REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2010-03282

Between

FRANK MARTINEAU

1st Named Claimant

SPEKTAKULA PROMOTIONS INTERNATIONAL LIMITED

2nd Named Claimant

AND

JEAN HARPER

1st Named Defendant

KEVIN LEWIS

2nd Named Defendant

CARIBBEAN FINANCE COMPANY LIMITED

3rd Named Defendant

BEFORE THE HONOURABLE MR JUSTICE PETER A. RAJKUMAR
Appearances:

Mr. K. Wright instructed by Ms. A. Olowe for the 1st & 2nd Claimants
Mr. P. Lamont instructed by Mr. G. Hannays for the 1st & 2nd Defendants
Ms. R. Bholai for the 3rd Defendant

Reasons for decision

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Background

1. The claimants' claim arises from the seizure on July 29th 2010 of a motor vehicle Registered Number PBX 261, (the said vehicle) by the second named defendant acting on the instructions of the first named defendant.

2. The first named claimant was the tenant of premises situate at Ana Street Woodbrook Port of Spain, (the said premises). He contends that he was no longer the tenant at the time of an initial and subsequent purported distress.

3. The second named claimant was the hirer of the subject motor vehicle under the hire purchase agreement with the third named defendant, which was the owner of the said vehicle. Neither the Second Claimant, as hirer, nor the Third Defendant as owner of PBX 261, were parties to the tenancy agreement.

4. The first named defendant was the agent of the landlord.

5. The second named defendant was a bailiff acting as the agent of the first named defendant in relation to an initial and subsequent purported distress.

6. The Third Defendant applied to the High Court on 23rd September 2010 to intervene in proceedings between the First and Second Named Claimants and the First and Second Named Defendant and to obtain injunctive relief to protect its interest and/or assert its rights of ownership of PBX 261.

7. The Court ordered that the Third Defendant be joined in the proceedings and granted an injunction to the Third Defendant on 23rd September 2010 restraining the 1st and 2nd Named Defendants from auctioning the said vehicle.

8. **The claimants** contend -

a. That neither of them was a tenant of the said premises at the time of the initial distress, That the first named defendant had no rights of distress in relation to them,

b. That no rent was due and owing by the claimants,

c. That in any event the said motor vehicle was not found on the premises at the time of the initial distress and was not the proper object of a valid distress,

d. That the seizure of the said motor vehicle 21 days later was therefore unlawful.

9. **The first and second named defendants** contend

a. that amounts were due and owing in respect of unpaid rent.

b. that the first named claimant was a tenant of the said premises and had never ceased to be.

c. that the said vehicle was on the premises at the time of the distress and was validly and factually an object of that distress.

d. that the first named claimant committed poundbreach in removing the said vehicle from the premises after the distress was levied

e. that the seizure of the said vehicle 21 days later was a lawful remedy available to them under the Landlord and Tenant Ordinance s. 15 in respect of a fraudulent or clandestine removal of goods by a tenant in respect of goods distrained upon,

f. alternatively that the landlord's agent was entitled to recapture the vehicle, after a rescue or pound breach, on fresh pursuit.

g. that notwithstanding that the said vehicle was the subject of a hire purchase agreement it could be the subject of a valid distress against a tenant in arrears of rent.

10. The third named defendant contends that it was the owner of the said vehicle and that accordingly the said vehicle could not be the object of a seizure thereof, whether on the initial purported distress, or on the subsequent purported retaking thereof.

Issues

11.

i. Whether the 1st Named Claimant was a tenant of the 1st Named Defendant on July 8th 2010, at the time of the initial distress.

ii. Whether there was rent due and owing from the first named claimant to the first named defendant at the time of the distress on July 8th 2010.

iii. Whether that distress on July 8th 2010 was valid.

iv. Whether, as a question of fact, the subject vehicle was on the demised premises at the time of the initial alleged distress.

v. Whether, as a matter of law, the subject vehicle could have been subsequently seized on July 29th 2010 off the demised premises under a purported recaption or at all?

