

CITATION: *Phuong v Weber & Nguyen* [2004] NTMC 002

PARTIES: NGUYEN THI PHUONG

v

JOE WEBER

and

TAI HUU NGUYEN

TITLE OF COURT: LOCAL COURT

JURISDICTION: LOCAL COURT ACT

FILE NO(s): 9908732

DELIVERED ON: 6 January 2004

DELIVERED AT: Darwin

HEARING DATE(s): 29 September 2003

DECISION OF: Mr V Luppino

**CATCHWORDS:**

Local Court Rules – Bailiffs – Application to restrain action against bailiffs – principals involved.

Local Court Rules 2.04, 3.03, 14.04, 14.05, 14.06, 14.07, 14.08, 14.09, 14.12, 44.03.  
Partnership Act 1997 s 27 (1)

**REPRESENTATION:**

*Counsel:*

Plaintiff:	Unrepresented
First Defendant:	Mr Cantrill
Applicant:	Mr Cantrill
Bailiff	Ms Leahy

*Solicitors:*

Plaintiff:	Brian Johns
Defendants:	T S Lee & Associates
Applicant:	T S Lee & Associates
Bailiff :	Elizabeth Leahy

Judgment category classification: B

Judgment ID number: [2004] NTMC 002

Number of paragraphs: 44

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 9908732

BETWEEN:

**NGUYEN THI PHUONG**  
Plaintiff

AND:

**JOE WEBER**  
First Defendant

and

**TAI HUU NGUYEN**  
Second Defendant

REASONS FOR DECISION

(Delivered 6 January 2003)

Mr V M Luppino SM:

1. These proceedings have an extensive history. The action commenced by a Statement of Claim on 19 April 1999 concerning a dispute about the rights to a certain mango processing machine. A decision was given in this Court on 2 June 2000. Nominal damages only were awarded (\$2.10). However, with interest and costs the amount subject to enforcement as at the commencement of the current application was \$56,950.00. Following the decision in this Court, an appeal to a single Judge of the Supreme Court resulted in the Local Court decision being overturned. That decision was reinstated by the Court of Appeal. I was also told that an application for leave to appeal to the High Court is pending.

2. Despite this being an interlocutory application many issues were raised and there was much evidence to sift through. The current application has its genesis in a warrant taken out by the plaintiff to enforce the judgment. On 22 August 2003 the first defendant applied to stay execution of that warrant and to obtain an order for return of the property seized by the bailiff in purported execution of that warrant. That application was dismissed on 27 August 2003 although certain issues in that application survive. That application remains relevant as background material to the matter currently before this Court. Indeed the affidavits relied on in that application were also relied on in the current application.
3. The current application is in the nature of interpleader protection sought by the bailiff. The bailiff, Hans Mitterhuber, has filed an application dated 27 August 2003 seeking an order pursuant to rule 14.05 of the Local Court Rules, to restrain the applicant in this application, Thong–Rit Weber (“TRW”), from commencing proceedings against him pursuant to a notice dated 21 August 2003 and given under rule 14.04(1) of the Local Court Rules.
4. An extract of the relevant Local Court Rules follow, namely.

**14.04 Notice of claim to bailiff**

- (1) Where a bailiff has taken or intends to take property in execution of a warrant, a person making a claim in respect of the property or the proceeds of sale of the property may give the bailiff written notice of the claim.
- (2) A notice of claim under subrule (1) is to –
  - (a) be given as soon as practicable after the claimant becomes aware that the bailiff has taken or intends to take the property;
  - (b) state the name and address for service of the claimant;
  - (c) identify each item of property that is, or the proceeds of sale that are, claimed; and

(d) state the grounds of the claim.

#### **14.05 Bailiff's application to stay or restrain proceeding**

(1) Where a claimant who is entitled to give notice under rule 14.04 does not do so within the time referred to in rule 14.04(2)(a), the bailiff may apply for an order to –

(a) restrain the claimant from commencing a proceeding in a court; or

(b) stay or restrain the continuance of a proceeding in a court by the claimant,

against the bailiff in respect of anything done by the bailiff in execution of the warrant after the time when the person might reasonably have given notice.

