IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO. 20/03**

BETWEEN **TUAO MESSINE** of Aitutaki, Planter

Plaintiff

AND **TERRY MITCHELL** of New Zealand, Planter

First Defendant

AND **DANIEL MITCHELL** of New Zealand, Occupation Unknown

Second Defendant

Hearing: 14 November 2003

Appearances: Ms C A McCarthy for Plaintiff
No appearance for First Defendant
Mr Daniel Mitchell in person

Date of Judgment: 18 December 2003

RESERVED JUDGMENT OF DAVID WILLIAMS J

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Solicitor for Plaintiff:
Ms C A McCarthy
Solicitor
Browne Gibson Harvey PC
Parekura Place
Avarua, Rarotonga
Cook Islands
Telephone: 00682 24567
Facsimile: 00682 21567

No appearance for First Defendant.

Appearance in person for Second Defendant:
Mr Daniel Mitchell

Introduction – Procedural Matters

[1] These civil proceedings were heard before the Court in Rarotonga on 14 November 2003. At the commencement of the hearing Mr Ka sought to appear as agent for the second defendant, Mr Daniel Mitchell, pursuant to section 42 of the Judicature Act 1980-1981. After hearing from Mr Ka, the Court refused the application. (The ruling is attached to this judgment as Appendix 1.) Thereafter Mr Daniel Mitchell presented his case in person.

[2] On 10 April 2003, the plaintiff commenced legal proceedings against Mr Terry Mitchell ("Terry") as first defendant and Ms Elizabeth Tapora as second defendant. An application for an interim injunction was filed by the plaintiff. As a result of the evidence which came to light in that application the injunction was withdrawn, Ms Tapora was dropped from the proceedings, and Mr Daniel Mitchell was joined as second defendant.

[3] The first defendant, Terry, filed a Confession of Claim and Affidavit with the High Court on 13 November 2003. The plaintiff thereafter proceeded against the second defendant only. The following evidence was adduced; (1) oral evidence given by the plaintiff on his own behalf, (2) oral evidence called by the second defendant including evidence by the second defendant, (3) affidavit evidence lodged in respect of the interim injunction application in April 2003.

[4] At the conclusion of the hearing, Ms McCarthy presented closing submissions on the facts and law, as did the second defendant. Because the relatively straightforward factual narrative gave rise to some difficult legal issues, the Court directed that each side would file post-hearing submissions. The plaintiff's post-hearing submissions were received on 28 November 2003. The second defendant's post-hearing submissions were received on 2 December 2003. These have been carefully considered by the Court in reaching its decision.

Factual Findings

[5] The proceedings relate to the purchase of a tractor by the plaintiff from Terry in November 2002. On the island of Aitutaki where the events took place, a tractor is a valuable possession. The transaction went horribly wrong due to the misconduct of

Terry in selling the tractor when, unknown to the plaintiff, his authority to do so had been terminated. In essence, the case involves a determination of which of the two parties, the plaintiff or the second defendant, should bear the loss occasioned by the misconduct of Terry, who has been characterised by his brother, the second defendant, as "idle and useless". The case is to be decided not on the basis of which of the plaintiff and the second defendant is entitled to the most sympathy, but instead on the basis of the application of settled principles of law to the largely undisputed factual narrative.

[6] I find the following facts have been established on the evidence before me. The plaintiff is a planter residing on Aitutaki. Terry was formerly resident on Aitutaki but is now living in New Zealand. The second defendant is Terry's brother. He was formerly a Police officer. He is now a company representative residing in New Zealand and is also a part-time Army Officer. At all material times he was in control of the tractor by virtue of a power of attorney given to him by his father on 24 June 2002.

[7] In 2002 the Mitchell family became embroiled in civil litigation in the Cook Islands High Court brought by a Cook Islands Development Bank in respect of Mr Mitchell Senior and Terry Mitchell, relating to the Mitchell family home on Aitutaki. It concluded in the High Court at Rarotonga on 26 November 2002. Financial resources were needed to find the fund the defence of the litigation and the second defendant took the lead in that respect. It was decided that the tractor should be sold to supply some of the necessary funds. In August 2002 Terry, who was in Aitutaki, was instructed by the second defendant to advertise the tractor for sale by television advertisement in Aitutaki. There is no doubt that the second defendant had authority, by virtue of the power of attorney, to give such instructions and also to terminate them. Terry did as requested and television advertisements appeared listing him as the person to contact in respect of the proposed sale. There is no doubt therefore that Terry was the authorised agent for the sale of the tractor. In late September 2002 the second defendant terminated the sale instructions. The precise reason for this decision is not clear. According to the second defendant, other members of the family had come to the assistance of the Mitchell family and enough

money had been found to fund the High Court litigation. However the second defendant also stated in evidence that:

> "Several offers had been received but no reasonable offer was forthcoming. I therefore told my brother that the tractor was now withdrawn from sale."

[8] It is not necessary to make a finding as to the true reason for the termination of the instructions for sale. The important undisputed point is that the plaintiff was never told of the withdrawal of these instructions.