Findings and disposition

12. There is no dispute that the said vehicle was the subject of a hire purchase agreement between the second named claimant and the third named defendant and was owned by the third named defendant – the finance company.

13. I find as a fact:

1. That the first named claimant was the tenant of the subject premises at the time of the initial and subsequent attempts at distress.
2. That he had not ceased being a tenant of the subject premises at the time of the first attempted distress.
3. That even during the period that he admits being a tenant of the said premises- as at October 31st 2009 - rent was due and owing.
4. That the said vehicle was not on the subject premises at the time of the first attempted distress. Therefore it could not legitimately have been the subject of the first attempted distress, and therefore it could not have been the subject of the seizure and purported subsequent recaption on July 29th 2010, off the subject premises.

14. I find further, that the second attempted distress could not be justified under section 15 of the Landlord and Tenant Ordinance. It failed under section 15 because the goods were not the tenant's goods. Section 15 applies to goods that are the goods of the tenant who clandestinely or fraudulently removes his own goods.

15. Even if I were to have accepted the evidence of the bailiff in this regard, (which I did not), this would not have been a case of rescue. It would have been a case of pound breach.

16. Even if it were a case of pound breach I would have found that the purported seizure on the 29th of July was not on a fresh pursuit. I consider that a fresh pursuit does not only apply to rescue. It must also apply to pound breach as it has to, in order for the window for, and therefore, the chances of, a breach of the peace to be minimized. Fresh pursuit must mean as soon as possible. After 21 days any pursuit cannot by any stretch be considered to be a fresh pursuit.

Disposition

17.

i. The claim for an Injunction Ordering the Defendants their servants and/or agents to return the said vehicle to the 2nd Named Claimant is dismissed. The vehicle is owned by the third named defendant.
ii. The claim for an Injunction restraining the Defendants whether by themselves, their servants, and/or agents or workers otherwise from threatening, molesting and annoying or otherwise interfering with the 1st Named Claimant, is dismissed. The actions of the first and second named defendants were based on an attempt at distress; in the first instance a lawful distress at the demised premises, and in the second instance an unlawful attempt at distress.
iii. With respect to the claim for an Injunction restraining the Defendants whether by themselves, their servants and/or agents from interfering with the Claimants' quiet use and enjoyment of the said vehicle belonging to the 2nd Named Claimant, - the vehicle is in fact owned by the third named defendant.
iv. With respect to the claim for an Injunction restraining the Defendants whether by themselves, their servants and/or agents from taking or attempting to take the said vehicle belonging to the 2nd Named Claimant; the vehicle is in fact owned by the third named defendant.

v. With respect to the claim for Damages for the wrongful seizures of the said vehicle belonging to the 2nd Named Claimant, the vehicle is in fact owned by the third named defendant.

vi. With respect to the claim for Conversion, this does not arise as the vehicle was returned to the custody of the third named defendant.

vii. The claim for Damages for unlawful and/or illegal distress would not apply to the first distress. In so far as it relates to the second attempted distress/ recaption this claim is conceptually the same as the claim for Damages for Trespass to Goods. There is no evidence as to the quantum of these damages. They would have been for the loss of use of the said vehicle from the date of seizure to the date of its return to the custody of the actual owner – the finance company. In the absence of such evidence an award of nominal damages would have been made. In this case I decline to do so as there is evidence of, though no counterclaim for, substantial arrears of rent owing and remaining due to the first named claimant in respect of the demised premises.

viii. With respect to costs it is ordered that the first and second named defendants do pay to the first named claimant costs in the sum of $14,000.00 as I have found that the second seizure of the said vehicle was unlawful as the vehicle was not on the subject premises at the time of the first attempted distress.

ix. With respect to costs of the hearing on August 13th 2010 it is ordered that the first and second named defendants do pay to the claimants costs to be assessed by the Registrar.

