REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB REGISTRY, SAN FERNANDO

H.C.A. NO. S-1777 OF 2003

BETWEEN

KISHORE RAMROOP LOKAI	**PLAINTIFF**

AND

DEODATH MAHARAJ	**FIRST DEFENDANT**
SANCHEE MAHARAJ	**SECOND DEFENDANT**
BOBBY KISSOON	**THIRD DEFENDANT**

Before the Honourable Mr. Justice David Alexander (Ag.)

Appearances: Mr. S. Seunarine for the Plaintiff.
Mr. S. Rampaul for the Defendants.

JUDGMENT

1. The undisputed facts are that the Plaintiff was the tenant of the first and second Defendants in respect of the northern portion of the ground floor of the building owned by the first and second Defendants known as 26 Mucurapo Street, San Fernando (hereinafter called "the demised premises").

2. On these premises the Plaintiff operated a business known as LOKAI'S SHOES'N STUFF from where he sold shoes, garments, wares, haberdashery and general merchandise.

3. The third Defendant was the Plaintiff's business competitor who operated from 15 Mucurapo Street obliquely opposite the demised premises.

4. By what purports to be an agreement in writing dated the 29th March, 1999, between the first and second Defendants of the one part and one Bhagwandath Kissoon (whom I consider to be one and the same as the third Defendant) of the other part, the first and second Defendants agreed to sell the demised premises to the third Defendant for the sum of $600,000.00, subject to the monthly tenancies of the Plaintiff and one Jaheed Ali trading as "Sizzles" free from all encumbrances.

5. On the 23rd August,1999, one Anil Maharaj Persad, a licensed bailiff acting on behalf of the first and second Defendants with their authority went to the demised premises to distrain upon the goods of the Plaintiff for rent allegedly in arrears for 3 months in the sum of $9,000.00 (at $3,000.00 per month) for January, 1999 – March 1999. The bailiff abandoned this exercise after the Plaintiff informed him that he had mailed the rent to the landlord by registered post and showed him the post office receipts for having done so.

6. By letter dated the 24th August, 1990, Mr. Seusankar Seunarine, Attorney-at-Law for the Plaintiff informed the first Defendant that through the bailiff Persad, he had trespassed upon his client's premises and levied upon his goods on the 23rd August, 1999. The first Defendant was also warned not to persist in such unlawful acts else legal proceedings would be brought against him.

7. On the 6th October, 1999, one Sugrim Ramoutar another licenced bailiff acting on behalf of the first and second Defendants distrained upon goods of the Plaintiff allegedly valued at $14,075.00 for the alleged arrears of rent. The first Defendant received the sum of $2,000.00 from the sale of these goods leaving a balance of $7,000.00 due and owing on the alleged arrears of rent.

8. Again , on the 23rd October, 1999, the said Ramoutar distrained on goods of the Plaintiff for the alleged arrears of rent of $7,000.00.

9. On Monday the 25th October, 1999, the Plaintiff returned to the demised premises but was unable to enter therein since the lock was changed. The Plaintiff returned to the demised premises on the 26th October, 1999, and saw the demised premises stocked and open for business. The third Defendant was behind the counter as the person in charge.

10. The Plaintiff has never regained possession of the demised premises which are now owned by the third Defendant.

11. By Petty Civil Court Action No. 29 of 2000, the Plaintiff claimed against the third Defendant damages for trespass to the demised premises. This action was dismissed with costs on the 10th April, 2001. The Petty Civil Court's decision was overturned by the Court of Appeal in Petty Civil Court Appeal No. 3 of 2001. Unfortunately, the Court of Appeal is yet to deliver its written reasons for its decision.

12. In this action, the Plaintiff Kishore Ramroop Lokai claims against the Defendants Deodath Maharaj, Sanchee Maharaj and Bobby Kissoon and each of them:

    (a) damages for trespass, conversion and/or detinue arising out of illegal and/or irregular and/or excessive distress on the Plaintiff's goods on the 6th October, 1999 and on the 23rd October, 1999.

The Plaintiff claims against the third-named Defendant Bobby Kissoon, damages for trespass to the demised premises from the 23rd October, 1999 and continuing to the date of judgment;

(b) damages for unlawful and/or excessive distress, fraudulent removal of goods as set out in paragraph a;
(c) double damages. Damages for the double value of goods for illegal distress;
(d) Special damages;
(e) damages for breach of the covenant for quiet enjoyment of the demised premises;
(f) exemplary damages;
(g) punitive damages;
(h) a declaration that the Plaintiff's tenancy was never extinguished and an order that the third Defendant do vacate the demised premises.