[9] The plaintiff, in good faith, agreed to purchase the tractor for $5,000. A written agreement dated 5 November 2002, signed by the plaintiff and Terry, evidences the agreement. The relevant parts of the agreement read as follows:

> **"Re tractor Massey Fergusson**
>
> I Terry Mitchell the owner of the abovementioned vehicle would like to sell my Tractor at the cost of $5,000. I have also agreed a part payment of $3,000 deposit from Tuao Messine (the Buyer) under the following condition due to Damaged Parts of the Tractor and need repair at the total cost of $2,000. We the two Party have agreed. Until the Tractor is fully maintain[ed] the full Repayment of $2,000 will be Paid to Original Owner T. Mitchell to me the total cost of the tractor at $5,000. Sign: Terry Mitchell. Buyer: Tuao Messine." (underlining added)

[10] The sum of $3,000 was paid to Terry on 5 November 2002. A written receipt dated 5 November 2002 was signed by Terry in respect of the $3,000, being part payment for the tractor. Although the agreement is not appropriately worded in all respects the Court finds that the agreement required the purported owner (Terry Mitchell) to undertake the repairs to the tractor, following which the balance of $2,000 would become payable. The Court finds that this was by way of a collateral oral agreement which formed part of the overall oral and written agreement between the parties.

[11] The Court finds that the plaintiff purchased the tractor in good faith believing Terry to be the rightful owner and without any notice of any defect in Terry's title to the tractor.

[12] On or about 18 November 2002 Terry advised the plaintiff that he did not want to perform the contract and wanted to retain possession of the tractor. At this stage the tractor was in Terry's possession.

[13] When Terry informed the plaintiff that he did not want to perform the contract and instead wanted to retain possession of the tractor, the plaintiff demanded the return

of the $3,000. Terry acknowledged liability for the $3,000 but did not reimburse the funds either on 26 November 2002, or later on 12 December 2002, as had been agreed between Terry and the plaintiff. Terry has since admitted that he started to spend the money received from the plaintiff on himself and his family's personal needs as soon as it was received from the plaintiff on 5 November 2002. On 29 November 2002, the plaintiff laid a "Notice of Complaint for Fraudulent Act" at the Aitutaki Police Office in respect of Terry's failure to return the $3,000.

[14] On 26 November 2002 when the second defendant was in Rarotonga he received a telephone call from Senior Sergeant Vaiki of the Aitutaki Police regarding the fraudulent act complaint involving Terry. This was the first time the second defendant learned that his brother had sold the tractor. On the advice of Mr Joseph Ka, his agent, the second defendant confronted Terry who admitted he had sold the tractor and that he had received $3,000 from the plaintiff. Terry claimed, untruthfully, that the money was in safe keeping in Aitutaki. Terry and the second defendant were at this time in Rarotonga. The second defendant advised Terry to go back to Aitutaki and repay the $3,000. This was never done. On or about 19 or 20 December Terry left Aitutaki and now resides in New Zealand.

[15] Following Terry's departure from Aitutaki, the plaintiff again went to the Police. Sergeant Putu gave the plaintiff some informal advice, as a result of which he went to Terry's former residence on or about 1 January 2003 and towed the tractor to his own home.

[16] Mr Ka then advised the second defendant on the matter and attempted to solve the problem of Terry's wrongdoing. The second defendant agreed that Mr Ka could suggest to the plaintiff that he could either pay the $2,000 and keep the tractor, but release the Mitchell family from the repair obligation, or alternatively accept $3,000 to be offered by the second defendant and the sale would be cancelled. Mr Ka conveyed these proposals to the plaintiff. The offer for the return of the $3,000 was initially declined by the plaintiff on the basis of legal advice that he had legitimate title to the tractor. Following the plaintiff's assertion of title, Mr Ka said:

> "... to the respondent that I believed if it was true that his lawyer, the Chief of Police and his legal advisor have all advised him to steal (said in the Cook Islands Maori context) then they have all in my view, given him a bad advice and he could, like them, go to jail for it, because

the theft (in the Cook Islands Maori context) or rather the conversion of the tractor was a criminal offence."

[17] As to his reaction to Mr Ka's statement, the plaintiff said that he "was scared and did not want to go to jail", and only wanted his money back. At this point Mr Ka said he would bring the $3,000 with him to Rarotonga on 29 January 2003. In return he received the plaintiff's undertaking to return the tractor.

[18] Mr Ka then asked the plaintiff to send all relevant documents to New Zealand by facsimile. The plaintiff did so. Later, on 24 January 2003, the plaintiff called Mr Ka requesting that he be allowed to retain possession of the tractor until the money was received. Mr Ka agreed to this.