Orders

18.

i. The claimants' claims are dismissed.

ii. With respect to costs it is ordered that the first and second named defendants do pay to the first named claimant costs of the action in the sum of $14,000.00.

iii. With respect to costs of the hearing on August 13th 2010 it is ordered that the first and second named defendants do pay to the claimants costs to be assessed by the Registrar.

iv. The first defendant is to pay to the third named Defendant costs of the action in the sum of $14,000.00.

v. With respect to costs of the application to intervene on September 23rd 2010 and the costs of the hearing on September 29th 2010 it is ordered that the first and second named defendants do pay to the third named defendant costs to be assessed by the Registrar.

vi. Liberty to apply

Analysis and Reasoning

19. The defendants contend that the tenant owed the landlord considerable arrears of rent. The landlord purported to distrain for the rent owed and in the process of the distress it claimed to have seized the motor vehicle, PAX 261.

20. The legal owner of that vehicle intervened and claimed that the vehicle is protected from distress by statute- the UK 1908 Law of Distress Amendment Act.

21. In fact all parties appeared to be under the impression that the UK 1908 Law of Distress Amendment Act applied. This was misconceived as that Act does not apply.

22. The 3rd named defendant eventually conceded that the UK 1908 Law of Distress Amendment Act did not apply, after contending from inception in its correspondence to the first and second named attorneys, and in its written submissions that it did.

23. In fact the Landlord and Tenant Ordinance, Chapter 27 No. 16 (1846) of the Laws of Trinidad and Tobago applies. Section 8 provides as follows:

> *Every person having any rent in arrear and due to him upon any grant, lease, demise, or contract whatsoever, shall have the same remedy by distress for the recovery of such rent as is given by the law of England in the like case.*

24. Although the law of distress gives the landlord specific additional recourse, nothing prevents the landlord from suing for arrears of rent, obtaining a judgment debt, and enforcing this against any assets that the tenant may have.

25. It was submitted that at the time of the distress levied upon premises at 53 Ana Street Woodbrook, all the prerequisites for a distress were in place.

Law - Distress

26. According to **Halsbury's Laws of England 4th ed. Vol 13 para 207 page 110** – "*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 the rent must be in arrear".***

*An actual existing demise is necessary; the common law right to distrain for rent does not...****continue after it has determined: Williams v Stiven (1846) 9 QB 14***.

The general rule is that a distress can only be made of goods found upon some part of *the premises out of which the rent issues.*

Whether the relationship of landlord and tenant existed at the time when the rent became due and when the distress was made.

27. The relationship of landlord and tenant did exist at the time when the distress was made. There is no dispute that the first named claimant was one of the tenants of the premises up to the end of October 2009. There is a dispute as to whether he relinquished his interest in the tenancy after that date, in a manner accepted by the landlord so as to absolve him of the responsibility to pay rent thereafter.

28. Neither the first named claimant nor Dylan Martineau **ever gave a notice to** terminate the tenancy. Even if the first named claimant told the landlord that he proposed

to move out, a suggestion that the first named claimant wanted to move out does not amount to a notice to terminate or to a termination of the tenancy. See **Hill and Redman 14th ed pg 537, para. 413- Form of notice to quit**

29. The first named claimant never gave a notice expressing a time when he proposed to leave and he never gave a notice expressing an intention to determine the tenancy. At FM (b) paragraph 13 he stated that he indicated to Jean that he no longer wished to stay on and occupy his portion of the premises. At paragraph 14 he says that **after mutual arrangements he ceased to occupy the premises.** On his evidence the first named claimant, in effect, simply indicated that he was tired of paying rent, and walked away. This, without more, was insufficient to determine the tenancy as a whole or the first named claimant's interest in it. This is far too vague to support a finding that the first named claimant in effect gave a notice to terminate.

30. I find that the tenancy was never terminated prior to July 2010. The original tenancy was not terminated, and the Landlord was not given the option to consider whether she wished to enter into a separate arrangement with Dylan Martineau, for the whole or part of the premises.

