N2LR

No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A.993/69

BETWEEN TUI FLORENCE MARION HALL of Puni near Auckland, Married Woman

Plaintiff

A N D PETER STEPHEN HULJICH of Auckland, Farmer

Defendant

272 1X

Hearing: July 27th, 28th, 29th, 30th; August 2nd and 3rd, 1971.

Counsel: Firth for Plaintiff.
Davison Q.C. and Short for Defendant.

Judgment: 12th August, 1971.

JUDGMENT OF McMULLIN, J.

This is a claim by the Plaintiff for damages for the seizure of certain pedigree and other stock from a property at Mercer. The facts as I find them are that the Plaintiff and her husband at all material times were farmers but from 1962 onwards they carried on their farming operations independently of each other. It would appear that prior to 1962 they had farmed together but about that year they had a disagreement about their farming methods, with the result that they took up farming on different properties.

In May, 1969, Plaintiff owned a farm property at Puni. On this property she had run for some years pedigree Jersey stock, although some of the milking cows had been let out to various farmers on the basis that the farmers had the free use of the cows with an obligation on their part to rear and hand back to the Plaintiff the pedigree calves born to those cows.

In May, 1969, the plaintiff's husband, B. B. Hall, occupied defendant's property at Mercer containing 179 acres. This he held under a lease dated 11th May, 1964, for a term of five years from 1st June, 1964. I will refer to it as "the Mercer property". Plaintiff continued to live on the Puni

property and the husband resided on the Mercer property which plaintiff visited from time to time, sometimes staying overnight or possibly for some days and nights on end. This she did for the sole purpose of seeing her aged parents who shared a house on the property with plaintiff's husband.

Plaintiff's husband, at the beginning of the lease of the Mercer property, had his own herd consisting of 70 dairy cows and some 20 heifer calves, and on the 30th April, 1964, he gave an instrument by way of security over these to the Bank of New South Wales. This instrument was renewed by the Bank on the 18th April, 1969, before its expiry and this fact might suggest that the husband at that time still had the same herd or a herd of the same size, but I am satisfied that in fact by the date of renewal of the instrument the husband's stock had been so reduced by deaths and other reasons that by the beginning of the 1967/68 season there were none left. Plaintiff agreed to help him out letting him have certain stock on the basis that he had the free use of the same conditional upon his rearing and handing back to the Plaintiff the calves which were the progeny of such stock. This arrangement, however, did not seem successful because of flooding on the property and the number of calves which survived were very few.

Prior to the 14th May, 1969, Plaintiff had been arranging for the sale of her pedigree herd and an auction of this herd was to be conducted at Morrinsville by the Farmers' Auctioneering Co. on the 31st May, 1969. When pedigree stock are to be auctioned the prices which they will realise are likely to be enhanced if the animals have been cleaned, clipped and trimmed prior to the sale. The extent to which this preparation work has to be carried out depends on the time of the year and the state of the animal, including the state of its coat. Some time before the 14th May, 1969, Plaintiff proceeded to clean up and trim her pedigree herd on her Puni property but she was interrupted in this by a breakdown of the power supply to the property. She therefore proceeded to truck the animals to the

Mercer property and I am satisfied that by the morning of the 17th May, 1969, some 60 animals had been taken to the Mercer property by the Plaintiff for the purposes of preparing them for the sale which had been arranged for the 30th of that month. At this time the husband owed the Defendant some $3,100 for arrears of rent and the lease was due to expire in the matter of a few weeks' time.