[19] Mr Ka wrote to the plaintiff later on 24 January 2003, reiterating the essence of the discussion. In this letter Mr Ka advised that he was acting on behalf of the second defendant and recording the view that Terry did not have authority to sell the tractor. Mr Ka further recorded that he knew that Terry had not repaid the $3,000. He said that the second defendant was very unhappy about the behaviour of his brother Terry who had lied to him in a number of respects. Mr Ka confirmed that he would be coming to Rarotonga on 30 January and planned to come to Aitutaki to return the plaintiff's money. Mr Ka concluded the letter by stating:

> "... it would be in your best interest to return the tractor back immediately to where you took it from. I do not agree with your lawyer Adam MacDonnell's advice to you to take (steal) the tractor. If he had indeed advised you to, then he had incited [advised] you to commit theft, which is a very serious criminal offence. You could go to jail for it. So please Bro take the tractor back..."

[20] On 25 January the second defendant handed over $3,000 in cash to Mr Ka in New Zealand on the basis that Mr Ka would travel to Rarotonga on 30 January and repay the $3,000 to the plaintiff. For medical reasons Mr Ka was delayed in going to Rarotonga and did not travel to Rarotonga until 6 February 2003. When Mr Ka reached Rarotonga he was unable to travel to Aitutaki. Therefore, with the approval of the second defendant, he sent the $3,000 on 6 February to his friend and cousin Mr Strickland Henry on Aitutaki to give to the plaintiff.

[21] The next development was that the second defendant decided, following the conversation on 24 January between Mr Ka and the plaintiff, to sell the tractor for $5,000 to Ms Elizabeth Tapora and Mr Ka. Ms Tapora is the partner of Mr Ka. The

second defendant claimed that he agreed to the same price of $5,000 because Mr Ka and Ms Tapora had done so much for his family in their recent troubles in return for no praise, recognition, or reward. This was in spite of the fact that the second defendant believed the tractor was worth $16,500 and claimed to have authorised his brother to sell it for no less than $10,500. When he was cross-examined as to why he sold the tractor to Ms Tapora and Mr Ka for the same price that he had earlier criticised his brother for selling, he gave two reasons: the first, other sudden family circumstances had arisen which again required funds, and secondly that Mr MacDonnell, solicitor of Brown Gibson Harvey, who had been counsel in the bank litigation, had advised the plaintiff that he was the legal owner of the tractor. While the reason for the sale may not be material to the legal position, the Court finds that the animosity between the Mitchell family and the law firm of Brown Gibson Harvey, because of Mr MacDonnell's role in the bank litigation, was so great that the reappearance of this firm advising the plaintiff led the second defendant to organise and approve of a sale at $5,000. On 26 January the purported sale to Ms Tapora and Mr Ka was completed and $5,000 paid to the second defendant which was put into his personal bank account.

[22] On 6 February 2003, Mr Strickland Henry offered $3,000 to the plaintiff on behalf of the second defendant. The plaintiff refused to take it on the basis that his lawyer had advised him not to do so since he had become the owner of a valuable tractor. Following this refusal, by letter dated 8 February 2003, Mr Ka lodged a complaint with the Aitutaki Police at the request of the second defendant. Mr Ka alleged theft and/or conversion had been committed by the plaintiff when he had initially taken the tractor. In addition he requested "Police protection" for the purported new owners when they sought to collect the tractor from the plaintiffs.

[23] On or about the third week of February, following advice from the police that it would be best if the plaintiff handed over the tractor, the tractor was taken to the Aitutaki police station. The Aitutaki Police had received an undated letter from Ms Elizabeth Tapora advising that she was the legal owner of the tractor and that it should be released to her agents. On or about 22 February the plaintiff was advised that the tractor had been sold to Elizabeth Tapora and released to her.

[24] After this, the plaintiff decided that there were "too many complications" and he had to accept he had lost possession of the tractor. He therefore went to Mr Strickland Henry in the late afternoon on Friday 7 March. He asked Mr Henry whether he still had the money. Mr Henry replied in the affirmative. The plaintiff said that he wished to uplift the $3,000 but since the bank did not take deposits in the late afternoon he did not wish to have the money in his possession over the weekend. He said he would come back the following Monday 10 March to pick up the $3,000. He said that he had been advised by Mr Norman George, a lawyer and MP from Rarotonga, that it would be best if he picked up the money. Mr Henry said the money would be available on Monday.

[25] The plaintiff called on Mr Strickland Henry on Monday 10 March to uplift the $3,000. Mr Henry refused to return it to him because he had been told by Mr Ka and/or the second defendant that it was no longer available for the plaintiff. In this respect the second defendant stated as follows:

> "In the absence of the Respondent and or the Police taking interest in the money available to them there in Aitutaki, I decided after 5 weeks to ask Strickland to send the money back to me here in Auckland."

[26] Once again the true reason for the second defendant's actions is not material. The key point is that the $3,000 was never returned. In case it is relevant the Court finds that the reason for the instructions to Mr Henry was the same as motivated the sale of the tractor to Mr Ka and Ms Tapora as discussed in paragraph 21 above.

The Nature of the Contract of 5 November 2002

[27] A central question in the case is whether the plaintiff acquired a valid title to the tractor under the agreement of 5 November. If he did so, it would follow that unless he voluntarily abandoned his ownership of the tractor thus acquired, the second defendant had no legal right to sell the tractor to Mr Ka and Ms Tapora and therefore no right to retain the proceeds of the latter sale.