31. I find that there is evidence that the first named claimant may have moved his administrative office to Picton Street and that he may have been under the impression that Dylan would assume responsibility for the premises and for finding another tenant to make up the balance of the rent. However, there is no evidence either -

a. that this was communicated to the Landlord

b that the landlord ever accepted that the first named claimant could relinquish his obligation to pay rent.

32. Further, the very fact that it was contemplated that a tenant would be sought to make up the balance of the rent confirms that rent remained payable in respect of the whole premises.

33. The fact that the first named claimant wrote a letter on behalf of Dylan tendering $5,000.00 and offering to reoccupy the premises also confirms that at no point did the landlord ever agree to the tenants' giving up part of the premises or requiring rent only in respect of the portion occupied.

34. It is clear that the entire premises were rented and therefore rent was due in respect of the entire premises. It is also clear from the first named claimant's own evidence that the tenancy agreement was between the landlord and Claude, the first named claimant and Dylan. The first named claimant's unilateral intention not to be bound by the obligation to pay rent after October 31st 2009 could not by itself absolve him of that obligation.

35. The first named claimant never ceased to be involved in the tenancy. Consequently, I find that the relationship of landlord and tenant was never terminated, and likewise, the first named claimant's interest in the tenancy was never terminated.

Was rent owed -Analysis of the rent cheques

The monthly rent

36. I find that analysis of the rent cheques supplied by the first named claimant demonstrate (a) an initial rent of $40,000.00 per month, a possible reduction to $35,000.00 per month, (because the first named claimant consistently paid this amount for a few months). (b)No evidence of a further reduction to $30,000.00 per month (save for the equivocal fact that $15,000.00 was apparently paid by Dylan, possibly towards a half share of the rental.

37. In any event there is no evidence whatsoever that the landlord ever agreed to accept a rent of $30,000.00 per month or that payment of $15,000 was anything other than an internal arrangement between the first named claimant and Dylan.

38. Further there is absolutely no evidence of a reduction to $25,000.00 per month. In his evidence in the box, he asserts that the rent came down to $25,000.00. When this was challenged he admitted that he never told this to his attorneys. It is not in any witness statement, affidavit, or pleading, and I find this to be a fabrication in the witness box.

39. As to whether the first named claimant remained a tenant after October 31st 2009, I find that his evidence of agreement with the landlady to this effect was vague in the extreme and lacking in credibility

Whether cheques produced for rent were incomplete?

40. I do not accept the landlord's position that the rent was always in the sum of $40,000.00 per month. The cheques reveal that the rent **paid** was reduced to $35,000.00 and I accept the evidence of the first named claimant in this regard, though not his evidence that it was further reduced to $30,000.00 or even $25,000.00.

41. I do not accept that there were cheques which the first named claimant failed to produce to the court. The record shows that at the earlier periods of the tenancy first $40,000.00 then $35,000.00 was paid monthly. It is not likely that the first named claimant's records for later periods would be less complete than his records for earlier periods. Those records show, consistent with the first named claimant's evidence, that the tenants were becoming less compliant with their rental obligation over time, issuing multiple cheques for reduced amounts, and not always for the total amount each month.

42. Even if the figures for rent for which cheques were allegedly not produced are taken into account, rent was owed.

The Rent owed

43. It is clear from the analysis of the cheques proffered by the first named claimant that even at October 31st 2009 rent was in arrears.

44. Even if the rent had been reduced to $30,000.00 after October 2009, as the first named claimant contends, on his own evidence the rent was $35,000.00 per month up to the end of October 2009. Even if it is accepted that he left the tenancy, the evidence is that for June 2009 the sum of $16,500 was paid for rent, for July the sum of $30,000 was paid for rent, for August 2009 the sum of $35,000.00 was paid for rent, for September 2009 the sum of $15,000.00 and for October 2009 the sum of $8,000.00 was paid. The rent by that time, while the first named claimant, even on his own admission, was still a tenant, was $70,500 in arrear. Even if the $40,000.00 deposit was applied to that sum according to an agreement with the first claimant, it was still in arrear.

