

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAC.P. 244/93BETWEEN: FRED PETERSEN and LUCIA
PETERSEN of Apia, FishermanPlaintiffsA N D: TUIGAMALA SUA FEUU of Vailoa,
Faleata, Director and WEST END
CONTRACTOR also known as
WEST END DAIRY LTD, an incor-
porated company having its
registered office at ApiaDefendantsCounsel: T. Malifa for Plaintiffs
C.J. Nelson for DefendantsHearing: 4th & 5th May 1994Judgment: 6th May 1994

JUDGMENT OF SAPOLU, CJ

This is an action by the plaintiffs claiming damages against the defendants for conversion of their alia boat.

The evidence shows that the first-named plaintiff is the sole owner of the alia boat and not joint owners with the second-named plaintiff. Accordingly only the first-named plaintiff and not the second-named plaintiff has locus standi to bring this action. I therefore accept the submission by counsel for the defendnats that the second-named plaintiff should be struck out. That plaintiff is struck out of these proceedings.

The evidence also shows that the persons directly connected with the alleged conversion of the alia boat were all employees of the second-named defendant. The first-named defendant is a shareholder in and the managing director of the second-named defendant. The involvement of the first-named defendant in this case is clearly as managing director and an employee of the second-named defendant. I therefore also accept the submission by counsel for the defendants that the first-named defendant should also be struck out. That defendant is also struck out of these proceedings. This leaves only the first-named plaintiff and the second-named defendant. They will hereinafter be referred to as "the plaintiff" and "the defendant" respectively.

It is clear that the plaintiff is the owner of the alia boat in this case and the defendant a company contracted to the Lands, Survey and Environment Department for the collection of rubbish around the Apia area. The defendant also carries out as part of its business operation the export of scrap metal.

Now the plaintiff who lives at Vaisigano had his alia boat anchored on the Vaisigano river just behind where Aggie Grey's Hotel is now. This alia is a twin aluminium hull boat joined together by a wooden floor with a houselike structure built on it. On Saturday night, 30 January 1993, a storm named Lina struck Western Samoa without warning for a few hours. The Vaisigano river was flooded and it washed away the plaintiff's alia boat. On Monday, 1 February, which was two days after the storm Lina, the plaintiff found his boat lodged between rocks, logs and debris at the waterfront in front of the Margaritas Nite Club at Matautu-tai. This is about 200 metres from where the boat had been anchored before the storm struck. According to the plaintiff his boat at that time was underwater except for part of the boat's houselike

structure which was still above water. The houselike structure of his boat was damaged but the boat was still intact. He looked for boys to pull up his boat but was not successful. So he left the boat where it was with the rocks, logs and debris until he finds the necessary assistance. At that time there was no storm for the storm passed away in the early hours of Sunday morning, 31 January. No one kept watch on the boat.

On Tuesday, 2 February, when the plaintiff's wife came to where the boat was, it was gone. The plaintiff did not know who had taken the boat. So he immediately contacted the Police, but by Friday, 5 February, the boat was still not found. Then on Saturday, 6 February, the plaintiff travelled in a bus to the west along the road to the Faleolo Airport. When he came to Vailoa, he noticed a boat like his boat at the yard of the defendant's premises. He alighted from the bus and went to the defendant's premises. When he arrived there he confirmed that the boat was in fact his boat. Two men, one of them is named Epa Valevale, were cutting the boat. The plaintiff asked Epa about the boat and Epa referred the plaintiff to Tuigamala, the defendant's managing director, who was present nearby. The plaintiff says he talked to Tuigamala about the boat but the latter became angry and said he does work for the Environment Department. So the plaintiff responded we will meet in Court.

Epa Valevale was called by the plaintiff to give evidence. He says that he used to work for the defendant as a driver. He also says that the defendant was exporting scrap metal to New Zealand when he was working for the defendant. He also says that the boat was brought in two separate parts by two separate trucks to the defendant's premises. He also says that the defendant's managing director instructed him to cut the boat and to cut

aluminum into parts for the defendant to export as scrap metal. Epa
low employee named Michael then set to work on the boat. Epa used a
grinder to cut the pipes first and then the aluminium body of the boat.
used a big hammer to flatten the aluminium so it could be fitted into
liner for export.

When the plaintiff arrived, according to Epa, he was still cutting the
with the disc grinder and Michael was still working with the big hammer
on it. They then stopped cutting and hammering the boat as the
defendant's managing director told them to take the boat to his house at the
same later date, Epa was instructed by the defendant's managing director
to see the managing director's lawyer and to tell the lawyer that it
was himself who pulled up the boat from the shoreline in front of the
Nite Club. When Epa came and saw the lawyer's secretary, he
talked as he was instructed by the defendant's managing director as
present when the boat was lifted from the shoreline.