(2) An application under this rule is to be –

(a) made in the proceeding in which the warrant was issued; and

(b) served personally on the claimant.

#### **14.06 Notice to execution creditor**

(1) Not later than 7 days after receiving a notice of claim under rule 14.04, the bailiff must serve on the execution creditor –

(a) a copy of the notice; and

(b) a notice in accordance with Form 14A.

(2) Not later than 7 days after being served with the notices under subrule (1), the execution creditor may serve on the bailiff a written notice stating that the execution creditor –

(a) admits the claim;

(b) disputes the claim; or

(c) admits part and disputes part of the claim as specified in the notice.

#### **14.07 Consequences of admission of claim**

(1) Where an execution creditor admits a claim to property in dispute –

- (a) the execution creditor is not liable for any fees in respect of that property claimed by the bailiff under the warrant after the notice admitting the claim is served;
  - (b) the bailiff must –
    - (i) withdraw from possession of that property; or
    - (ii) if the property has been sold – pay the proceeds of the sale into the Court and notify the execution creditor and the claimant in writing of the payment into the Court; and
  - (c) the bailiff may apply for an order to –
    - (i) restrain the claimant from commencing a proceeding in a court; or
    - (ii) stay or restrain the continuance of a proceeding in a court by the claimant,
 

against the bailiff in respect of anything done by the bailiff in execution of the warrant.
- (2) As soon as practicable after receipt of the proceeds of sale under subrule (1)(b)(ii), a Registrar must pay out the proceeds to the claimant.

**14.08 Bailiff's application for interpleader order**

- (1) If an execution creditor –
- (a) does not serve a notice admitting the whole of a claim within the time specified in rule 14.06(2)(a); or
  - (b) serves a notice under rule 14.06(2)(b) or (c) disputing the claim or part of the claim,
- the bailiff may, if the claimant does not withdraw the claim, apply to the Court for an interpleader order.
- (2) An application under subrule (1) is to be –
- (a) made in the proceeding in which the warrant was issued;
- and
- (b) served on the execution creditor and each claimant.

#### **14.09 Interpleader orders**

On application for an interpleader order, the Court may –

- (a) where a proceeding in which the applicant is being sued in respect of any of the property in dispute is pending in the Court –
  - (i) order that a claimant be added as a defendant in the proceeding in addition to or in substitution for the applicant; or
  - (ii) order that the proceeding be stayed or dismissed;
- (b) order that a question between the claimants be stated and heard and direct which of the claimants is to be plaintiff and which defendant;
- (c) where a proceeding in which the applicant is sued in respect of any of the property in dispute is pending in another court – restrain the continuance of the proceeding;
- (d) order the applicant to transfer or dispose of any of the property in dispute or pay the proceeds from its sale into the Court or elsewhere;
- (e) where a claimant claims to be entitled by way of security for debt to any of the property in dispute – make orders for the sale of any of the property and for the application of the proceeds of sale;
- (f) summarily determine a question of fact or law arising on the application; or
- (g) make the orders or give the judgment it considers appropriate.

#### **14.12 Hearing of interpleader question**

On the hearing of an application for an interpleader order, the Court may finally determine all questions arising out of the application.

5. TRW, the applicant in the current proceedings is not a party to the substantive proceedings. Her application is on the basis that the bailiff has purported to execute the subject warrant against her goods and has also seized two items of property belonging to her.