45. By the time of the initial alleged distress the rent was definitely in arrear as on his figures, $586,500.00, at most, had been paid. In cross examination, the first named claimant accepted that the amount on cheques which he failed to produce to the court could not exceed $50,000.00. Therefore, in his estimation, the rent paid could not exceed the sum of $636,500.00. Since the rent owed must exceed the sum of $720,000.00, even on the assumption that the monthly rent was $30,000.00, rent was in arrear. I find that the first named claimant was not truthful with respect to the amount of rent payable monthly, and that the monthly rental was never reduced below $35,000.00

46. I find that there was a tenancy in existence at the material time, and that rent was in arrears in respect of that tenancy, and that the first named claimant was a tenant. Consequently, I find that the landlord was entitled to distrain for rent.

Whether vehicle PAX 261 was properly seized and impounded

47. It is the contention of the defendants that the vehicle PAX 261 was properly seized and impounded and that the distress was carried out according to law.

Distress – law

48. **Halsbury's Laws of England, 4th edition, Volume 13, paragraphs 307 and 309** states that "*a seizure may be either actual or constructive. It is **actual** by laying hands on the article, or on one of several articles and claiming to detain it or them until the rent is satisfied*". **Cramer v Mott (1870) LR 5 QB 357**. "*The most proper manner of making a distress is… to take hold of some personal chattel and declaring that it is taken as distress in the name of all the goods …and this is will be good seizure of all".*

*"Seizure is constructive if the bailiff after intimating his intention to distrain walks round the premises and… **gives written notice** that he has distrained".* **Swann v Earl of Falmouth (1828) 8 B & C 456.**

Whether vehicle PAX 261 was on the compound

49. The first named claimant insists that that the said vehicle was never on the compound. It was properly conceded in submissions of the landlord that if the vehicle was never levied upon, a later levy off of the premises would be illegal.

50. As to whether or not the said vehicle was on the premises at Ana Street the evidence of the first named claimant must be considered together with the evidence of the bailiff. The first named defendant candidly admitted that she was not present and therefore cannot say whether the vehicle was seized on the premises.

51. The Bailiff states as follows:

He entered the premises at Ana Street at about 10 am on July 8th 2010. At the time there were two vehicles, (which he subsequently amended to three vehicles), parked on the tenanted premises. He went upstairs and met a female employee, who phoned Dylan and the first named claimant. They both arrived soon after.

52. The bailiff says that at 10 am. On the morning in question, he went on to the premises, and **blocked all the vehicles that were there**, and that **PAX 261 was on the**

premises. He says that **the first named claimant was not there in person at that time but that he came shortly after.** He says that he went upstairs and levied from there. He says in evidence in chief, and in cross examination, that **he placed his hand on the trap set and said by that trap set he levied on all the goods** for the amount in arrear. Thus, on the bailiff's evidence, there was an actual seizure of the goods on the compound including the Sorento. It was seized and impounded. However his evidence is not accepted.

53. In cross examination he confirmed that the first named claimant and Dylan were not at the premises when he arrived. He also confirmed that he went upstairs **after he had parked his vehicle blocking all three vehicles**.

54. He initially claimed that he did not say that a female employee called Dylan and the first named claimant despite paragraph 4 of his witness statement. He insisted all the time he was there he was blocking the three vehicles including the said vehicle. It was put to him that, (if his version were correct), the first named claimant could not drive away with any car because the bailiff's vehicle would be blocking the driveway. In response he stated that a police officer told his driver to move his vehicle or it would be impounded.

55. This sequence of events raises the obvious query as to why would the first named claimant's vehicle be on the compound, and Dylan's vehicle also, if they themselves were not on the compound at that time.

