IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 117/94

BETWEEN: CHAN CHUI & SONS LIMITED a duly incorporated company under the Companies Act 1955 (NZ)

Plaintiff

A N D: SAMOA AIR COMPANY LIMITED a duly incorporated company having its registered office in American Samoa and carries on business in Western Samoa

Defendant

Counsel: P. Meredith for plaintiff
P.A. Fepuleai for defendant

Hearing: 1 November 1994

Judgment: 8 November 1994

JUDGMENT OF SAPOLU, CJ

The plaintiff in this case is a company carrying on business at Saleufi in Apia. The defendant is a company having its registered office in American Samoa and carrying on business as an airline in both American and Western Samoa. The plaintiff, as landlord, is now claiming from the defendant, as its former tenant, rent and damages under a lease which was terminated by mutual agreement between the parties I will deal first with the claim

for rent and then with the claim for damages.

Claim for rent:

On 15 May 1989, the plaintiff and the defendant executed a lease for a term of three(3) years at an agreed monthly rental subject to a right of renewal for a further term of three(3) years. Under that lease the defendant, as tenant, occupied the ground floor of the plaintiff's building at Saleufi where it carried on its business as an airline. On 8 October 1993, the plaintiff and the defendant executed a renewal of the lease for a further term of three(3) years to take effect from 1 April 1992 at an increased monthly rental of $1,200 commencing from August 1993. In the last week of January 1994, the Apia general manager of the defendant's company approached the managing director of the plaintiff's company that the defendant wanted to vacate the plaintiff's building. There are some minor discrepancies as to the details of what was said between them. I do not consider those discrepancies as material to this judgment. Essentially they both agreed to the defendant vacating the plaintiff's building. There was no mention of the defendant paying rent for the unexpired term of the renewed lease due to end on 31 March 1995. There was also no mention of any damages. The plaintiff's managing director and the defendant's general manager in Apia simply agreed for the defendant to go ahead and vacate the plaintiff's building. However, the plaintiff's managing director did request the defendant's general manager to

submit a request in writing for vacation of the plaintiff's building. That was done by the defendant by letter of 14 February 1994; and in the same letter the defendant stated that it will move out of the plaintiff's building on 19 February 1994 which actually happened.

It appears that after the mutual agreement between the representatives of the plaintiff and the defendant to terminate the lease, the plaintiff contacted its solicitor who wrote to the defendant on 17 February 1994 to pay the full rental for the unexpired term of the lease. In March 1994, the plaintiff sent an invoice to the defendant requesting, inter alia, payment of the rental for the month of February and that rental was paid by the defendant for the full month of February. On 13 June 1994 a new tenant moved in and occupied the same space of the plaintiff's building previously occupied by the defendant at the higher monthly rental of $1,263.

In the course of the evidence adduced in this case, counsel for the plaintiff made application to amend the total amount of rental claimed for the full unexpired term of the lease to the reduced amount of rental for the period from the end of February to 13 June 1994 when the new tenant moved into the plaintiff's building. This was a proper application and it was granted.

Now counsel for the defendant made two submissions. His first submission is that as the parties had terminated the lease by mutual agreement without anything more or any mention of rent to be paid for the unexpired term of the lease, that was the end of the matter and therefore the present claim for rent cannot be entertained. Alternatively, he says that if his first submission is not accepted, then he further submits that the defendant should be liable only for rent for the period from the beginning of March 1994 after the defendant vacated the plaintiff's building to June 1994 when the new tenant moved in and occupied the plaintiff's building at a rent higher than that paid by the defendant when it was tenant of the plaintiff.

In my view, I do not think that the mere mutual agreement between the plaintiff and the defendant for the latter to vacate the plaintiff's building without more is sufficient to preclude the plaintiff from bringing the present action claiming rent for that part of the unexpired lease between the beginning of March and the date in June when the new tenant moved into the plaintiff's building. There is nothing either by word of mouth or by conduct on the part of the plaintiff to show that it agreed to the defendant not paying rental for any part of the unexpired term of the lease. In fact the question of rental, as already stated was never mentioned at any time when vacation of the plaintiff's building was discussed between the plaintiff and the defendant.

