had alleged that they were "lawfully in possession of all the assets on the seized property" (see paragraph 2(f) of statement of defence). If so on what basis? This was not proved at hearing.
 80. Defendant's only witness had no personal knowledge of this action, as she was not involved with this at that time. Hence the position that taking over of the property was lawful was not proved, through evidence of the witness of Defendant.
 81. Defendant cannot seize a property belonging to a customer of Toa who had come to the property of business purpose or that of an employee.

82. Similarly Defendant cannot seize a properties belonging to any person in charge of Toa at the time of taking possession as it was a livestock farm and could not shut down and vacate premises immediately.
83. There was no dispute that Plaintiff was living on the farm and she was also Manager or the person in charge, and there was another employee of Toa whose personal items were released without proof of purchase. Plaintiff's evidence on this was not cross examined. So, Defendant had acted contrary to their position taken in this hearing.
84. The position taken at the hearing is contrary to D2 where Defendant had requested to remove "possessions". It specifically stated that cost or damage to goods on such removal should be borne by Toa. This is contrary to Defendant's position that all items on the premises were securities under an undisclosed debenture of Defendant.
85. It is also not pragmatic to ask for invoices of all personal items as no reasonable person would keep such receipts after purchase. Plaintiff in her evidence stated that most of the items were imported from USA as she had lived and used these items there. So these items were mostly not purchased in Fiji and when relocation happened these were shipped to Fiji but she could not find space to store in her house at Fantasy Island.
86. Defendant in the statement of defence at paragraph 2(g) had stated that under deed of debenture Defendant is entitled to have possession of all stock, plant machinery and other undertakings on the mortgaged property.
87. Defendant at hearing did not produce any debenture document that allowed them to take possession of items they have taken possession from Plaintiff.
88. Plaintiff had admittedly taken possession of three containers and from that one empty container was released to its owner and the contents were stored in farm. It was admitted that when that container was opened Plaintiff was not requested be present and Defendant had not taken any inventory of the items taken out.
89. Defendant had not informed the current status of items that were stored in the farm, and whether those items were in good condition or not. Similarly no inventory was produced regarding remaining items in two containers on premises.
90. Witness for Defendant stated that they have access to all items in remaining two containers, so they could easily produce an inventory and status of items, but Defendant had not done so.
91. Plaintiff had lost the constructive possession she held regarding the containers by holding keys for the containers. At what point this happened is not clear but it is proved that only Defendant held exclusive possession of items in the container and it

had prevented Plaintiff from taking possession despite there were no claims from any other person.

92. Plaintiff had proved on balance of probability that empty containers and the goods inside them belonged to her as personal items of her. Taking possession of them at the time of Defendant taking possession of the farm, and not releasing them and requesting proof of ownership of the items was to prolong the detention and to refuse the release of them. This was an act of conversion.
93. There is undisputed evidence that all the containers and items inside of them, except the leased empty container are on the premises of farm. They were not part of mortgagee sale to third party. Hence these containers, including items inside and contents of leased container are in Defendant's possession.
94. Plaintiff said that she was using the vehicle EJ 311 and it was in her possession at the time of taking over of property. Defendant cannot insist its owner to come to collect as it was in Plaintiff's possession and it should be released to her forthwith.
95. Defendant should take all reasonable steps to release all other items within thirty days.
96. Defendant had finally agreed to release the two containers with all contents to Plaintiff but that was subject to Plaintiff withdrawing this action. This is again not a reasonable offer as Defendant had deprived Plaintiff of the properties for a long period and some items such as clothes of children had lost its intended purpose as children had grown. At the same time due to long period detention of goods had depreciated its value.
97. Plaintiff cannot refuse the items being redundant due to her change of circumstances. It is not a reason to refuse the items and claim for entire cost of these items.
98. Even if I am wrong on the above, Plaintiff had not proved the estimated values pleaded in the statement of claim which was claimed in lieu of release of the same.
99. Since I have released all the items to Plaintiff the claim based on \$129,030 need not be proved.
100. Apart from claiming estimated value of goods, Plaintiff had claimed for damages for unlawful detention and conversion.