56. The first named claimant's evidence is that he received a telephone call at his office on Picton Street, that it took him 10 minutes to drive to Ana Street, and that when he arrived there he did not park on the compound of the tenanted premises but instead parked on the pavement on the opposite side of the road. Accordingly his vehicle could not have been blocked by the bailiff since -

a. his vehicle was not on the compound when the bailiff's vehicle arrived and allegedly blocked the driveway, and

b. he arrived after the bailiff and never entered the compound as he parked on the street.

57. I find that the bailiff's evidence is contradictory and inconsistent. If the first named claimant were not on the premises it is likely, on a balance of probabilities that his vehicle also would not be on the premises.

58. If the first named claimant came several minutes afterwards in response to a telephone call to him from a female employee, (as the bailiff says in his witness statement), then this is consistent with and corroborative of the first named claimant's statement that he came from his office on Picton Street driving his vehicle, that he did not park his vehicle in the compound, that he parked it on the pavement on the opposite side of the road, and that his vehicle was simply not on the premises and was not the subject of distress on the premises on July 8th 2010.

59. It was suggested that the first named claimant did not raise the point that the vehicle was not on the premises on the **8th July**, and that he raised it for the first time in his affidavit in reply filed on August 12th 2010.

60. However in his initial affidavit he was addressing the issue of the seizure of the vehicle on **29th July 2010,** and the question of distress on that vehicle on the first occasion (8th July 2010), according to the first named claimant's version of events, would simply not have arisen.

61. I therefore draw no adverse inference about the omission to mention the absence of the vehicle from the premises on July 8, 2010.

62. In any event at paragraph 32 and 33 of the first named claimant's affidavit dated August 5th 2010 he refers to being shown the purported notice of distress of July 8th 2010, and the purported inventory and warrant of distress, being shown this for the first time at Tunapuna Police station on July 29th 2010.

Findings of fact

56. I find

a. The said vehicle was **not** the subject of distress on July 8th 2010.

b. There was therefore no pound breach by the first named claimant because the subject vehicle was not impounded on that day.

63. Although I have expressly found as a fact that the subject vehicle was **not** on the premises at the time of the initial distress, for completeness, the alternative scenario, that the vehicle was in fact on the premises at the time of the initial distress, will be considered.

64. It will be considered, in particular whether, in that alternative scenario, such seizure subsequently, **off** the demised premises, would have been permissible, either -

(a) Under s. 15 of the Landlord and Tenant Ordinance.

(b) Under the doctrine of recaption.

Subsequent Seizure

65. It was submitted that when the first named claimant drove away PAX 261, he perpetrated either an **unlawful rescue** of the vehicle or **a pound breach**. Alternatively, **he fraudulently removed his goods to prevent a lawful distress.**

66. It is the evidence of the second claimant, the bailiff, that the first named claimant drove the car away **after** it had been seized and impounded. He claims that the claimant called the police to intervene. The police then told the claimant that he could remove his vehicle. In these circumstances, it was submitted that there was **either a fraudulent removal of the goods** to prevent distress or there was **pound breach** or **rescue**. In these circumstances, had I accepted the evidence of the bailiff, the vehicle would have been impounded by that point, and the first named claimant would have been guilty of Pound breach,