There was also no manifestation of any kind from the plaintiff that it was willing to forgo any action it has a right to bring to recover rent from the defendant for any part of the unexpired term of the lease. I also do not agree that, in the present circumstances, the plaintiff by agreeing to terminate the lease upon request from the defendant had, by virtue of that agreement, further tacitly agreed not to bring any action for rent due under the lease which has been terminated. I think for the plaintiff to be precluded from bringing this action for rent, the defendant must be able to point to circumstances which will raise an estopple or waiver against the plaintiff. There is, however, serious doubt as to the contents of the concept of 'waiver' and whether it has an independent existence of its own : Equity Doctrines and Remedies, para 1723, 2nd edn., by Meagher, Gummow and Lehane. In the circumstances of this case, I do not think that estopple or waiver does arise against the plaintiff so as to preclude it from bringing the present action for rent.

As for the alternative submission by counsel for the defendant, I think that submission must succeed. The defendant, on the evidence that I accept, paid the full rent for the month of February even though it vacated the plaintiff's building on 19 February. The space rented by the defendant was vacant from 20 February until 13 June. As I understand counsel for the plaintiff, he is in essential agreement with the alternative submission

by counsel for the defendant. That is shown by the amendment he sought to make to the total amount of rent claimed for the whole unexpired term of the renewed lease when he applied to reduce that amount so as to cover only the period that the plaintiff's building was vacant after the defendant left on 19 February until 13 June when the new tenant moved in. As the defendant had paid the rent for the month of February, that must mean the period of vacancy for which rent is claimed is from 1 March to 12 June.

In my view, three(3) months rent from the beginning of March to the end of May is allowed to the plaintiff. That represents a total sum of $3,600. I make no allowance for rent for the 12 days in June when the plaintiff's building was still vacant and before the new tenant moved in on 13 June.

In a situation like that in this case where a building is put up for lease again after departure of a former tenant, there is usually a period of time after the departure of a tenant when the landlord has to do any necessary cleaning up or repairs before a new tenant moves in. During that period of time the landlord's premises is not rented out and therefore earns no rent. That is what happened in this case even though on the evidence the landlord took more than 12 days to carry out certain repairs to its building after the departure of the defendant. If this period for repairs had not taken place because the lease was terminated before the

expiry of its full term, it would certainly have taken place at the end of the full term of the lease before a new tenant can move in. That would have been the situation in this case if the lease had gone its full term. I have therefore decided to allow in this case 12 days for the usual repairs a landlord carries out after the departure of a tenant and before a new tenant moves in and not to award rent for the 12 days in June.

That brings me to the claim for damages which is phrased as general damages.

Claim for damages:

The claim for damages by the plaintiff is separately pleaded from its claim for rent. For convenience I have decided to deal with the two claims separately even though they could have been dealt with together.

Now when the defendant first rented the ground floor of the plaintiff's building in 1989, the floor was without tiles and the premises was bare space except for the bathroom which had the usual convenience including a wash-basin with a tap. The defendant then affixed and glued tiles to the floor and built counters for the convenient operation of its business. It also installed an air condition unit in a holed space provided in the building for an air conditioner. When the defendant vacated the plaintiff's building,

the wash-basin in the bathroom had dropped on the floor and broken almost in half; some of the tiles had been damaged by water; the flush of the cistern of the toilet was damaged; and the paint on part of one of the walls of the building had come off. The plaintiff also says that there was dirt in the building to be cleaned up even though the defendant's general manager says that they swept the floor and cleaned the plaintiff's premises before they left. As for the air condition unit, there was dispute between the plaintiff and the defendant whether the defendant could remove the air condition unit even though eventually the defendant did remove the air condition unit. According to the plaintiff's managing director, he eventually agreed to the defendant removing the air condition unit on the condition that the defendant paid a total of four months rent plus any outstanding charges. That was not done by the defendant.