Assessment Damages

101. Defendant in the written submissions had argued that Plaintiff had not proved special damages as pleaded in the statement of claim. Plaintiff had pleaded 'Estimated' values and on that basis pleaded a value of \$129,030 .00 **in lieu of goods**.

102. As I have refused the above claim due to release of goods to Plaintiff, the issue of Plaintiff's failure to prove the value stated there in, is moot.
103. The special damages by way of 'estimated' value of goods were pleaded for a claim for the value of the goods under seizure by Defendant as Plaintiff preferred not to have them in present condition. This was rejected and Defendant was ordered to release the containers and items inside them and also vehicle EJ 311.
104. Is the return of goods, the only remedy when Plaintiff had proved on balance of probability that there was a damage or loss to Plaintiff due to Defendant's wrongful act of conversion?
105. In my mind Plaintiff is entitled to damages either special or general damages depending on the circumstances of the case. This is discussed below.
106. Court of Appeal in *Kalabo Investments Ltd v Bank of Baroda* [2020] FJCA 24; ABU 30 of 2019 (28 February 2020) when a mortgagee had seized a property belonging to third party it was held.

“24] Considering the facts of this case, I hold that the ownership of the side-loader has been established by the Appellant satisfactorily and accordingly the appellant had made a justifiable demand to release the same. Nevertheless, the Respondent had sold it to a third party and converted the proceeds for its own use. Hence, the Appellant is entitled to sue in conversion.”

107. In the above Court of Appeal judgment the seizure was relating to one movable property, but the court had granted damages on several headings, and from the judgment in the Court of Appeal and also in court below what evidence was available was not clear. In that case seized items were sold by mortgagee, this was not done to Plaintiff's goods.
108. The deprivation of property belonging for over four years had caused damages due to depreciation of items and also loss of use of them.
109. In *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 3 All ER 209, at 227 held,

“Aim of the law, in respect of the wrongful interference with goods, is to provide a just remedy. Despite its proprietary base, this tort does not stand apart and command awards of damages measured by some special and artificial standard of its own. The fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award just compensation for loss suffered. Normally (prima facie) the measure of damages is the market value of the goods at the time the defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner.

He has been dispossessed of his goods by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount, may be appropriate. The plaintiff may have suffered additional damage consequential on the loss of his goods. Or the goods may have been returned.”(underlining is mine)

110. When one leased container was released to its contents were taken out without even informing Plaintiff and these items were stored in unacceptable environment, hatchery of a farm. Defendant should have at least released these items as there was no safe method of keeping the contents safe due to release of leased container. The loss of value to the items stored in hatchery cannot be calculated in arithmetic manner. This is a waste of resource and no one benefited from such an action by letting personal items exposed to natural elements in a farm. Defendant had deliberately done such an act knowing that such storage was not suitable for household items and these items may have lost its value fully or to substantial amount.
111. On the balance of probability it is proved that the items contained in the leased container were significantly reduced its value. It is difficult to assess the diminished value of all the items, due to Defendant’s wrongful action that prevented Plaintiff taking possession and using them, as and when required.
112. At the same time empty containers that were exposed to natural elements also depreciated in value from 2018 to date of judgment.
113. The estimated values given for goods in the containers and other special damages are as follows as contained in the pleadings

a) Container 1

Furniture	\$ 5,500.00
Kids clothes/books/toys/scooters	\$ 800.00
Basketball hoops/basketballs	\$ 2,500.00
Laptops 2/Printer	\$ 2,500.00
Miscellaneous Household items	\$ 2,000.00
Washing Machine	\$ 350.00
Microwave	\$ 300.00
Pilips 50”TV	\$ 3,000.00
Large Persian Rug	\$ 1,300.00
Large Designer Mirror	\$ 1,500.00
Christmas Tree	\$ 200.00
Suitcase with clothes	\$ 800.00
Books	\$ 200.00
Chainsaw	\$ 2,500.00
Shoes	\$ 100.00
Box Speaker	\$ 200.00
Total	\$23,750.00