[28] The true nature of the agreement is also pertinent. If it was a conditional sale only, and if, before the condition was satisfied, the plaintiff was made aware that Terry was not authorised to conclude the sale, then the plaintiff might be precluded from acquiring a valid title. He would not be a bona fide purchaser without notice of

Terry's lack of authority. Another important question is whether the agreement included terms implied by the Sale of Goods Act 1908 ("the Act").

[29] As to whether the contract entered into between the plaintiff and Terry constituted a complete contract for sale or a conditional agreement to sell the Court finds that the agreement of 5 November was a contract for sale, with further terms as to payment. The contract clearly states "I Terry Mitchell the owner of the above mentioned vehicle would like to sell my tractor at the cost of $5000." The agreement states that a deposit of $3,000 is to be paid. This deposit was duly paid and a receipt was signed by Terry. The remaining $2,000 was only due on the completion of repairs by Terry. Should this not occur, the sale was complete at $3,000. Oral testimony given by the parties evidences that this was the clear intention of the parties. Thus there was an absolute contract of sale with the essential conditions being payment by the plaintiff and delivery by the seller. There was a further warranty to repair the tractor, in return for the payment of an additional $2,000. A warranty is defined as an agreement with reference to goods which are then subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated.

[30] In accordance with section 19 of the Act, property in the tractor passed when it was so intended by the parties. The intention of the parties is to be ascertained by considering the terms of the contract, the conduct of the parties and the circumstances of the case. Where there is no express term in the contract as to when property will pass, section 20 provides the rules for ascertaining intention. In relevant part, the rules provide as follows:

> "Rule 1. Where there is an unconditional contract for the sale of specified goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed."

[31] For goods to be in a deliverable state means they must be in an adequate condition so that the buyer would be obliged to accept them if they were to be delivered. (*Gault on Commercial Law*, 1994, SG20.06) The cases indicate a central issue is whether or not the goods can be physically moved without further work required by the seller: See *Underwood v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 343; *Phillip Head & Sons Lt v Showfronts Ltd* [1970] 1 Lloyd's Rep 140. It is not

possible to suggest here that the mere warranty for further repairs, stated in the contract, rendered the tractor undeliverable. The ability of the plaintiff to later move the tractor from Terry's property to his own proves that the tractor was adequately deliverable.

[32] Having regard to the fact the contract created an unconditional sale, the receipt of the $3,000 by Terry Mitchell, and the finding that the undertaking of repairs was merely a collateral condition on which the further would $2,000 pass, the Court finds that title in the tractor passed on the date of the execution of the contract. Thus under Rule 1 property passed in the tractor at the time of the contract formation. It is therefore the case that there was a valid contract for sale, with property in the tractor passing to the plaintiff, on 5 November 2002.

The Pleadings of the Parties - Challenges to the Validity of the Contract

[33] The plaintiff pleaded against the first defendant that; (1) on 18 November 2002, the statement from Terry that he wished to retain possession of the tractor and not perform the contract, amounted to a breach of contract for which the plaintiff was entitled to sue for damages or specific performance, and (2) Terry held himself out to be the legal owner of the tractor when he had no authority to do so and on that basis the plaintiff was induced to enter into the contract for sale, and as a consequence suffered loss when the second defendant on-sold the tractor to Mr Ka and Ms Tapora. The plaintiff pleaded against the second defendant that the second defendant was unjustly enriched from the receipt of the $3,000 from the plaintiff and the $5,000 from Mr Ka and Ms Tapora, and as a result the plaintiff was entitled to claim possession of the tractor or $3,000 in damages.

[34] In reply the second defendant noted that the first two pleadings were matters pleaded against the first defendant, but in any event contended that no contract was formed between Terry and the Plaintiff due to: (1) a failure of the parties to reach *consensus ad idem*, (2) if there was an agreement then it was properly terminated on 18 November 2002, or (3) the agreement was properly terminated by the failure to perform the repairs as required by the contract. Alternatively, it was pleaded that Terry "had no right and authority from him [the second defendant] to purport himself to the plaintiff to be the owner or to (attempt) to sell his tractor to the

plaintiff'. In reply to the allegation of unjust enrichment, the second defendant pleaded that he had no benefit of the funds paid to the first defendant as there was no agency established. Further the second defendant contended that he was at all material times the true owner of the tractor and thus entitled to on-sell the tractor to Mr Ka and Ms Tapora.

Causes of Action Against the First Defendant – Breach of Contract

[35] While the matters pleaded against the first defendant do not require the consideration of the Court in light of Terry's Confession of Claim, the related defences raised by the second defendant require examination. The Court will first consider the defences raised in response to the allegation of breach of contract.