(a) Under s. 15 of the Landlord and Tenant Ordinance

60. Section 15 of the Landlord and Tenant Ordinance provides

"*In case any tenant, lessee for life or lives, term of years, at will or sufferance, of any land upon the demise or holding whereof any rent is or shall be reserved, due, or made payable,* ***shall fraudulently or clandestinely convey*** *away or carry off or from such demised premises* ***his goods*** *or* ***chattels****, with* ***intent to prevent the landlord*** *or lessor* ***from distraining the same for arrears of rent*** *so reserved, due or made payable as aforesaid, it shall and may be lawful to and for such lessor or landlord, or any person or persons by him for that purpose lawfully empowered,* ***within the space of thirty days next*** *ensuing such conveying away or carrying off such goods or chattels as aforesaid,* ***to take and seize such goods*** *and chattels,* ***wherever the same shall be found****, as a distress for the said arrears of such rent, and the same to sell or otherwise dispose of, and to distribute the money arising by such sake, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord in and upon such demised premises for such arrears of rent, any law, custom, or usage to the contrary in anywise notwithstanding: Provided that* ***nothing*** *in this Ordinance contained* ***shall*** *extend or be construed to* ***empower*** *such lessor or landlord to take or seize any goods or chattels as a distress for arrears of rent,* ***which shall have been sold bona fide*** *and for a valuable consideration* ***before*** *such seizure made,* ***to any person or persons not privy to such fraud*** *as aforesaid, anything herein contained to the contrary notwithstanding."*

67. *"When a tenant* ***fraudulently or clandestinely removes his*** *goods or chattels from the demised premises to prevent the landlord from distraining them, then the landlord , or any person empowered by him, may within 30 days …seize the goods and chattels from wherever they are to be found".* **Halsbury's Laws of England, 4th Edition, Volume 13, para 354, page 177** and **Landlord and Tenant Act section 15**.

68. Where the **tenant** fraudulently and clandestinely removes **his** goods to prevent distress, then the bailiff is entitled to follow the goods and distrain upon them. The removal by the tenant must be a removal of the **tenant's own goods**, (see **Stollmeyer v**

Fletcher Judgments of the Supreme Court of Trinidad and Tobago Vol II p 271 per Russell CJ Ag.)

69. This was eventually conceded by attorneys for the Landlord in their supplemental written submissions.

70. I have found as a fact that the subject vehicle was not on the premises at the time of the initial distress. Therefore, even if the vehicle had been removed by the first named claimant the right to seize the vehicle off the premises under section 15 of the Landlord and Tenant Ordinance, does not apply to permit seizure, off the premises, of goods removed by a tenant which do not belong to the tenant. In this case the said vehicle was not the first named claimant's goods. It was owned by the third named defendant and the bailiff was not empowered to seize it within the 30 day period prescribed by section 15. This is further corroborated by the fact that the section contains a proviso exempting its application to third parties who have purchased the goods without being privy to any fraud. In this case the finance company was already the owner, and was not privy to any fraudulent removal.

(b) Under the doctrine of recaption

64. **Rescue** arises where the goods are taken out of the custody of the distrainor **before** he has impounded them.

65. **Pound breach** occurs **after** the distrainor has impounded the goods and the goods are retaken from the custody of the law. Both rescue and pound breach are offences against the dignity of the law.

66. Where there has been rescue or pound breach then the landlord has the remedy of **recaption**. In exercising the right the landlord must not commit a breach of the peace.

67. **In the case of a rescue** reception must be "upon a fresh pursuit". There is authority for saying that the same limitation applies in the case of poundbreach. **Hill and Redman 14th ed page 461 para. 355** citing **Turner v Ford (1846) 15 M&W 212**.

68. I find that, based on logic and principle, fresh pursuit could not apply only to rescue. It must also apply to poundbreach as it has to, in order for the window for, and therefore, the chances of, a breach of the peace to be minimized. Fresh pursuit must mean as *soon as possible*, or *within a reasonable time*, or *as soon as practicable*.

69. Even if there had been a pound breach by the first named claimant the subsequent seizure would not have been within a time that could be considered to be fresh pursuit. 21 days later cannot be considered to be a reasonable period after the seizure, nor can it be considered as soon as possible, or even as soon as practicable. The window of opportunity for a fresh pursuit, and the window for a possible breach of the peace by seizure of goods off the demised premises, cannot be as long as 21 days, and no authority was produced to the effect that it could be. The bailiff therefore could not, as a matter of law, have seized the said vehicle off the premises for arrears of rent, 21 days after an initial distress on the demised premises.