Epa was also shown the defendant's photographs of parts of the boat and
his evidence is that the disc grinder was applied to cut all those parts and
the big hammer was used to flatten them. He also says that the
condition of the boat as shown in the defendant's photographs was not the
condition of the boat at the time it was brought in to the defendant's
premises. He says that when the boat was brought in, its condition was
good except for some damage to minor parts which might have been caused
by the defendant's employees.

The defendant's managing director who also gave evidence, says that
the boat was brought to the defendant's premises in two trucks on two different

days, 4 and 5 February. When the boat was brought to the defendant's yard it was in the same condition as shown in the defendant's photographs. He says that the defendant's employees who brought in the boat told him that they picked up the boat on the shoreline in front of Su'a's place which is the Margaritas Nite Club at Matautu-tai. He also denies that any person cut the boat. He also says it would be very difficult to cut the aluminium sheets and that no person could have hammered the aluminium sheets of the boat which were 5 millimetres in thickness as aluminium has a certain spring tension. When cross-examined by counsel for the plaintiff as to why the boat was in five pieces, the defendant's managing director says that winds or waves of 150mph blowing for 24 hours could have splitted the boat into these pieces by tossing the boat onto logs or rocks. He maintains that the twists and tears to the aluminium sheets of the boat must have been caused by winds and waves.

As to his meeting with the plaintiff at the defendant's premises, the defendant's managing director says that the plaintiff only said to him that is my boat and we will meet in Court. He also says that the witness Epa was dismissed from the defendant's company for misconduct and there is a friction between Epa and a shareholder of the defendant's company.

The defendant's managing director also testified that the defendant when it collects rubbish, brings that rubbish first to the defendant's premises. Items which can be recycled are taken out and non-recycled items are taken to the Government's rubbish dump at Tafaigata. Aluminium is one item that can be recycled. He also says that the defendant exports scrap metal. Such metal are flattened with a hammer and exported in a container.

The witness Olive Su'a who was also called for the defendant says that he went to work for the defendant collecting rubbish. He says that he and other employees found a piece of boat floating on the shoreline near the Margaritas Nite Club together with debris like logs and other rubbish. They lifted the piece of boat on to the defendant's rubbish truck and took it to the defendant's premises. They did not collect the other debris because the rubbish truck's load was full. However they did not collect that other debris on that same day or any other later day. There is no evidence that they ever/after uplifting the piece of boat that they took.

Having considered the evidence and the demeanour of all the witnesses, I decided to accept the evidence for the plaintiff and reject the evidence for the defendant. It is quite clear from the defendant's photographs that the damage to the plaintiff's boat are not twists and tears caused by winds and waves. The boat clearly appears to have been cut with a sharp object and battered with a strong and heavy object. This is quite consistent with the evidence of the witness Epa that he cut the boat with a hammer whilst a fellow employee battered it with a big hammer. The defendant's managing director's own evidence disproves that the twists and tears were caused by the winds and waves. He says that the aluminium sheets on the boat are 5 millimetres in thickness and aluminium has a certain springiness. But winds and waves of 150mph lasting for 24 hours could have caused those tears to the aluminium sheets of this boat. I do not accept that the storm Lina reached 150mph or that the waves reached that velocity. At least there is no evidence that the storm or the waves reached anywhere near that velocity. I do not overlook the fact that the storm Lina lasted for only a short time. And if it were true that the storm and waves did split up the boat on Saturday night, 30 January 1993 or the early hours of Sunday

morning, 31 January 1993, it is unbelievable that all those pieces should be found floating at one place on Thursday and Friday, 4 and 5 February, the two days the defendant's managing director says that the boat was uplifted in parts from the shoreline. I was also not impressed with the demeanour of the defendant's managing director especially under cross-examination when his answers to questions by counsel for the plaintiff appear evasive. I also disbelieve the evidence of the witness Olive Su'a. If the defendant's duty was to collect rubbish, it is most suspicious that Olive and his fellow employees picked up only the piece of boat they found and disregarded all the other rubbish floating together with that piece of boat. And they never came back on the same day or the following day or any other day to collect the rubbish floating with the piece of boat. In fact the evidence by the defendant's managing director also suggests to me that the same thing happened when the first part of the boat was uplifted from the debris by the defendant's other truck. All other rubbish floating with that part of the boat were ignored despite the fact that the defendant was contracted to the Lands, Survey and Environment Department for the collection of rubbish in the Apia area.

The clear inference from the evidence is that this boat was deliberately taken by the defendant's employees into the defendant's custody because it was of value to the defendant. It could be turned into scrap metal and exported for value by the defendant. The nature of the damage to the boat was a deliberate act of destruction to turn the aluminium and pipes of the boat into scrap metal for export.

I accept the plaintiff's evidence as to the condition the boat was in when it disappeared on 2 February. That is, the boat was still intact though

suffering some damages. The plaintiff's actions in immediately notifying the Police when his boat disappeared and his efforts in looking for his boat, are consistent with his evidence that the boat was intact and therefore of real value to him, rather than with the defendant's evidence that its employees found only twisted and torn pieces of the boat on the shoreline. I also accept the evidence of the witness Epa.