Defence 1: The failure of the parties to reach *consensus ad idem*

[36] The contention of the second defendant that the parties failed to reach *consensus ad idem* is easily disposed of. As noted above at paragraphs [27] to [32] the Court has found that an unconditional contract of sale was entered into between the plaintiff and Terry. It is clear from the terms of the contract and the conduct of the parties that they intended to, and in fact entered into, a valid contract for sale.

Defence 2: The contract was terminated on 18 November 2002

[37] The Court has found that parties formed a contract on 5 November 2002. A party cannot unilaterally terminate a legally binding contract. When Terry advised the plaintiff on 18 November 2002 that he no longer wished to continue the contract, the plaintiff did not agree to such a cancellation. The plaintiff made it clear that only in the event that the $3,000 paid on 5 November to Terry was returned, he would cancel the contract. However no such repayment was forthcoming. Terry left Rarotonga on 19 or 20 December 2002 without repaying the $3,000 in question. The plaintiff thereafter asserted his possessory right in the tractor by collecting it from the plaintiff's property on or about 1 January 2003. It is thus clear the plaintiff had not accepted any cancellation of the contract. On the contrary, by his actions he affirmed its continuation.

Defence 3: The contract was terminated by the failure to perform the repairs

[38] The failure of Terry to repair the tractor as required by the contract was not a breach of warranty that gave rise to an entitlement of either party to cancel the contract. The Court has found that the repair condition was not an essential term of the contract, but merely a condition for further payment. The failure to repair therefore simply had the result that the plaintiff was not required to pay the additional sum. A party is not entitled to cancel a contract for the sale of goods in respect of non-essential terms. It merely allows the disadvantaged party to sue for damages pursuant to section 54 of the Sale of Goods Act. Thus the submission that the contract was cancelled as a result of Terry's failure to complete the repairs is untenable.

[39] In any event, the second defendant is not entitled to rely on Terry's failure to do the repairs because of the principle of law that no person can rely on a state of affairs which he or a related person has himself brought about: See *NZ Shipping Co Ltd v Societe de Ateliers et Chanters de France* [1919] AC 1; *Scott v Rania* [1966] NZLR 527.

Defence 4: The question of agency

[40] It is an important question whether an agency still subsisted at the time of the sale as between the second defendant as principal and Terry as agent. If a valid agency was created between the defendants, then the second defendant becomes responsible for the acts undertaken by Terry as his agent. In other words "it is obvious that the principal is bound by every contract or disposition of property made by the agent with his authority": see Burrows, Finn & Todd *The Law of Contract in New Zealand* (8th ed, 1997) at 15.4.1. Section 60(2) of the Sale of Goods Act 1908 expressly highlights that agency law has been imported into the Act. It states:

> "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods."

[41] The second defendant has pleaded that no such valid agency was established, but this is untenable. It is clear that the second defendant had the right to give instructions regarding the sale of the tractor to Terry, pursuant to the Power of Attorney granted to him from his father. He gave such instructions when he

requested that Terry advertise the tractor for sale on television in Aitutaki, with Terry clearly identified as the contact person for the purposes of any sale. Thus an actual agency was established. However, the second defendant had the right to revoke that agency. It is accepted that the second defendant made such a revocation to Terry prior to the sale of the tractor on 5 November 2002. Thus there was no actual agency in place at the time the contract was entered into.

[42] Notwithstanding the absence of an agency at the time of sale, the question arises whether an ostensible authority was created, so that the plaintiff was led to believe, and rely on, a representation by the second defendant that Terry was in fact entitled to sell the tractor. In such a situation, the second defendant would be estopped from denying a valid contract on the basis that his words or conduct had represented an agency did in fact exist. Burrows, Finn & Todd states at 15.4.1:

> "It must be stressed that once "an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal" *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 at 209, per Lord Blackburn. Limitations in fact imposed upon the powers of the agent and ignored by the agent will not exonerate the principal from liability, unless, of course, their existence is known to the third party to the transaction."

[43] It is necessary for the plaintiff to establish that the second defendant created the inference that Terry was entitled to act on the second defendant's behalf in selling the tractor. The representation that Terry was entitled to make the sale must be made by the second defendant himself, and cannot be a representation made by Terry, as agent. *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 affirmed the principal that an agent's apparent authority to act on behalf of the principal must be created by the principal's representation, and not that of the agent. In addition, it is necessary that the plaintiff can prove that he relied on that representation when entering into the contract for sale. On this point, *Anson's Law of Contract* (28th ed, 2002) states at 668 that the doctrine of ostensible authority cannot apply where the third party does not know or believe that person to be an agent, for example if the existence of the principal is unknown to the third party. The final factor is that the agent's want of authority must be unknown to the plaintiff.

[44] The Court finds that when entering into the contract for sale, the plaintiff had approached Terry on the basis of the representation made in the advertisement. However, it is clear there was no reliance on the advertisement when the contract

was formed. The plaintiff went to great lengths to ensure that Terry was the true owner of the tractor, as is evidenced by the actual terms of the contract which contain an express representation as to Terry's ownership. Thus it is clear that the plaintiff had no knowledge of an ostensible agency, and in any event did not rely on it when entering into the contract for sale. The plaintiff as purchaser had no knowledge of the interest of the second defendant in the transaction. Accordingly, the Court finds that the second defendant did not cloak Terry with ostensible authority to contract to sell the tractor.