13. I think it appropriate to deal firstly with one of the issues posed on behalf of the Defendants which is whether the Plaintiff is prevented in law from proceeding against them having previously instituted the Petty Civil Court Action. It is submitted on the Defendants' behalf that the cause of action against the 3rd Defendant arises out of the same facts and involves substantially the same issues raised in the Petty Civil Court action and in the Court of Appeal and that the Court of Appeal has already adjudicated upon these facts and issues. Further, since the Plaintiff in the Petty Civil Court action claimed against the 3rd Defendant for distress, he cannot now proceed against the other Defendants.

14. The Defendants are in essence relying on the doctrine of res judicata which is the basis for the rule that when a matter has been finally adjudicated by a Court of competent jurisdiction it may not be reopened or challenged by the original parties or their successors in interest.

In support of their submissions the Defendants cited H.C.A. No. S-447 of 2002 Teddy Mohammed v Gold and Gold Limited in which Smith J. in his judgment considered the issue of estoppel under the doctrine of res judicata.

15. It is widely accepted that the doctrine was given life in Henderson -v- Henderson [1843 – 1860] All E.R. Rep. 378 wherein Wigram V.C. stated at pg 381:-

> "….. where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

16. Cause of action estoppel and issue estoppel which are considered branches of res judicata are explained by Lord Keith of Kinkel in Arnold and Ors -v- National Westminister Bank PLC [1991] 2 A.C. 93 where at page 104 he elucidates:-

> "It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings, is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.

In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment."

17. At page 105 Lord Keith continues:-
"issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue….. issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."

18. In the case of the 1st and 2nd Defendants, I hold that this action against them can be properly maintained. The previous Petty Civil Court action was brought by the Plaintiff against the 3rd Defendant solely. The 1st and 2nd Defendants were not parties to that action therefore neither cause of action estoppel nor issue estoppel applies to them. In the circumstances, I overrule the submission that the Plaintiff is estopped from proceeding against them in this action.

19. The 3rd Defendant's position is somewhat different. The Plaintiff clearly, is estopped from proceeding against him for trespass in this action, that having been the sole cause of action in the Petty Civil Court which was determined in the Plaintiff's favour by the Court of Appeal.

But the claim against the 3rd Defendant is in addition to damages for trespass, damages for conversion and/or detinue arising out of illegal/or irregular and/or excessive distress on the Plaintiff's goods on the 6th October, 1999 and the 23rd October, 1999, damages for unlawful and/or excessive distress, fraudulent removal of goods; damages for the double value of goods for the illegal distress; special damages; damages for breach of the covenant of quiet enjoyment of the demised premises; exemplary damages; punitive damages and a declaration that the Plaintiff's tenancy was never extinguished and an order that the 3rd Defendant do vacate the demised premises.

20. The issue which arises here is whether these other claims can now be properly brought and maintained against the 3rd Defendant in light of the previous claim for trespass in the Petty Civil Court which arose out of the same facts which gave rise to the claim for trespass or whether such claims are an abuse of the Court's process.

21. In Johnson –v- Gore Wood & Co. [2001] 2 WLR. 72 Lord Bingham of Cornhill at pg. 40 para. A explains:-

> "but Henderson –v- Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.

> I would not accept that it is necessary before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

22. It is my view that by reason of issue estoppel and abuse of process these additional claims which should not have been brought against the 3rd Defendant in the first place, he not having been the Plaintiff's landlord at the material time or at all, ought to have been raised in the Petty Civil Court, of this I am satisfied. These proceedings against the 3rd Defendant I regard as unjust harassment. In the circumstances, I will dismiss each and every claim brought against the 3rd Defendant in the instant action.

23. The next issue, is whether the 1st and 2nd Defendants are liable to the Plaintiff for illegal or irregular and/or excessive distress on the Plaintiff's goods on the 6th October, 1999 and the 23rd October, 1999.

24. Distress is a summary remedy by which a person is entitled without legal process to take into his possession the personal chattels of another person, to be held as a pledge to compel the performance of a duty, the satisfaction of a debt or demand, or the payment of damages for trespass by cattle. The law of distress enables the landlord to secure the payment of rent or the performance of certain obligations due to him, by seizing the goods and chattels found upon the premises in respect of which the rent or obligations are due:- Hill and Redman's Law of Landlord and Tenant 14th edn. P.356, para 238.

25. In order that the right to distrain for rent upon a demise may arise, the relation of landlord and tenant must exist, both when the rent becomes due and when the distress is levied, and further, the rent must be in arrears:- Hill and Redman's Law of Landlord and Tenant 14th edn. Pg 361 para. 243.