For the wash-basin the plaintiff claims $180; for the tiles the plaintiff claims $120; for the glue to affix the tiles to the floor the plaintiff claims $220; for nails to instal the new water-basin the plaintiff claims $3. There is also a claim for the cost of labour to instal the new water-basin, to repaint that part of the wall where the pain had come off, and to lay the replacement tiles. For all these claims for damages, the plaintiff also claims an additional 10% for goods and services tax.

The plaintiff also claims $84 for the stamp duty paid on the lease. It is also asking for damages to the flush of the cistern. In addition, even though it is not distinctly put forward by the plaintiff, it is clear to me from the evidence and the way the claim for damages has been put generally, that the plaintiff is also claiming damages for the air condition unit removed from the plaintiff's premises by the defendant on the condition stipulated by the plaintiff that the defendant was to pay a total of four months rent plus outstanding charges. The defendant has not complied with that condition.

To deal first with the more straight forward parts of the claim for damages, it appears from clause 1.02 of the lease that the defendant, as tenant, was under the general obligation to yield up the plaintiff's building together with the landlord fixtures and fittings in a good and substantial state of repair, order, and condition. Clause 1.03 of the lease then specifically makes the defendant liable for any injury to the plaintiff's fittings, taps, and appurtenances inside the building. It is therefore clear that the defendant is liable for the damage to the wash-basin and flush of the cistern. Accordingly the sum of $198 is allowed for the wash-basin inclusive of goods and services tax; the sum of $4.50 is allowed for the nails inclusive of goods and services tax; and $30 is allowed for cost of labour but without goods and services tax as it is not clear whether the labour is to be rendered by an employee

of the plaintiff itself or an independent contractor. So the total sum allowed in respect of the wash-basin is $232.50. As for the flush of the cistern, no cost was provided by the plaintiff so I will allow $22 inclusive of goods and services tax plus $20 for cost of labour without goods and services tax for the same reason given in respect of the award in respect of the wash-basin. So the total amount allowed for the flush to the cistern is $42.

For repainting that part of the wall where the paint has come off, the defendant should also be liable under its covenant in clause 1.02 of the lease to yield up the plaintiff's building in a good and substantial state of repairs, order and condition. As the plaintiff did not adduce evidence as to the cost of paint and labour required to repaint the part of the wall where the paint has come off, the Court is placed in a situation of having to award an arbitrary figure. I will allow $38.50 for the paint inclusive of goods and services tax plus $20 for cost of labour. The total award of damages under this claim is $58.50.

The next part of the claim is for stamp duty. Clause 1.14 of the lease is quite clear that it is for the defendant to pay the stamp duty on the lease. The amount of $84 claimed for stamp duty is therefore allowed.

That brings me to the claim for the replacement of the tiles

damaged by water. The tiles were put in by the defendant at the commencement of the lease. It is not clear when they were damaged by water but the evidence for the defendant was that the tiles were damaged from flooding during cyclone Val and other times the Saleufi area had been flooded. I accept this part of the evidence for the defendant. Now clause 1.02 of the lease exempts the tenant from liability for damage caused, inter alia by tempest or inevitable accident. Clause 3.03 of the lease then provides that the tenant is only liable for damage caused by water as a result of its negligence or that of any of its servants or agents. There is no evidence that the damage caused by water to the tiles was as a result of negligence on the part of the defendant, as tenant, or of negligence on the part of any servant or agent of the defendant. But the onus of proof is on the plaintiff to prove its claim for damages. I am therefore of the view that the defendant is not liable for damages sought in respect of the tiles. Accordingly the claim in respect of the tiles is disallowed.

I come now to the question involving the air condition unit. Counsel for the defendant submitted that in the circumstances of this case the air condition unit is a tenant's fixture, instead of a landlord's fixture, and therefore it was removable by the defendant at the termination of the lease. He further submitted that the air condition unit in this case was a special kind of tenant's fixture, namely, a trade fixture. Counsel for the plaintiff did

not oppose this part of the submission by counsel for the defendant except to point out that under clause 3.05 of the lease, the defendant was not to remove at the termination of the lease "all the fixtures and fittings" it had brought onto the demised premises during the term of the lease.