[45] The resultant position therefore is that a valid contract of sale had been entered into between Terry and the plaintiff. However, prima facie, due to the finding that no agency was established between the second defendant and Terry, the nemo dat quod non habet principle, that no seller passes better title than he or she holds, means that the plaintiff merely gains voidable title. Thus the second defendant at first blush would be entitled to assert a better title to the tractor than the plaintiff.

Sale of Goods Act 1908

[46] It then becomes necessary for the Court to examine whether the Sale of Goods Act 1908 implies any relevant terms into the contract for sale. Section 23 of the Act is pertinent. It states:

> **"23. Sale by person not the owner** – (1) Subject to the provisions of this Act, where goods are sold by a person which is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

[47] Section 23 only applies to contracts for sale, not agreements to sell. It reiterates the nemo dat quod non habet principle. However, section 23 also states that the true owner can be estopped from asserting his title on the basis that the owner has by words or conduct caused the buyer to believe that the seller is in fact the true owner. Thus the section also preserves the law of estoppel.

[48] The relevant question is therefore whether the second defendant, as the true owner of the goods at the time the tractor was sold, by his conduct should be precluded from asserting his title over that of the plaintiff. The reference to conduct in the section includes both actions and words. *Gault on Commercial Law* states at SG23-08:

> "An estoppel will arise by words wherever the true owner of the goods has clearly represented that some other person has the authority or power to give good title to the goods under a contract of sale: see *Henderson & Co v Williams* [1895] 1 QB 521. Even in the absence of express words, where the true owner of goods has acted in a way which clearly represents that a particular state of affairs exists, then he or she will not be able to deny the existence of that state of affairs when a third party has relied on that representation."

[49] Whether the true owner has acted innocently or in a blameworthy manner in making the representation that some other person is the true owner is not a relevant basis for determining whether an estoppel is found. It is necessary to look at the representation made by the owner and the conclusions that can be drawn reasonably and objectively from that conduct.

[50] Several factors could lead the reasonable person to the conclusion that Terry was the true owner of the tractor for the purposes of sale. The advertisement, undertaken pursuant to the actual authority of the second defendant, represented that Terry was the person to contact for the purposes of purchasing the tractor. Terry was in possession of the tractor. The reasonable person, contacting Terry with no knowledge of an agency relationship, could be under the belief that Terry was the true owner. On the facts, Terry perpetuated that belief by further representing to the plaintiff that he was in fact the true owner. This situation would not have arisen in the present circumstances if the advertisement had not taken place and Terry did not have possession of the tractor. Possession of the tractor alone would be insufficient to amount to a representation: see *Farquharson Bros v C King & Co Ltd* [1902] AC 325. However much more has been established in the instant case. The second defendant, having taken steps that would lead the reasonable person to believe Terry was the owner, was required to undertake similar steps to negate that belief when the instruction to sell was terminated. The steps required were not difficult – all that it needed was another television advertisement advising that the tractor was no longer for sale. The second defendant's poor appreciation of his brother's reliability ("idle and useless") heightened the need for such action. No such steps were undertaken. The Court therefore finds that the second defendant is by his conduct, estopped from denying the plaintiff's claim to title to the tractor, resulting from the contract of sale dated 5 November.

[51] In summary the Court finds that a valid contract for sale was entered into between the first defendant and the plaintiff. Title passed on the completion of the contract

pursuant to sections 19 and 20 of the Sale of Goods Act, and having regard to the intention of the parties. The title that passed was prima facie voidable, as Terry did not himself hold good title to the tractor. This was because Terry was no longer acting pursuant to the authority originally granted to him from the second defendant, as that agency had been revoked prior to the contract being entered into. No ostensible agency was established on the facts. However, the plaintiff gained good title pursuant to section 23 Sale of Goods Act, due to the conduct of the second defendant, namely his failure to take the reasonable and obvious step of advising the public that Terry no longer had authority to sell the tractor, estopping him from asserting his previous title to the goods.

Voluntary Abandonment of Rights

[52] The question remains whether the plaintiff by his conduct evinced an intention to voluntarily abandon his rights under the contract. In *Paal Wilson & Co v Partenreederei Hannah Blumenthal* [1983] 1 All ER 34 Lord Brandon stated the position of the law of abandonment at 47:

> "The concept of the implied abandonment of a contract as a result of the conduct of the parties to it is well established in law: see Chitty on Contracts (23rd edition, 1968) vol I, para 1231 and cases there cited. Where A seeks to prove that he and B have abandoned a contract in this way, there are two ways in which A can put his case. The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evinced towards A, has been such to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief. The first method involves actual abandonment by both A and B. The second method involves the creation by B of a situation in which he is estopped from asserting, as against A, that he, B, has not abandoned the contract (see *Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1919] 1 KB 78, [1918-19] All ER Rep 702)."