On the morning of the 17th May, 1969, Defendant arrived at the Mercer property with a number of assistants and rounded up 29 of the animals out of the paddock where they were grazing and drove them across a railway line into another paddock which formed part of the Mercer property and impounded them there. There is a dispute as to the sequence of events on this occasion. Plaintiff says that she and her family observed Defendant returning from the paddock over the railway line having already taken some of the animals there. Defendant was about to seize a Holden motor-car which in fact belonged to B. B. Hall, plaintiff's son. The son was able to demonstrate to Defendant that in fact he owned the motor-car, whereupon Defendant restrained from seizing the car saying that he would go and take more animals instead. In the course of the conversation Plaintiff or her family told the defendant that animals were plaintiff's and under a Bill of Sale to a Mr. Edwards. Defendant then took further animals and drove them across the railway line impounding them in the paddock. Defendant for his part claims that he made one round-up of the animals only. He admits that having taken those animals across the railway line and padlocked the gate of the paddock into which he drove them, he returned with the intention of seizing the car but on being satisfied that this belonged to Plaintiff's son he took no further action, merely indicating that he might take further animals. In the event it does not appear to me to matter whether the seizure was accomplished in two manoeuvres or merely in one, but I prefer the Plaintiff's version of what took place. Before the Defendant left the

property he handed to the Plaintiff a notice under the Distress and Replevin Act, 1908, and wrote on the bottom of such notice the fact that he had impounded 29 animals on the property.

Plaintiff, fearing that the Defendant might return and take further animals because the notice referred to a distress being made for the sum of $1,700 whereas there was in fact a greater amount owing for rent, decided to shift the balance of her herd to a run-off which the husband held from the New Zealand Electricity Department. The balance of the herd was therefore driven to the run-off and remained on the run-off until the 24th May when it was brought back to the leasehold area. Following upon the seizure of the animals Plaintiff instructed her solicitors who, on the 22nd May, 1969, wrote on behalf of the Plaintiff and her husband to Defendant's solicitors advising that it was the Plaintiff who owned the stock which had been seized and that this was subject to an Instrument by way of Security to one, Edwards. The letter made the point that the stock did not belong to Plaintiff's husband by whom the rent on the lease was due. Correspondence followed between the respective solicitors and an arrangement was made to overcome the impasse by Defendant agreeing to release the animals which he had impounded on certain undertakings being given as to the disposal of the proceeds of their sale. Plaintiff received advice on the evening of the 23rd May that Defendant had agreed to release the stock to her and on the 24th May she brought back the stock which had been impounded in the paddock over the railway line to the paddock near the shed and forthwith proceeded to clean up the animals as best she could and to clip them in preparation for the sale. The animals were in a dirty condition, the paddock in which they had been impounded being one which gave access to a swamp. As a result the animals had to be washed before clipping could commence. Whereas 29 animals had been seized it was found on the 24th May that a pedigree cow called "Cloverlands Divine" and a bull calf from that cow were

missing. A search for these was made by Plaintiff and her family but they have not been located. The paddock in which the animals had been impounded is one which is poorly fenced in parts. It gives access to a large area of swamp. Between the 24th and 29th May Plaintiff endeavoured to prepare the animals for sale but was unable to complete their preparation to her satisfaction. Her difficulties were increased by the fact that in the initial stages of clipping the cows some difficulty was experienced through the animals receiving electric shocks from the electric clippers and a transformer had to be procured to overcome this trouble. Then the cartage contractor who was to take the animals to the Morrinsville sale arrived a day earlier than expected. The sale was reasonably well attended but the prices realised for the animals were much less than Plaintiff and her adviser, Mr. A. A. Banks of the Farmers' Auctioneering Co., had anticipated. As a result Plaintiff alleges that she suffered damages in that she did not receive the prices which she says she would have obtained but for the wrongful seizure of the stock. She also claims to have incurred more interest to Mr. Edwards through her inability to pay off the moneys secured to him under the Instrument by way of Security as soon as she would have been able to pay it off had the animals reached a proper price at the sale.

There can be no doubt on the evidence that the animals impounded were Plaintiff's and not the property of her husband, but for Defendant it was contended that the seizure of the animals was in fact lawful and within the terms of the Distress and Replevin Act, 1908. It was common ground between the parties that if the Defendant's action was to be justified it could only be done if it could be shown to be within that Act and that any seizure of the animals not justified by that Act was a trespass. In particular, on behalf of the Defendant it was contended that the seizure was a lawful one in that -

(a) Plaintiff was a "person in possession" as defined in Section 3 of the Distress and Replevin Act, 1908.

(b) If Plaintiff were not a "person in possession" of the whole of the property in respect of which rent was due and owing, then Plaintiff was in possession of a field on which the cattle were pasturing at the time of the seizure.