6. The evidence before me largely consisted of affidavit material of significant quantity. Those affidavits comprised;
  1. Affidavits of the first defendant sworn 21 August 2003, 21 September 2003 and 29 September 2003;
  2. Affirmations of TRW affirmed 21 August 2003, 29 August 2003, 21 September 2003, and 29 September 2003
  3. Affidavit of Hans Mitterhuber sworn 1 September 2003;
  4. Affidavit of Grant Jonsson sworn 1 September 2003
  5. Affidavit of Mark Marchant sworn 22 September 2003
  6. Affidavit of Darren James Parker sworn 22 September 2003.
7. Much of the affidavit content was on peripheral matters which might be relevant to issues concerning the exercise of my discretion, particularly in relation to costs. There was also much material of an argumentative nature in the affidavits. That is entirely inappropriate and the solicitors who prepared those affidavits need bear in mind that affidavits are for the purposes of putting evidence before the Court and not for making submissions through the deponents. In addition to the affidavit material, the first defendant and TRW both gave oral evidence and were both cross-examined. The oral evidence however was of limited utility relative to the body of the affidavit material. Very little was achieved in cross-examination of those witnesses.
8. The issues for decision in the current application are:-
  1. Whether TRW gave notice within the time prescribed as required by rule 14.04(1).
  2. If not, whether and what orders in favour of TRW should be made.

3. Who is the rightful owner of the items of property seized or impounded by the bailiff.
4. Whether the various items seized in purported execution of the warrant are “...personal property necessary for adequate living and continuation of work...” within the meaning of rule 44.03(1)(b) of the Local Court Rules.
9. The only application currently before the Court is the application by the bailiff made under rule 14.05 of the Local Court Rules. Mr Cantrill, counsel for the first defendant and the applicant, urged me to treat the application as one for an interpleader order with a view to resolving all issues outstanding between these parties. That was opposed by Ms Leahy. Parties are entitled to seek whatever orders they consider appropriate. It is not for another party, in this case TRW who incidentally has no right to seek an interpleader order, to request that an application before the Court should be broadened to encompass other orders in the way suggested on behalf of TRW. That should only occur with the consent of all parties and with the leave of the Court. Otherwise it is inappropriate. There may well be reasons why the bailiff has chosen only to seek the orders that he has. Moreover, I am entitled to assume that the evidence the parties have led has been led within the confines of the application before the Court. It is entirely unsatisfactory to suggest that the Court should make orders which have not been sought by the only party entitled to seek those orders when in any event that party may have led further evidence had he elected to seek those orders. Also relevant is the fact that I have no evidence as to the attitude of the judgment creditor in terms of rule 14.06(2) i.e. whether or not the plaintiff concedes TRW’s claim to ownership.
10. I appreciate the need to bring some sort of finality to these proceedings. I acknowledge that treating the current application as also an application for interpleader orders would enable me to finally deal with application having

regard to rules 14.09 and 14.12. Tempting as that may be, it is inappropriate for the reasons stated. However, I do consider some ancillary type orders to be appropriate notwithstanding the absence of a specific application. For example, the rules empowering this Court to extend time are of general application and I feel can be the basis of an order in the current application even absent a specific application. I am confident that the parties have put before me all evidence relevant to that notwithstanding that a specific order has not been sought as I consider it to be a central issue and that all the parties were alert to its general application.

11. Bearing the foregoing in mind I do not consider that it is the role of this Court in the current application to finally resolve questions of ownership of the property in dispute. The role of this Court is to decide whether or not the applicant should be restrained from taking any further action against the bailiff. In addition it is not the role of this Court in the current application to decide the validity of the warrant or the validity of the procedure followed by the bailiff. However those matters are not entirely irrelevant as they may be relevant if the exercise of discretion is involved. That may also be relevant in relation to the question of costs. Separate proceedings or applications will need to be taken either by the TRW or by the parties to the substantive proceedings in relation to the subject property depending on the orders that I make.
12. Having regard to the foregoing, the evidence shows that the bailiff attended at premises known as Eva Valley Station on 2 May 2003. References in the first defendant's affidavit and in TRW's affirmation to that occurring on the date in April are obviously incorrect. The first defendant only was present on that occasion. The bailiff spoke to the first defendant. What was said and what occurred is in dispute. It is common ground however that the bailiff impounded three items of property by placing stickers on those items. Those items were a Kubota tractor, a Sylvan sprayer and a Suzuki motorcycle.