It is correct in law that a tenant may remove from the demised premises what are described as the tenant's fixtures. These are traditionally categorised into trade fixtures, ornamental fixtures and agricultural fixtures. But the tenant will lose his right to remove tenant's fixtures if it has entered into a covenant in the lease either not to remove such fixtures from the demised premises at the end of the lease, or to yield up the demised premises to the land-lord together will all fixtures when the lease is determined. Whether that has happened or not must depend on the construction of the lease agreement. In Lambourn v McLellan [1903] 2 Ch 268, 277, Vanghan Williams L.J stated that rule in this way :

> "It is very desirable that we should lay down such a rule "that landlords and tenants may know once and for all that "when a house is let to a tenant for the purpose of a "trade, if the landlord wishes to restrict his tenant's "ordinary right to remove trade machinery or fixtures "attached to the demised premises, as these machines are, "so as to be more conveniently used, and not placed there "as an addition or improvement to the premises, the landlord "must say so in plain language. If the language used leaves "the matter doubtful, the ordinary right of the tenant to "remove trade fixtures will not be affected".

Even though this passage refers only to the tenant's trade fixtures, the principle it contains must also apply to the tenant's ornamental and agricultural fixtures which the tenant has covenanted not to remove from the demised premises. The position may of course be different, if there is a statutory provision to the contrary.

Turning to the relevant provision of the lease in this case, it is clear that the prohibition on the tenant to remove fixtures applies to "all fittings and fixtures" brought onto the demised premises by the tenant. This provision which prohibits the defendant from removing all fixtures is contained in the original lease and carried through in the renewed lease. In my view the words "all fixtires" must include the tenant's trade fixtures brought by the tenant onto the demised premises. In the case of Leschallas v Woolf [1908] 1 Ch 641 which contained a lessee's covenant that at the determination of the lease the tenant will yield up the demised premises "with all and singular the fixtures and articles belonging thereto", Parker J held that those words were not confined to the landlord's fixtures but included the tenant's fixtures so that the tenant had lost his right to remove tenant's fixtures.

I have therefore come to the view that the defendant, as tenant, by reason of the covenant in the original lease, as

continued in the renewed lease, not to remove all fixtures it had brought onto the demised premises, had lost its right to remove the air condition unit. Even though subsequently the plaintiff agreed to the defendant removing the air condition unit, it was on the condition that the defendant paid a total of four months rent plus outstanding charges. The defendant did not comply with that condition. So the provision in the lease that the defendant was not to remove all fixtures he had brought onto the demised premises still applies. In these circumstances, the difficult question whether a tenant loses its right to remove tenant's fixtures when the original lease is surrendered or determined by effluxion of time before a new lease is granted, where there is no stipulation preserving the tenant's right of removal of tenant's fixtures, does not call for decision in this case.

As for assessing damages in respect of the air condition unit, the first difficulty is that there is no evidence as to the value and condition of the air condition unit when it was first installed in the plaintiff's building in 1989 by the defendant. There is no evidence whether the air condition unit was brand new or second hand at that time. There is also no evidence as to the value and condition of the air condition unit at the time it was removed in 1994 by the defendant. However the onus of proof is on the plaintiff to prove its claim for damages. In the absence of evidence, the award for damages I have to make for this part of the plain-

tiff's claim must necessarily contain some arbitrary element. I take into account the local conditions and the depreciation factor. I also draw the inference from the dispute between the plaintiff and the defendant over the air condition unit that the air condition unit was not a write off or useless but still fit for use. I allow $380 for this part of the claim.

In all then the total sum of $795 is allowed for the claim for damages. That is, however, taken care of by the bond fee of $800 deposited by the defendant with the plaintiff.

Judgment is therefore given only for the sum of $3,600 which is the amount allowed for the claim for rent. As it appears that the defendant has succeeded substantially in its defence, there will be no order as to costs.

T.F.M. Schofield

CHIEF JUSTICE