[53] Two distinct scenarios might give rise to the suggestion that the plaintiff contemplated abandoning the contract. The first arose pursuant to the plaintiff's agreement to accept $3,000 from Terry in return for the cancellation of the contract on 18 November. This did not result in a mutual agreement of abandonment as it was clear from the conduct of the parties that there was no intention to perform the terms. There was no intention on Terry's part to return the funds, or on the plaintiff's part to relinquish his rights to the original contract unless the $3,000 was received. The plaintiff consequently affirmed the contract by taking possession of the tractor, unequivocally confirming that there was no intention to abandon the contract.

[54] The second situation arose as a result of the phone conversation between the plaintiff and Mr Ka on 24 January, whereby the plaintiff, under duress, agreed to accept $3,000 for the tractor. The Court finds that the plaintiff only agreed to accept $3,000 offered as a result of the pressure applied by Mr Ka during the phone conversation of 26 January. Thus duress invalidated any consensus ad idem between the parties. When the plaintiff refused the $3,000 offered by Mr Strickland Henry on 8 February, he was electing to affirm the original contract of sale. Therefore it cannot be suggested that the plaintiff evinced an intention to abandon the contract.

[55] Thus the plaintiff has in all circumstances asserted his legal right to the tractor. Only on 7 March 2003 did he finally agree to a cancellation of the contract, but this was on the basis of the return of the $3,000 which he had then been offered.

Cause of Action Against the Second Defendant - Unjust Enrichment

[56] The plaintiff pleads that the $3,000 the second defendant received pursuant to the alleged agency relationship with Terry, and the $5,000 further received from the on-sale of the tractor to Mr Ka and Ms Tapora amount to an unjust enrichment. The second defendant submits that there was no unjust enrichment, first on the basis that no legal agency was established and thus he had no benefit of the $3,000 paid by the plaintiff to Terry. Secondly, the receipt of the $5,000 was in consideration of a legitimate sale, on the basis that the second defendant had retained valid title to the tractor.

[57] In *National Bank of New Zealand v Waitaki International Processing* [1999] 2 NZLR 211 at 215, Henry J confirmed the elements of unjust enrichment required to be established by the plaintiff, namely; enrichment of the defendant by the receipt of a benefit, which was at the expense of the plaintiff, in circumstances rendering it unjust that the enrichment be retained. Burrows, Finn & Todd describe restitution as "a series of rules enabling one person to recover money from another where the retention of money or some other benefit would unjustly enrich the other party at the expense of the first." This occurs inter alia where money has been had and received from a third party to the plaintiff's use or where the plaintiff has conferred a benefit on the defendant in circumstances where it is fair that it should be paid for.

[58] There has been debate over whether as a matter of pleading it is possible to plead a cause of action of unjust enrichment simpliciter, or if such a pleading is only relevant as a basis for seeking relief based on a cause of action which pleads [inter alia] a payment by mistake or monies had and received. Laurenson J addressed this question in *ASB Bank Ltd v Davidson* (2003) 7 NZBLC 103,927, stating at 103,940 that:

> "Based on my understanding of the views of Henry and Thomas JJ in *National Bank of New Zealand* my conclusion is that the point has been reached where realistically a cause of action said to be founded on unjust enrichment should be regarded as acceptable, providing it is related to an accepted cause of action and it meets the three criteria I have referred to."

[59] The three criteria are those listed in paragraph 57. As to the requirement that the unjust enrichment is related to an accepted cause of action the Court finds that the tort of conversion provides this requirement in the present case. The essential feature of the tort is the denial by the defendant of the possessory interest or title of the plaintiff in the goods. The defendant is said to convert the goods to his or her own use, thereby manifesting an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff. It is this conduct by the defendant which is inconsistent or incompatible with a recognition of the plaintiff's continuing rights in the goods which lies at the heart conversion: see Todd (ed), *The Law of Torts,* (2nd ed, 1997) at 11.3.1.

[60] On the basis of the factual findings in paragraphs [5]-[26] and the legal conclusions under the Sale of Goods Act at [46]-[51], conversion of the tractor has clearly occurred in this case. Conversion is an intentional wrong which means that the defendant must intend to do the act which constitutes the denial of the plaintiff's rights. Once intention is established, liability is generally strict and conversion may be committed with no moral fault or dishonest intention on the part of the defendant. On the facts of this case, even if the second defendant was been unaware that he was acting in violation of the plaintiff's rights and was acting in the honest belief that his actions were lawful, this would not alter this intention to deal with the tractor. The relevant intention that is required by conversion is to do the act itself, not to challenge the plaintiff's rights.

[61] The plaintiff had title to the tractor, and the right of possession, although actual physical possession of the tractor was held by the relatives of Ms Tapora. The

second defendant clearly intended to sell the tractor. This is the act that constitutes conversion. The fact that the second defendant may have had no intention to act illegally is of no consequence, as has already been noted. In *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 it was held that the respondent's act in handing over a handbag to a stranger who claimed it was a denial of the claimant's title. The critical issue was whether an act was done that was incompatible with the appellant's right of dominion as owner. Disposing of the bag to someone other than the true owner was such an act.