(b) Leasing of Container 1 in the sum of **\$3,620.00** (Three Thousand Six Hundred Twenty Dollars)

(c) Containers 2 and 3

Tool box	\$ 4,000.00
Lawn Mower	\$ 200.00
Bed	\$ 150.00
Toyota Hiace Seats	\$ 1,200.00
Golf Set	\$ 350.00
Tennis Racquets	\$ 100.00
Miscellaneous	\$ 1,200.00
Boxes of brand new Indian outfit (mother in laws)	\$ 13,000.00
Shelves/Kids Study Desk	\$ 1,200.00
Hedge Cutter	\$ 300.00
Total	\$ 21,700.00

(d) Toyota Surf, Vehicle Registration No. EJ 311 in the sum of **\$5,000.00** (Five Thousand Dollars).

(e) Value of the containers in the sum of **\$74,960.00** (Seventy-Four Thousand Nine Hundred Sixty Dollars).

114. Plaintiff had claimed the above estimated values but did not prove them and this was pleaded as part of their claim in lieu for return of items and this was an alternate claim.
115. Plaintiff cannot claim for vehicle EJ 311 and its depreciation as it did not belong to her. But she had used it and deprivation of that was a loss to her. Again there was no evidence on this due to deprivation of this by Plaintiff.
116. Plaintiff as the person who had possession and use could claim for damages for deprivation of it.
117. So it is not pragmatic to request special damages for, all the above items, under conversion by Defendant considering the circumstances of this case. It is difficult or nearly impossible to prove the value of these used items on or around 31.12.2017. The present condition of these items are also not known, mainly due to refusal of Defendant to release them to Plaintiff, unconditionally prior to this hearing.
118. Defendant in the statement of defence had not denied such items were inside containers detained by them. Plaintiff said that inventory of the items were taken on 31.12.2017 by Defendant. This was not denied but was not produced by Defendant. So from non-denial of the items in the statement of claim by statement of defence and also at hearing it is proved at least the items stated in the statement of claim were inside three containers though there was no proof of estimated values of them.

119. Plaintiff was not informed about the release of leased container and was not asked to be present, when it was opened and container was handed over. Again there was no inventory taken by Defendant or such an inventory produced by Defendant. The conduct of Defendant was very unsatisfactory, to say the least. Irrespective of Plaintiff's relationship with Directors of Toa, her personal items cannot be treated in this manner, by an institution owned by government.
120. In my mind the fact that Plaintiff was unable to prove special damages was not a reason to deny damages for the wrongful act of Defendant that infringed the property rights of Plaintiff;
121. The tort of conversion, by Defendant, invariably infringe Bill of Rights, hence common law needs to be interpreted in terms of Bill of Rights considering obligation of Defendant as a state entity.
122. Section 6(2) of the Constitution of the Republic of Fiji states
- “(2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognized in this Chapter”
123. The Profile Defendant in Strategic Plan states,
- “The Fiji Development Bank (FDB) was established on 1st July 1967 under the Fiji Development Bank Act (Cap 214). FDB is the only Government owned financial institution and the only development bank in Fiji. Its core business is initiating and delivering on financial solutions.”⁸
124. As a government owned legal entity, Defendant is bound by Bill of Rights contained in Constitution of Republic of Fiji, as a state institution.
125. Section 12 and 27 of Constitution of Republic of Fiji safeguards unlawful deprivation of property. Defendant should take proper procedures, to safeguard property rights enshrined in the Constitution of Republic of Fiji.
126. Defendant had not taken any measure to safeguard property rights of Plaintiff in this action, and had contradicted to its own letter D2 where removal of “possessions” were allowed, but acted contrary to that.
127. This action is not filed for violation of constitutional rights and damages under that, but it is based on under common law Tort of conversion. The fact that this action is not a constitutional redress does not preclude the court from considering Bill of Rights in the assessment of damages, in terms of Section 7 of Constitution of the Republic of Sri Lanka, which I discuss later.