13. Some of the peripheral evidence before me was evidence from the bailiff in relation to enquiries he made with Batchelor police regarding ownership of firearms by the first defendant. The bailiff claimed some concern about this at one point but almost within the same breath he said that he was not concerned as he had known the first defendant for a long time. This evidence was entirely unsatisfactory, contradictory and irrelevant. I question the bailiff's motives in even raising that. Submissions questioning his objectivity were made based not only on this but also on the basis of a complaint he made to the Law Society against the solicitor acting for the first defendant and TRW.
14. In terms of the dispute about what was actually said on that occasion, the first defendant maintains that he told the bailiff on that day that the property was in fact that of TRW. The bailiff does not agree with that but agrees at least that the first defendant told him this in the course of a telephone conversation that occurred the next day. It is interesting to note that in response to that information, the bailiff says that he dictated to the first defendant the acknowledgment he would require to support that claim. Moreover and very importantly, the bailiff concedes that a handwritten note subsequently prepared by the first defendant was largely in compliance with that requirement. The bailiff's evidence is also that on 2 May 2003 he told the first defendant that he would give him seven days to see if he could raise the money. Importantly he did not say that the seven days was to enable the warrant to be challenged. In my view it would be quite a fair impression for the first defendant to have formed following those events that he had satisfied the bailiff's requirements up to that time.
15. In any event the first defendant says that not only did he then advise the bailiff of the claim to ownership of TRW, he says that he also produced relevant documentation. That is disputed by the bailiff. That is one of the core issues here given that the production of those documents may arguably amount to notice under rule 14.04. If not strictly notice, then it would at

least be evidence relevant to the granting of discretionary relief by this Court.

16. Despite the bailiff disputing production of those documents at that time, I think it is relatively unchallenged, and in any event I so find, that those documents were available at that time. Their existence were satisfactorily proved both on the evidence of the first defendant and of the evidence of TRW. Copies of the relevant documentation, which are summarised below, were annexed to the various affidavits. It is not the role of this Court to determine the validity of the transactions by which TRW acquired title to those goods. I say that because it is apparent that there may be issues regarding those transactions under bankruptcy legislation. That is not however something that this Court has jurisdiction over.
  
17. The documents referred to are firstly a Deed of Loan whereby the first defendant borrowed \$100,000 from TRW. That Deed, although dated 9 February 2001 was not stamped until 23 April 2003. The loan was made, according to the recital to that Deed, to enable the first defendant to have funds to meet the legal costs he incurred in the proceedings. The Deed provided that the loan was to be secured by way of equitable mortgage over the first defendant's share of the property at lot 85 Miles Road Eva Valley. Subsequently, that debt was in part satisfied by the transfer to TRW by the first defendant of his interest in certain plant and equipment which had until then been jointly owned by him and TRW. Those items of plant and equipment included the items impounded by the bailiff on 2 May 2003 as well as the forklift which the bailiff subsequently seized on 20 August 2003. The consideration for that transfer was \$15,520.50 which represented, as far as I can tell on the evidence, one half of the depreciated value ie. not the market value, of those items. The consideration was not physically paid but was a partial set off against the debt owing under the Deed of Loan. There is some evidence of the inadequacy of that consideration. Again, it is not for

this Court to make findings on that although I note that might likewise be grounds for challenge in another jurisdiction.