Section 3, Distress and Replevin Act, 1908, prohibits any distress for rent unless it is a distress against the chattels "of the tenant or person in possession of the premises in respect of which such rent has accrued due". In the present case it is conceded that the chattels could not be said to be the property of the tenant who was clearly the husband, but it is said that they were the property of the person in possession of the premises. Defendant's argument proceeds on an historical analysis of the law. At common law, with certain exceptions, a landlord could prima facie seize and distrain for arrears of rent all goods and chattels found on the premises in respect of which the rent was due, including distress upon the goods of a stranger: Halsbury's Laws of England, 3rd Ed., Vol. 12, p.100, para. 152. The exceptions, which are not relevant to the present case, are set out at p. 110, para. 175. In New Zealand a landlord's right to distrain was governed by the common law until the passing of the Distress and Replevin Act, 1868. That statute contained no provision corresponding to Section 3 of the Distress and Replevin Act, 1908, at present in force in this country. To that extent the common law position prevailed and a landlord was free to distrain on the goods of a stranger. So the position remained until the passing of the Distress Act, 1885, section 3 of which was similar in its wording to section 3 of the 1908 Act. Section 3 of the 1885 Act introduced the concept of "person in possession of premises" as distinct from "the tenant". There has been almost a dearth of authority on the section, a fact which is somewhat surprising in a country whose economy has from its early European settlement been so closely identified with pastoral farming. There appear to be

in New Zealand two cases only in which the law as to the seizure of goods not the property of the tenant has been discussed. The first is Wertheim v. Samson (1887) 5 N.Z.L.R. 208, a case which concerned the seizure of a sewing machine on premises in respect of which rent was owing. In this case Williams, J. in a very short judgment said that Section 3 of the Distress Act, 1885, was a direct reversal of the common law rule that a landlord could distrain on all goods found on the demised premises whether belonging to the tenant or a stranger because the landlord's lien was one which applied to the goods on the place in which they were found and not in respect of the person to whom they belonged.

The same judge, in Finlinson v. Reid (1888) 6 N.Z.L.R. 24, considered the meaning of the words "person in possession" in Section 3 of the Distress Act, 1885. That was an action for the illegal distraint of sheep belonging to the plaintiff who had a verbal agreement with the tenant giving him the right to graze sheep upon the defendant's farm. There was a conflict of evidence as to the exact nature and terms of the agreement, but Williams, J. held that it did not give the plaintiff exclusive possession of the farm. The legality or otherwise of the seizure depended on whether the plaintiff was a person within the words "person in possession of the premises in respect of which such rent shall have accrued due". At p.27 Williams, J. said:-

> " The possession must of course be an exclusive possession, and must carry with it, as I have said, the right to bring an action against trespassers and, of course, the right to turn them off. "

At p. 28:-

> " It seems to me, moreover, that the possession referred to in section 3 must be a possession co-extensive with the original possession of the tenant. I mean this, that if the surface and subsoil were demised and the tenant let a third person into possession of the surface, but retained possession of the subsoil; or if two fields were included in a demise and the tenant parted with the possession of one, that

> the person to whom such possession was parted would not be the person in possession of the premises within the meaning of section 5. "

It is true that the learned Judge said that he had resolved the matter only after considerable doubt, but the most transient reading of the judgment demonstrates that it was a carefully considered one. For the defendant, it is submitted that Williams, J. was wrong in Finlinson v. Reid in holding that the possession had to be an exclusive possession and a co-extensive possession because, it was claimed, there was nothing in the Distress Act, 1885, which would warrant the view that the legislature intended to alter the common law position to the extent that the possession should be an exclusive one. What he submitted the 1885 statute intended was that chattels could be distrained if they were the chattels of the tenant or of any other person provided that they were located on the property in the possession of that other person. He further submitted that there was no warrant for holding that the possession must be co-extensive and that Williams, J. was not acting in accordance with what Bramwell, L.J. had said in Coverdale v. Charlton (1878) 4 Q.B. 104. The latter case was decided under the Inclosure Act, 1766. At p. 118 Bramwell, L.J. said:-