⁸ https://www.fdb.com.fj/wp-content/uploads/2020/12/FDB-Strategic-Plan-2021-2023_low-res.pdf (9.12.2022)

128. The items under conversion varied from clothes to electronic/mechanical items. The condition of the items were also not ascertainable at the time of conversion and or at the time of trial from evidence. It is nearly impossible to assess value of such a mix of items which were mostly used.
129. Even if one tries to get an assessment now it would be a hypothetical value due to circumstances of this case. Such an estimate cannot be considered as 'special damage' and will base on numerous assumptions.
130. So considering circumstances of case it is not possible to assess special damages with reasonable accuracy in a pragmatic manner. Since the bulk of the items stated were used it is very difficult to assess their value even on 31.12.2017 and assessing its present value is impossible. Assessment of special damages will be the depreciated or diminished value, and this was not done.

Nominal Damages

131. When a special damage could not established nominal damages can be granted by the court. This was done in UK case of Brandeis Goldschmidt & Co Ltd v Western Transport Ltd [1982] 1 All ER 28 at p31-32.
132. In contrast to Fiji UK the tort of Conversion and detention is a statutory wrong in terms of UK, Torts (Interference with Goods) Act 1977.
133. The assessment of damages in UK, is also covered in Section 5 of Torts (Interference with Goods) Act 1977 UK Act.
134. In my mind considering the conduct of Defendant and complete lack of respect for property rights of Plaintiff, it is not justified to grant a nominal damages, only on the basis that Plaintiff could not establish a fixed value by way of special damages, for her loss due to conversion of items. As I have stated above this was not a thing Plaintiff could have done with reasonable precision due to circumstances and reasons given earlier.
135. Plaintiff on the balance of probability had proved damages and loss of value of the items and applying the test of probability it is safe to deduce the items such as clothes and electronic items had significantly reduced value over four years
136. Grant of nominal damages for conversion, will undermine Bill of Rights contained in the Constitution of Republic of Fiji, which contained specific provision to develop common law to recognize and safeguard property rights of citizens of Fiji.
137. I am aware that in the case of Brandeis Goldschmidt & Co Ltd v Western Transport Ltd [1982] 1 All ER 28 at p31-32, Court of Appeal UK , only granted nominal

damages rejecting special damages proved by parties through consent. This part of judgment can be distinguished as action for tort regarding conversion was statutorily determined in UK and the circumstances in that case were not clear and , the flexibility found in Fiji in relation to common law was not in UK.

138. Even if I am wrong on that Constitution of Republic of Fiji, contains a provision that allows court to adopt suitable development in common law to protect the property rights enshrined in the Section 12(2) and 27 of the Constitution of the Republic of Fiji.

139. *Abe v Azim* [2010] FJHC 34; HBC144.2006L (22 January 2010) discussing the scope of tort of conversion stated,

“Cleasby J robustly stated the scope of the tort at page 639 in *Fowler v Hollins* (1872) LR 7 QB 616 as follows:

“...liability ...is founded upon ...[the] **salutary rule for the protection of property**, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.”.....”(emphasis added)

140. Section 7 of Constitution of Republic of Fiji states,

“(4) **When deciding any matter** according to **common law**, a **court must apply** and, where necessary, **develop common law in a manner that respects the rights** and freedoms recognized in this Chapter.”(emphasis is mine)

141. Section 7(4) contained in Bill of Rights chapter of Constitution of the Republic of Sri Lanka, applies to “any matter” irrespective of whether constitutional redress is sought or such a claim is made under the constitution.

142. The requirement to apply the above provision of the Constitution is mandatory to the courts as it stated “court must apply”. This is irrespective of such an argument is made by either party in submissions and or in pleadings.

143. This is an obligation fairly and squarely on the courts of Fiji to ‘develop common law in a manner that respects the rights and freedoms recognized’ in the chapter of the Constitution that deals with Bill of Rights.

144. So in my mind in Fiji, general damages can be granted, where it is not pragmatic to insist special damages to be proved in an action for conversion, as in this case, in order to safeguard property rights of Plaintiff. Nominal damages is not the preferred method to award damages for conversion in this action.