18. Documentary evidence to support the transaction in the form of evidence of value from the accountant engaged by the first defendant and TRW, and stamp duty documentation were produced. Stamp duty was paid on the transfer on the value stated and the stamp duty was paid contemporaneously with the payment of stamp duty on the Deed of Loan i.e., on 23 April 2001.
19. In one of the anomalies in this case, the bailiff said that on 2 May 2003 that he told the first defendant that he would give him 7 days to raise the money. He does not say that he said anything about the need to challenge the warrant or to give notice. The first defendant says that the conversation occurred on the 3 May 2003 by telephone and not on the 2 May and that in any event he claims that he was told “in seven days Thong will have to put an application to Court”. This is more consistent with the need to give notice although the rules do not set an arbitrary 7 day period. Hence the first defendant says something which goes against the interest of TRW and the bailiff says something occurred which goes against his own interest Moreover the first defendant says that he told this to TRW and that she thereupon consulted a solicitor. Although TRW does not precisely confirm the words used by the first defendant when relaying the advice of the bailiff, her actions are consistent with advice along those lines. She says that as a result of the stickers being placed on those items, she consulted Mr Lee of T S Lee & Associates for his advice. She claims to have been advised that the bailiff could not execute against her goods. She says that Mr Lee suggested a certain course of action. It seems that no advice was given to her relative to the procedures in rules 14.04 and 14.05. Clearly Mr Lee ought to have advised TRW in relation to that. I have no doubt that had he so advised her that she would have complied with that advice as she acted in accordance with the advice that she received.

20. In her affirmation, in addition to confirming the matters raised by the first defendant in his affidavits, TRW also provided documentary evidence of her ownership by way of purchase of the Suzuki motorcycle. She had attempted to provide the receipt to the bailiff on 20 August 2003 but was unable to locate it then. The bailiff acknowledges that had proof of purchase then been provided, he would not then have seized that motorcycle. Being unable to locate that receipt, TRW thereupon obtained documentary evidence from the supplier of the motorcycle. It is clear from the further documentary evidence produced that TRW was telling the truth when she claimed to have a receipt. Although this confirmed her purchase of the motorcycle, other evidence also suggests that this might be subject to challenge in that there is some suggestion that the funds for that purchase were provided by the first defendant. The evidence was somewhat inconsistent as at another point, evidence is given that the motorcycle was in fact purchased by the first defendant and given to TRW as a gift. That apparently does not appear to be correct given the documentary evidence produced (letter from Motorcycle Territory dated 11 July 2003 being annexure G to the affirmation of TRW made 21 August 2003). That the events occurred a considerable time ago may well be a bar to such any challenge to that transaction.
21. TRW also deposed to being aware of the bailiff's purported seizure on the first three items namely the tractor, the sprayer, and the motorcycle on 16 April 2003. As I said above, this must be erroneous. It is clear however that she first became aware of the purported execution on the forklift on 20 August 2003. The bailiff seems to concede this in his affidavit, refer paragraph 20 of his affidavit sworn 1 September 2003. This I think is also very important given that there can be no argument that a notice pursuant to rule 14.04(1) was given the following day.
22. TRW also deposed to the use of the equipment in the mango production operation she conducts. This is relevant to the issue of whether in any event the bailiff is entitled to execute on those items on the basis that they are

“...personal property necessary for adequate living and continuation of work...” within the meaning of rule 44.03(1)(b) of the Local Court Rules.

23. In summary therefore the position is that TRW makes a claim to ownership of the goods and provides some prima facie evidence to support that claim. Moreover when she first became aware of the purported execution, either on 2 or 3 May 2003, she sought advice from Mr Lee and acted in accordance with that advice. Regrettably that advice did not go as far as to take steps pursuant to rule 14.04 of the Local Court Rules. That may well found a cause of action against Mr Lee. Although that is a factor which can be taken into account in deciding whether discretionary relief should be granted, it is not in itself a basis for denying discretionary relief.
24. The events that occurred on 20 August 2003 brought matters to a head. On that date the bailiff attended to seize the goods which he had previously impounded together with the forklift. The forklift was not one of the items upon which a sticker was placed on the occasion of 2 May 2003. Through the stealth of the first defendant, the bailiff was unable to seize the tractor and the sprayer. He however did seize the Suzuki motorcycle and the forklift.
25. Thereupon the applicant immediately consulted Mr Lee and this time by letter dated 21 August 2003 delivered to the bailiff by facsimile transmission, notice was given in accordance with rule 14.04(1). That notice covers the forklift as well as the three items upon which a sticker had earlier been placed.
26. There is no evidence to suggest that TRW was aware that the bailiff intended to take forklift prior to 20 August 2003. This is relevant for the purposes of rule 14.04(2)(a) of the Local Court Rules. Moreover documentary evidence of prima facie ownership on the part of TRW has been produced. Importantly the bailiff confirms that had a receipt for purchase been produced on that occasion, he would have not seized the

motorcycle. Moreover, I have no doubt that the receipt existed but was unavailable at the time. The notice validly operates within the prescribed time limits in relation to the Suzuki motorcycle at the very least.