Conclusion

70. a. The first named claimant was a tenant of the premises along with Dylan his nephew.

b. This tenancy was never terminated prior to 8th July 2010.

c. Rent was in arrear, and therefore the landlord was entitled to distrain for rent.

d. Goods were properly distrained upon by way of actual seizure, but this did not extend to the vehicle. The first named claimant was not on the premises when the bailiff arrived, and therefore his vehicle could not have been blocked thereon by the bailiff's vehicle**.**

e. Even if it were, however, and the removal of the vehicle from the custody of the law was a pound breach or rescue, the seizure on 29th July 2010 – 21 days later was not, by any stretch of the imagination on a fresh pursuit.

f. Further, under **s.15 of the Landlord and Tenant Ordinance** the bailiff was not entitled to recapture the goods by a fresh intervention, on the 29th July 2010, because, even assuming that the removal were either fraudulent or clandestine, that section applies when the tenant fraudulently and clandestinely removes **his own goods**, and the vehicle in this case was not the tenant's vehicle.

71. Accordingly

i. The claim for an Injunction Ordering the Defendants their servants and/or agents to return the said vehicle to the 2nd Named Claimant is dismissed. The vehicle is owned by the third named defendant.

ii. The claim for an Injunction restraining the Defendants whether by themselves, their servants, and/or agents or workers otherwise from threatening, molesting and annoying or otherwise interfering with the 1st Named Claimant, is dismissed. The actions of the first and second named defendants were based on an attempt at distress; - in the first instance a lawful distress at the demised premises, and in the second instance an unlawful attempt at distress.

iii. With respect to the claim for an Injunction restraining the Defendants whether by themselves, their servants and/or agents from interfering with the Claimants' quiet use and enjoyment of the said vehicle belonging to the 2nd Named Claimant, - the vehicle is in fact owned by the third named defendant.

iv. With respect to the claim for an Injunction restraining the Defendants whether by themselves, their servants and/or agents from taking or attempting to take the said vehicle belonging to the 2nd Named Claimant; the vehicle is in fact owned by the third named defendant.

v. With respect to the claim for Damages for the wrongful seizures of the said vehicle belonging to the 2nd Named Claimant, the vehicle is in fact owned by the third named defendant.

vi. With respect to the claim for Conversion, this does not arise as the vehicle was returned to the custody of the third named defendant.

vii. The claim for Damages for unlawful and/or illegal distress would not apply to the first distress. In so far as it relates to the second attempted distress/recaption this claim is conceptually the same as the claim for Damages for Trespass to Goods. There is no evidence as to the quantum of these damages. They would have been for the loss of use of the said vehicle from the date of seizure to the date of its return to the custody of the actual owner – the finance company. In the absence of such evidence an award of nominal damages would have been made. In this case I decline to do so as there is evidence of, though no counterclaim for substantial arrears of rent owing and remaining due to the first named claimant in respect of the demised premises.

viii. With respect to costs it is ordered that the first and second named defendants do pay to the first named claimant costs in the sum of $14,000.00 as I have found that the second seizure of the said vehicle was unlawful as the vehicle was not on the subject premises at the time of the first attempted distress.

ix. With respect to costs of the hearing on August 13th 2010 it is ordered that the first and second named defendants do pay to the claimants costs to be assessed by the Registrar.

Orders

72.

1. The claimants' claims are dismissed.
2. With respect to costs it is ordered that the first and second named defendants do pay to the first named claimant costs of the action in the sum of $14,000.00.
3. With respect to costs of the hearing on August 13th 2010 it is ordered that the first and second named defendants do pay to the claimants costs to be assessed by the Registrar.
4. The first defendant is to pay to the third named Defendant costs of the action in the sum of $14,000.00.
5. With respect to costs of the application to intervene on September 23rd 2010 and the costs of the hearing on September 29th 2010 it is ordered that the first and

second named defendants do pay to the third named defendant costs to be assessed by the Registrar.

6. Liberty to apply.

Dated this 7th day of February 2012

Judge

Peter A. Rajkumar