26. It is not in dispute that on the 6th October, 1999 and the 23rd October, 1999, the 1st and 2nd Defendants were the landlords of the Plaintiff in respect of the demised premises. It is also not in dispute that the 1st and 2nd Defendants were the landlords of the Plaintiff in January, 1999, February, 1999 and March, 1999, the months for which he was allegedly in arrears of rent. The Plaintiff says that he was not in arrears for those months or at any other time, while the 1st Defendant says that he was.

27. An illegal distress is one which is wrongful at the very outset, either because there was no right to distrain or because a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. It follows therefore, that a distress when no rent is in arrear is an instance of illegal distress. Was the Plaintiff in arrears of rent?

28. The Plaintiff's evidence is that he paid rent by registered mail. In support thereof he tendered into evidence 3 receipts for a registered article addressed to the 1st and 2nd Defendants to wit: No 13997 dated 4th January, 1999, No. 226251 dated 2nd February, 1999, and No. 191059 dated 1st March, 1999. In answer to Ms. Rampaul counsel for the Defendants in cross-examination, the Plaintiff said he paid rent by personal cheques and manager's cheques which he sometimes sent to the landlord by registered mail. He could not recall whether rent for January, 1999, was paid by personal cheque.

These cheques were drawn from an account at Royal Bank, Carlton Centre, San Fernando. The Plaintiff said he had 3 accounts at that branch, that there was no specific account for his business and of those 3 accounts, he could not remember if any was a chequeing account.

29. The Plaintiff produced no rental receipts. His only proof of payment of rent were the said 3 receipts for a registered article. He produced no return cheques. The 1st Defendant on the other hand told the court in answer to Mr. Seunarine, counsel for the Plaintiff that the Plaintiff sometimes paid rent by cash or cheque but he never got a mailed cheque. The 1St Defendant did not recall receiving registered letters from the Plaintiff and said he knew nothing of the said 3 receipts for a registered article. The Plaintiff in my view has failed to prove his payment of rent for January, 1999, February, 1999 and March, 1999. The distress complained of by the Plaintiff was not illegal and I so hold.

30. Was the distress irregular? A distress is irregular when, although the levy was legal and in order, the subsequent proceedings have been conducted in an unlawful manner. Instances of irregular distress are:-

(a) Selling without having served notice of the distress with copy of inventory on the tenant.

(b) Selling within the five or fifteen days allowed to replevy .

(c) Selling growing crops before they are gathered.

(d) Selling without appraisement when it is still requisite.

(e) Selling for otherwise than the best price.

(f) Improper dealing with any over plus.

(g) Distraining or removing the chattels distrained when a tender of rent and costs is made after distress and before impounding.

(h) Selling the distress when a tender of rent and costs is made after impounding but within the time allowed for replevin. Hill and Redman's Landlord and Tenant 14th edn. Pg 464 para. 358.

31. As regards irregularity, I agree with the submission of Counsel for the Plaintiff that the goods distrained must be sold at the best price, therefore the distrainor is answerable for the proper and reasonable conduct of the sale:- Clerk and Lindsell on Torts pg. 748 para. 1257. The bailiff who levied on the Plaintiff's goods was not a witness in these proceedings, both the Plaintiff and the Defendant having accepted that he died previously. The 1st Defendant could not assist the Court on this issue since he was not present at the Plaintiff's premises when the distress was carried out, neither did he know anything of the subsequent sale. He could not prove that the goods were sold at the best price. For this reason, I will conclude that there was irregular distress although the Plaintiff has not proved special damage.

32. Counsel for the Plaintiff further submitted that "it would be an obvious hardship for a landlord unnecessarily to multiply distresses." Clerk and Lindsell on Torts 11th edn. Pg 479 para. 804. His argument is that the 1st Defendant had an opportunity to realize his rent by the first distress on the 6th October, 1999; having neglected to do so, his remedy by distress is lost; if he distrains again he will be a trespasser. While I agree with counsel for the Plaintiff on his statement of the general rule regarding a second distress, counsel did not allude to the exceptions to that rule. The exceptions are:

(1) If there are insufficient goods on the premises on the first occasion.

(2) If the goods taken on the first occasion are of an uncertain or imaginary value and the landlord has reasonably mistaken their value.

(3) If the conduct of the tenant has prevented the landlord from realizing the fruits of the distress.

(4) If cattle die in the pound by act of God.

In any of these cases a second distress may be taken.

According to Clerk and Lindsell on Torts 14th edn. pg. 727 para. 1201:

> "And if on distraining first the landlord cannot find enough to satisfy his Claim, he may either abandon the distress altogether and subsequently distrain for the whole amount, or realise what he can and distrain for the residue.
>
> If a reasonable explanation be given of the abandonment, or inadequate execution, of a distress, it is no bar to another, even though it appears that there were enough goods on the premises to satisfy the claim."