> " . . . . it was said that there was a de facto possession. But it is difficult to say that there is a de facto possession, when there is no possession except of those parts of the lane which are in actual possession, and there is an interference with the enjoyment of the parts which are not in actual possession. My meaning is this, if there were an inclosed field and a man had turned his cattle into it, and had locked the gate; he might well claim to have a de facto possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common he could not be said to have a de facto possession of the whole length of the common. If it would not be a de facto possession it would be a nominal possession. If no right were attached to it, it would not be a constructive possession. That I look upon as being the condition of things, and consequently the plaintiff had not a de facto possession beyond the spots where his animals were grazing. "

(I note, however, that Coverdale v. Charlton was referred to and

considered by Williams, J. in Finlinson v. Reid.)

From this it was argued that Plaintiff was a "person in possession" and that that was all that the Defendant had to establish to make his seizure lawful. Alternatively, it was submitted that if Finlinson v. Reid was rightly decided then Plaintiff could be said to have had an exclusive possession of the field and that was enough in accordance with the dictum of Bramwell, L.J. in Coverdale v. Charlton. With respect I think that what Williams, J. said in Finlinson v. Reid was right and that there is nothing in Coverdale v. Charlton which would suggest otherwise. Moreover, the legislature, in enacting the Distress and Replevin Act, 1908, a consolidating measure, enacted Section 3 in substantially the same form as it was in the 1885 Act and it must be deemed to have known and accepted the interpretation placed on the earlier section by Williams, J. I propose to follow that interpretation to the extent that it is necessary to apply it to this case. Even if, however, there were no previous authority on the point I would have held:

(1) That Section 3 of the Distress and Replevin Act, 1908, requires that the person in possession other than the tenant should be in possession of premises the same or substantially the same as those demised to the tenant. In short, in my view the section renders invalid any distress for rent other than a distress against goods of the tenant or the person who, not having a tenancy, is nonetheless in possession of the premises in respect of which the rent is due.

(2) In the present case, Plaintiff, if she had possession within the meaning of Section 3, had possession only of one paddock out of a total area of 179 acres, and she could not in those circumstances be said to have possession of the premises in respect of which the rent was due.

(3) Plaintiff did not have an exclusive possession of even the paddock in which her stock were held at the time of the seizure. It is true that her husband in cross-examination answered certain questions put to him as to his wife's occupancy of the paddock in such a way as to suggest that she had exclusive possession of that paddock, but it is clear again that the possession, such as it was, was of the paddock and not of the premises and I do not think that the somewhat technical meaning which is given in law to the phrase "exclusive possession" should be spelled out of an answer from a lay witness. I think the proper view of the whole arrangement was that the Plaintiff, being without a proper means on her own farm of preparing the herd for sale, asked her husband if she could bring the animals to the Mercer farm to prepare them, that there were reasons of commonsense for putting the animals in one paddock there and not allowing them free range over the farm, and that it was for these reasons that they were in fact put in one paddock and other animals excluded from that paddock. I have no doubt that the husband could have required the Plaintiff at any time to move the stock from one paddock to another, or that he could have introduced his own stock into the paddock had he wished, but for ease of handling the stock it was the sensible course to put Plaintiff's herd in one paddock, handy to the shed, where they could be the more readily brought in for preparation.

In view of my finding of fact as to the details of the conversation between Plaintiff and her family on the one hand and Defendant on the other, I need not consider the further defence raised of equitable estoppel and I hold that the Defendant's seizure was unlawful.

Plaintiff consequently has a right to such damages as she can establish flowed from what was in fact a trespass to her

stock. The measure of damages for such a trespass is/~~a~~ the full value of the goods which have been lost to Plaintiff: Halsbury's Laws of England, Vol. 12, p.167, para. 314; and Mayne & McGregor on Damages, 12th Ed., p. 628, para. 730. Exemplary damages, in appropriate cases, would appear to be recoverable, Mayne & McGrego on Damages (Ibid) p. 629. Plaintiff is not, of course, excused from the normal obligation to mitigate her loss.