It appears to me that when the defendant's employees uplifted the plaintiff's boat and took it into the defendant's custody, the defendant became bailee of the boat. So a bailment came into existence. As there was to be no reward or valuable consideration for the defendant taking possession of the plaintiff's boat, this was a gratuitous bailment and the defendant was only a gratuitous bailee. Now if a gratuitous bailee takes possession of a chattel which belongs to another and uses the chattel for his own purpose he would be liable in conversion especially if the misuse was intentional :
2 Halsburys Laws of England, 4th ed., para 1509.

In this case I also find as a fact that the defendant's employees separated the boat into two parts at the place where it was found on the shoreline and then used two trucks to cart those parts to the defendant's premises. There is no doubt in my mind that the defendant's intention was to turn the plaintiff's boat into scrap metal for export. The cutting up and the hammering of the boat were clearly an intentional misuse of the plaintiff's boat. I find the defendant liable in conversion.

Counsel for the defendant submitted this was an act of salvage by the defendant relying on section 25 of the Shipping Act 1972. Therefore the defendant is entitled to all expenses properly incurred in salvaging the plaintiff's boat. I think section 25 of the Shipping Act 1972 applies only to the case of a "ship". And a "ship" is defined in section 2 of that Act to

mean a vessel customarily used for the carriage of passengers or cargo for commercial purposes. The alia boat in this case does not fit that description. In any event what the defendant's employees did to the boat after uplifting it from the shoreline and taking it to the defendant's premises was not an act of salvation as far as the boat was concerned but an act of destruction. The boat would have been safer from injury and much better off had it been left where it was at the shoreline untouched by the defendant's employees. Perhaps I should also refer in this connexion to a passage in the footnotes to 2 Halsburys Laws of England, 4th ed., para 1509 where it says :

"A person who voluntarily retrieves timber deposited on a river bank has no lien for his expenses in retrieving it, and is liable in conversion if he does not deliver it up to the owner on demand".

So if a person who voluntarily retrieves timber washed up on a river bank has no lien for his services in retrieving that timber, then it seems there is no basis for a person who voluntarily retrieves a piece of an aluminium alia boat washed up on the shoreline having a lien for his services for retrieving that piece of aluminium, that is assuming, but without accepting, that the defendant's evidence is true.

I turn now to the question of damages. The only damages claimed are for the boat. The plaintiff says that this boat was gifted to him by the children of his uncle and he has had the use of the boat for five years. The boat was quite old when gifted to him by his cousins. It was "a wreck". He made repairs to the boat and built a houselike structure on it. All these cost him \$4,000. Since he had the boat, it has again been repaired twice. The last repairs being done near the end of 1992. The plaintiff also says when he saw his boat on the waterfront after the storm Lina, the houselike

was damaged and part of the top of the bow was also damaged, but was still intact.

The boatbuilder who had been doing repairs to the plaintiff's boat hence and he says that the cost of rebuilding the boat will be He arrived at that amount on information given to him by the but he has not seen the boat in its present condition. As the boat effectively destroyed, it is in my view beyond repair. This is far from the defendant's photographs. It cannot therefore be rebuilt would appear to be building a different boat for the plaintiff.

Under these circumstances the only question for decision is what should be the measure of damages for the plaintiff's boat. The measure of damages is not the costs of repairs since the boat is beyond repair, it has been destroyed. In my view the proper measure of damages is the measure of the value of a case which involves the destruction of a chattel. Where there is no market for the chattel concerned, this would be the market value or the value of a chattel which is comparable to or in reasonably the same condition as the plaintiff's chattel was in at the time and place of destruction :

Dredger v Edison S.S. [1933] A.C. 449 and Hall v Buckley [1973]

at p. 620. In other words the measure of damages in this case is the value of a boat comparable to or in reasonably the same condition as the plaintiff's boat was in at the shoreline on 2 February 1993 before being damaged with by the defendant's employees. I leave open the question of what should be the proper measure of damages where there is no market for the chattel concerned even though it appears from Hall v Buckley that the measure of damages in such a situation would then be the replacement value of the

There is no evidence as to the market value of a boat in reasonably the same condition as the plaintiff's boat was in at the shoreline on 2 February 1993. However we have quite a large number of aluminium alia boats like that of the plaintiff used around the country. As I understand it, these aluminium alia boats are manufactured locally. We therefore have a market for such alia boats in this country. It should not be too difficult for the parties to find evidence as to the market value of an aluminium alia boat in reasonably the same condition as the plaintiff's boat was in at the shoreline on 2 February 1993. So while I have found the defendant liable in conversion, I will defer my judgment on the quantum of damages and adjourn this case to 12 noon on Wednesday, 11 May 1994, for the parties to call evidence on the question of market value as explained.

Tom S. S. S.
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CHIEF JUSTICE