145. There is no issue that wrongful detention and conversion are common law remedies in Fiji unlike in UK, and considering constitutional provisions awarding general

damages to Plaintiff is a development of common law (i.e Tort of conversion). Awarding nominal damages will not safeguard violation of property rights of people by state institutions such as Defendant. This will undermine rights enshrined in Bill of Rights Chapter in the Constitution of Republic of Fiji by a dominant state entity such as Defendant.

146. Defendant as mortgagee when exercising its contractual rights to possession, is statutorily obliged to safeguard property rights of third parties. Defendant's action had resulted deterioration of value of the goods contained in the containers. This is a fact that is proved on the balance of probability.
147. Defendant's action not to release vehicle EJ 311 was a clear indication that its officers arbitrarily prevented Plaintiff's removal when it was not under any form of security to Defendant.
148. *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1982] 1 All ER 28 at p31-32, Court of Appeal UK , discussed the assessment of damages for conversion and held that there cannot be universally applicable rule in the assessment of damages . Brendon LJ held,

“Looking at the matter from the point of view of principle first, I cannot see why there should be any universally applicable rule for assessing damages for wrongful detention of goods, whether it be the rule contended for by the plaintiffs or any other rule. **Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case.**

It is for plaintiffs to prove what loss, if any, they have suffered by reason of a tort, and when, as here, the effect of the tort is potentially adverse interference with the course their business operations, it is for them to establish by evidence that there was in fact such adverse interference, and that they suffered a properly quantifiable loss by reason of it. If that is indeed what the plaintiffs are in law required to do, it is manifest that they have wholly failed to do so in this case.” (emphasis added)

149. Considering circumstances of the case where some items were completely destroyed but others have lost significant value including two containers and the vehicle I award a General Damage of FJD 30,000. I also direct Defendant to make all necessary requirements to get the two containers and vehicle removed by Plaintiff or her authorized agent forthwith. Plaintiff should authorize a representative to hand over these items after they were opened in their presence. This should be done within 30 days from the date of judgment.

Indemnity Cost

150. Parties to this action were represented by legal practitioners. I have no doubt that Defendant being advised of the legal position. Defendant had continuously refused to release personal items. In fact Defendant had only agreed to release the items seized on 30.3.2020 on the condition that this action being withdrawn.
151. This was more than two years after the seizure.
152. This action was instituted in 2018 and Defendant was aware that it could not confiscate personal items unless there was some proof such items belonged to Toa, which was a farm. At least the goods should have been released unconditionally, which they refused to do without requesting withdrawal of this action.
153. *Abdul Rafiq v Lautoka City Council* Lautoka High Court Civil Action No. HBC 314 of 2002, where Justice Connors awarded indemnity costs and quoted Justice Winters on page 18 and 19:
- "The issue of indemnity costs was considered in re Aggressor Fiji Ltd (2005) HBE 0040 of 2004 where Winter J reliance on Taylor V Santos & Ors (1999) A.0 430 set out the relevant principles applicable to the exercise of the discretion to award indemnity costs:
Solicitor and client costs may be awarded where a party should have known it has no chance of success"*
154. The conduct of Defendant guarantee award of indemnity cost summarily assessed at \$10,000 considering time it had taken and circumstances of the case and novelty of the matter and the probable time taken for such an action and cost involved.
155. Without prejudice to above the nature of the conversion and circumstances also justifies grant of indemnity cost for a sum of \$10,000.

FINAL ORDERS

- a. Plaintiff is awarded damages in the sum of 30,000 for conversion and detention to be paid by Defendant.
- b. Defendant is directed to hand over all the items in the containers including dry (empty) containers and other items stored in hatchery that were removed from leased container, to Plaintiff or her authorized agent.
- c. Defendant to release the vehicle Reg EJ 311 to Plaintiff or her authorized agent within 30 days from the date of this judgment.
- d. Plaintiff is awarded indemnity cost of \$10,000 to be paid within 30 days.

Dated at Suva this 16th day of May, 2022.

.....
Justice Deepthi Amaratunga
High Court, Suva