On the question of damages I find:-

(1) That it is desirable to prepare a pedigree herd for sale by cleaning them and clipping their coats, particularly about the neck and the tails, and by checking on ear marks. I find that it is also normal and desirable to arrange a catalogue for the auction of such stock by placing the more desirable animals at the beginning of the catalogue in order to set the tone for the auction and thereafter to arrange the order of sale so that animals are presented in family groups, if possible, sisters being sold with sisters and the like.

(2) That Plaintiff had intended to prepare her herd between the 17th and the 29th May, and that but for the unjustified seizure she would have been able to complete this satisfactorily by the 29th at the latest. It is true that the truck called one day earlier than had been anticipated and that the clipping operations were interrupted to obtain a transformer to stop the cows from being shocked, but had not the unjustified seizure of the stock intervened both of these difficulties would have been overcome and there would have been sufficient time within which to prepare the animals adequately. It was only because of the trespass that these factors achieved any significance at all.

(3) That Plaintiff could not begin to prepare the animals until the 24th May having received notice from her solicitors only on the evening of the 23rd that she was free to take the animals from the paddock where they had been placed by the Defendant.

(4) That Plaintiff could not reasonably have been expected to prepare her other animals which she had put on the run-off because until she received notice that she was free to move the animals which had been seized ~~then~~ she could reasonably have held the view that Defendant might return to the Mercer property and seize further animals.

(5) That on 23rd May when Mr. Rowe, a stock agent, inspected the seized animals with the Defendant in the paddock into which they had been driven, the pedigree cow "Cloverlands Divine" and her bull calf were present, but that on the 24th May when the animals were recovered from the paddock, "Cloverlands Divine" and the bull calf were missing.

(6) That Plaintiff searched for these two animals in an adequate way but was unable to find them because they had been lost in the swamp.

(7) That as a result of delays brought about by the seizure the animals were not as well prepared as they would otherwise have been in that they were not properly clipped.

(8) That the postponement of the auction was not a step which Plaintiff could reasonably have been expected to take. By that time the catalogue for the sale had been printed and some 300 copies sent to persons over a wide area, and the sale had been advertised in the newspapers. If the sale had been then postponed Plaintiff would have had to make fresh arrangements with Mr. Edwards to extend the term of her loan. She would have had to obtain a new date for the auction, re-advertise the auction, and her agents would have had to advise each of the persons to

whom the catalogue was sent of the postponement. Even had these matters been attended to the postponement of the auction might well have killed interest in it. By the time a fresh date had been arranged some of those looking for stock for pedigree or grade herds may have been satisfied. It is to be observed that the auction had been arranged for the 30th May, which is virtually the end of the dairy season, at which time sales of dairy herds are held. Plaintiff may have found that the demand for dairy stock had been satisfied before she was able to obtain another suitable date for the auction. I think that she hoped that she would be able to prepare the animals satisfactorily by the 29th, but her hopes were defeated for reasons beyond her control.

(9) That the auction was reasonably well attended.

(10) That the animals did suffer in presentation in that "Cloverlands Divine", the "prima donna" of the herd, was missing, one animal had been cut by the Defendant and his representatives in the droving operations, and the general appearance of the animals was not as good as it should have been.

(11) That the slipping of two cows before the auction, alleged by Plaintiff to have been caused by the animals eating microcarpa foliage in the paddock in which they had been impounded, has not been shown to be due to this cause and to the extent that any diminution in price was caused by these animals being placed at the end of the list the Defendant is not to be held liable in damages.

It is difficult to say what the animals would have fetched at the auction but for the wrongful seizure. Auctions can be a success or a failure from a vendor's point of view, depending on a number of matters beyond the vendor's control, and I am left with the impression that Plaintiff's claim for damages

is based on a schedule of prices calculated on the optimum conditions prevailing. Nonetheless, I accept the evidence of Mr. Banks generally on auctions of pedigree stock and factors to be taken into account and this auction did suffer for the reasons already mentioned.