33 The Plaintiff was in arrears of rent in the sum of $9,000.00. The levy on the 6th October, 1999, realized the sum of $2,000.00 from the sale of the levied goods, as indicated by receipt dated 19th October, 1999, signed by the 1st Defendant. The Plaintiff did not challenge the 1st Defendant on this aspect of his case and is taken to have thus accepted it. This left a balance of $7,000.00 on the said arrears which I hold the 1st Defendant was entitled to attempt to obtain by the 2nd distress of the 23rd October, 1999.

34 As to excessive distress, the Plaintiff is alleging that the goods levied upon on the 23rd October, 1999, were valued at $414,000.00, while the rent allegedly in arrears was only in the sum of $7,000.00; the Defendant as a consequence, is liable for excessive distress. I do not agree with the Plaintiff on this assertion. The Plaintiff has adduced no evidence of the value of his goods except an inventory which he himself prepared. That evidence is insufficient to establish the value of his goods on the 23rd October, 1999. Furthermore, I find it improbable, that one would be deprived of goods of such value in October, 1999, and do nothing about it until 2003, when the writ in this action was filed. The Plaintiff has failed to proved excessive distress and his claim for damages therefore fails.

35 The Plaintiff also fails on his claim for double damages. Pursuant to Section 13 of the Landlord and Tenant Ordinance Ch. 27 No. 16. a person is entitled to double the value of the goods or chattels distrained for rent pretended to be in arrear and due, where no rent is in arrear or due to the person distraining. I have already found that rent was indeed in arrears in this action and I need say no more on this claim.

36. Issues on the torts of detinue and conversion do not arise in this action and nothing need be said here about these torts except that the Plaintiff fails on those claims.

37. There is no evidence before the court to suggest that the 1st and 2nd Defendant acted in any manner that would warrant consideration of an order for exemplary and/or punitive damages, accordingly I hold that the Plaintiff is not entitled to such damages.

38. Although the Plaintiff has claimed damages for breach of the covenant for quiet enjoyment his counsel made no reference to this claim in his submissions. I am at a loss as to which act or incident is considered as amounting to such breach. In any event, my findings herein suggest that there would be a similar finding on this claim.

39. As to the Plaintiff's claim for a declaration that his tenancy was never extinguished and an order that the 3rd Defendant do vacate the demised premises, I have already ruled that the action against the 3rd Defendant be dismissed, so an order that he vacate the demised premises is not available to the Plaintiff. While giving consideration to the declaration sought is now only of academic interest, I will mention a few words on this claim.

40. The Plaintiff's case is that there was a conspiracy between the 1st and 2nd Defendants to remove him from occupation of the demised premises. I find it difficult to accept that contention since the agreement dated 29th March, 1999, between the 1st and 2nd Defendants and the 3rd Defendant for the sale to him of the demised premises was subject to the Plaintiff's tenancy. Why would the 1st Defendant in the circumstances go through the trouble to be involved in a scheme to put the Plaintiff out of possession of the demised premises. That was a task which the 1st Defendant could easily have left to the 3rd Defendant.

41. Again, I will state that the major problem that I have with this action is the Plaintiff's failure to act with any urgency in an attempt to obtain a remedy. The Plaintiff is alleging being deprived of his only source of livelihood i.e. his store and his very valuable goods, and all he does is take action against the 3rd Defendant for trespass in the Petty Civil Court and commence this action almost 4 years

after the fact. The Plaintiff is indeed within his legal rights to bring his action anytime within the limitation period but the impression that a matter of this nature necessitated swifter action militates against the Plaintiff's veracity.

42. In his evidence – in – chief, the Plaintiff says that after the levy on the 23rd October, 1999, he called his insurers and instructed them to stop his insurance for his goods. The question arises, why would he do so if he intended to restock his store and continue in business. Why did his employees at the store never again show up for work after the 23rd October, 1999. The Plaintiff did not persist as he ought to, to have some discussion with the 1st Defendant as to what the position was with the demised premises.

43. I would conclude that the Plaintiff abandoned the dismissed premises and is not entitled to the declaration sought.

44. I make the following orders:-

1. The Plaintiff's claims against the 3rd Defendant are dismissed with no order as to costs, the Plaintiff being a legally aided litigant.

2. The 1st and 2nd Defendants are to pay damages to the Plaintiff for irregular distress on the 23rd October, 1999, such damages are to be assessed by a master in chambers on a date to be fixed.

3. All other claims against the 1st and 2nd Defendants are dismissed.

4. The 1st and 2nd Defendants to pay the Plaintiff's costs of the action fit for advocate attorney to be taxed in default of agreement, stay of execution 14 days if necessary.

Dated this 30th day of April, 2009.

David Alexander

Judge (Ag).