[62] Merely purporting to sell another's goods will not amount to conversion unless the plaintiff's right to possession or property is affected. However, where delivery of the goods has resulted from the defendant's acts, the owner's right to exercise his possessory rights over the goods is affected by the delivery itself: see *Edelstein v Schuler & Co* [1902] 2 KB 144 at 156:

> But if in addition to negotiating a sale the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorised sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner.

In this case, delivery of the goods occurred when the tractor was placed in the possession of Ms Tapora's agents. Thus conversion of the tractor is established on the facts.

[63] The comments of Laurenson J in *ASB Bank Ltd v Davidson,* noted above, make it clear that the plaintiff was entitled to plead unjust enrichment as a cause of action simpliciter. As to the elements of unjust enrichment, the benefit received by the defendant must be something objectively tangible. Burrows *The Law of Restitution,* (1993) states, at 10, "The receipt of money is the most obvious example of an incontrovertible benefit". This receipt must be at the expense of the plaintiff, and the retention of the benefit must be unjust. The unjust factor may be a wrong against the plaintiff, such as the tort of conversion. In *Chesworth v Farrar* [1967] 1 QB 407 the deceased landlord had wrongly converted property belonging to the tenant by selling it off. The Court awarded a restitutionary remedy: see Burrows *The Law of Restitution* (1993) at 383.

[64] The Court has considered each disposition of funds in turn. The matter of the $3,000 paid by the plaintiff to the Terry may be quickly disposed of in light of the finding that there was no agency relationship between Terry and the second defendant. Terry received the benefit of the payment. As Terry was not at the time of his purported sale to the plaintiff acting pursuant to an agency, the second defendant did not consequently receive any benefit of the funds as principal. Thus there is no question of unjust enrichment in relation to that payment.

[65] The second disposition was $5,000 paid from Mr Ka and Ms Tapora to the second defendant on 26 January 2003. The second defendant has admitted receipt of the funds. Thus the Court must examine whether this disposition was at the expense of the plaintiff, and if it was unjust for the second defendant to retain such funds. The Court has held that the plaintiff had at all times retained his property right in the tractor. He had obtained legitimate title to the tractor and at no stage abandoned his rights. As a result, the second defendant no longer had title to the tractor. The second defendant was aware of the plaintiff's interest in the tractor. This is evidenced by the second defendant's offer of $3,000 for the return of the tractor. Mr Ka, acting as the second defendant's agent, was similarly aware of the plaintiff's interest. Moreover, as the agent of the second defendant, Mr Ka said in evidence that he knew and understood the Sale of Goods Act, which clearly provides rights for the plaintiff in circumstances such as the present. Indeed, it was in light of such knowledge that Mr Ka advised the second defendant that he should offer $3,000 in return for the tractor.

[66] In summary, the second defendant interfered with the plaintiff's legitimate title to the tractor by on-selling it to a third party when he had no legal right to do so. The second defendant was enriched by receiving payment for the sale of goods while providing no consideration in return. The payment was in respect of the plaintiff's property and thus represented a loss to the plaintiff, which was acquired as a result of committing a wrong against the plaintiff. Thus the second defendant was unjustly enriched by the receipt of funds which should be the property of the plaintiff. The Court therefore finds that the plaintiff's claim of unjust enrichment has been established.

Result

[67] No judgment has been entered against the first defendant because the plaintiff has not made a written request to the Registrar under Rule 102(2) for the entry of judgment against him. As the Court understands it, the plaintiff has elected to pursue only the second defendant, at least at this stage. The plaintiff is entitled to recover one sum of $3,000 plus interest and costs only. It will therefore not be permissible for the plaintiff, if it successfully recovers $3,000 plus interest and costs from the second defendant, to then seek to enter judgment against the first defendant.

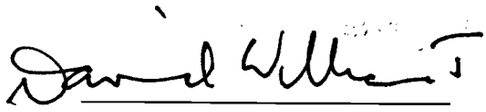
[68] On the basis of the finding of unjust enrichment referred to in paragraphs [56] – [66] the plaintiff is entitled to judgment in the sum of $3,000.00. Pursuant to the Judicature Act 1980-1981, the plaintiff is awarded interest on the said sum of $3,000 at 8% per annum from the period of 10 March 2003 until the date of payment of the principal sum of $3,000.00

[69] For the avoidance of doubt it should be recorded that the second defendant lodged no cross claim against the first defendant in these proceedings, nor did he seek to claim indemnity or contribution from the first defendant. Therefore the court has not had to rule on such matters.

Costs

[70] The plaintiff is entitled to recover all reasonable costs and disbursements from the unsuccessful second defendant. If the parties cannot agree the amount of costs and disbursements they must file memoranda on costs and disbursements within 21 days from the date of this judgment.

SIGNED at Auckland on 18 December 2003 at 4.30 pm



David Williams J