I turn to the individual items of claim:

Lot 1, "Cloverlands Divine": I accept that this was a particularly good cow, that plaintiff hoped that it would fetch a good price, arouse interest and set the tone of the sale. I accept that by reason of the absence of the animal not only did the Plaintiff lose the price which the animal would normally have fetched but that the sale was depressed to some extent but I think that Plaintiff's claim is excessive. She claims that the animal was worth $600, but I cannot overlook the fact that she had purchased it the year before for only $140. Even allowing for the fact that the animal then suffered from a number of complaints which Plaintiff says she had cured, and that it had improved out of sight in the intervening period of time, I cannot allow Plaintiff more than $250, being the price the cow would have fetched but for Defendant's trespass. I shall refer to this as the "proper price".

Lot 72, "Noble Marge": This animal was offered for sale. Plaintiff had originally placed a reserve on the animal of $3,000. Of course she was somewhat loath to dispose of the animal for sentimental reasons and the reserve was calculated to allow Plaintiff to retain her. She says that the animal was, in fact, worth $600. It fetched $112. I am of the opinion that "Noble Marge" by its very placing in the catalogue cannot be reckoned to have been better than "Cloverlands Divine" in Plaintiff's estimation, and I allow a figure of $250 as being her proper price.

Bull Calf: Plaintiff claims $200 for this animal and says that she has obtained up to $250 for animals of a like quality,

but she has also obtained much less than this. I allow the sum of $125 as being the proper price.

Beef breeding cows: Plaintiff claims that she sold these animals unwillingly and only because of the undertaking which she had had to give to get the animals back from defendant. She says that she had intended to retain the animals and that they were worth $100 each. In fact she received only $208 for the four. In my view, however, animals of this kind will always be saleable and the prices payable for them would not fluctuate in the same way as prices payable for pedigree animals, in that they would not require any special preparation before presentation for sale. I do not think that a claim for damages has been made out in respect of the four beef breeding cows.

Main body of herd (72): It is difficult to assess with any degree of accuracy what these animals would have fetched at the sale but for the seizure. Mr. Banks says that under optimum conditions they may have fetched $200 each and he would have expected that the least price from the worse conditions would have been $100, with the probability overall that they would fetch $150. They fetched considerably less than this. I think that some of the factors which affected the price are the result of the wrongful seizure, but other factors are not to be charged against the Defendant. I take into account the evidence of Messrs. Banks, Edwards, Lowe and Loveridge and I allow Plaintiff $120 as being the proper price.

Interest: Plaintiff claims interest on the principal sum owing to Edwards on the Instrument by way of Security. She was unable to repay the Instrument by way of Security because the stock did not realise as much as she thought they would have realised. Defendant resists the claim to interest on the principle that it is too remote and not a loss flowing from the trespass: Liesbosch Dredger v. Edison S.S. Co. (1933) A.C. 449. There are passages in that judgment which are apposite to this case. At p. 460 Lord Wright said:-

> " But the appellants' actualloss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite for the law to judge the cause of causes," or consequences of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger. "

I think that the inability of Plaintiff to repay the amount owing under the Instrument by way of Security is too remote and that the interest claimed cannot therefore be allowed. But I think this is a case where a plaintiff should be allowed interest at 5%/ on the amount for which she succeeds from the date of the trespass up to the date of judgment, giving credit, of course, for the money received from the proceeds of the sale and paid over to Edwards. This Court has power to make such an award. It is true that interest in this form is not specifically claimed but a claim for interest of a greater amount was always before the Defendant from the time the proceedings were instituted.

I do not think that this is a case for the award of exemplary damages. While it at first appeared that Defendant had acted in a high-handed manner, he had in fact taken a number of steps to ensure that he was acting properly in seizing the animals and it could fairly be said that circumstances conspired against him. I think that the parties can now

calculate for themselves the amount payable under this judgment but, if this is not the case, the matter can be referred back to me. Plaintiff will be entitled to costs according to scale, with witnesses' expenses and disbursements to be fixed by the Registrar. I certify for three extra days.

Solicitors:

Grierson, Jackson & Partners, Auckland, for Plaintiff.

Bennett, Vollemaere & Co., Auckland, for Defendant.