27. In relation to the other items, the preliminary question is when was it that TRW became aware of the bailiff's intention to take those items of property. It is undisputed that this occurred at the latest on 3 May 2003. To determine whether any act that TRW has done since that time complies with rule 14.04, it is necessary to ascertain what is required for compliance with that rule. In summary, rule 14.04 required TRW:-
  1. To give the bailiff written notice of claim;
  2. To give that notice as soon as practicable after she became aware of the bailiff's intention;
  3. To state in that notice her name and address for service;
  4. To identify in that notice each item of property that it claimed;
  5. To state the grounds of the claim.
28. Importantly written notice is required and on my interpretation of the rule, the matters in sub-paragraphs 2, 3, 4 and 5 of the preceding paragraph must also be in writing.
29. Having regard to the foregoing I now turn to consider whether any of the events occurring subsequent to 2 May 2000 can be evidence of compliance with rule 14.04 by TRW. Mr Cantrill asked me to find that the documentation which TRW and the first defendant claim to have produced to the bailiff subsequent to 2 May 2003 were in fact produced and do in fact comply rule 14.04.
30. Notwithstanding that the bailiff was not cross-examined on this issue I am prepared to at least find that those documents were produced. I think that it

is inconceivable that the documents then apparently being available and that the first defendant protested the ownership of those items to the bailiff with sufficient contemporaneity, that the first defendant would not have shown those documents to the bailiff. The first defendant, by writing out the acknowledgment dictated by the bailiff showed a willingness to satisfy the requirements of the bailiff at that point and it is a small step to conclude from that that he produced the documents which were apparently available.

31. Ms Leahy in her submissions relied heavily on the failure to put TRW's and the first defendant's version to the bailiff in the form of oral evidence. What his answer would have been to that line of questioning is clear from his affidavit. The finding I am prepared to make is based on the most favourable view of the evidence from the bailiff's point of view. Cross-examination of the bailiff could not have been helpful to the bailiff's cause given the considerable and significant questionable facets of the bailiff's evidence. I refer there to raising unnecessarily an apparent concern about the use of firearms by the first defendant despite claiming almost immediately after raising that issue with Batchelor police that he was not concerned about that given his knowledge of the first defendant. Furthermore despite his rather relatively infrequent visits to the premises of the first defendant and TRW for enforcement purposes, his action of making a complaint to the Law Society about Mr Lee is rather extraordinary in the overall scheme of things. I was also unimpressed by the extent of the evidence he was prepared to produce by way of hearsay in an apparent attempt to support his claim of an assault upon him by the first defendant. Although he did not say that he fell to the ground, he took the opportunity to point out that on that occasion other people subsequently commented on the dirty state of his clothes. That is inconsistent with his evidence about the assault in any event as he did not say that he fell to the ground. Accordingly I find that the documents referred to in the affidavits of the first defendant and of TRW were in fact produced to the bailiff.

32. I am of the view that no form of notice is required by rule 14.04. That rule only stipulates the requirements of the content of the notice. However, I do not consider that the documents taken as a whole can be taken as compliance with that rule other than the letter dated 21 August 2003 despatched by Mr Lee to the bailiff by facsimile transmission. That however is more than three months after the event in relation to all the items other than the forklift. That cannot be said to be as soon as practicable within the meaning of rule 14.04(2)(a).
33. However I have some discretion in relation to the matter. The court has a general power to extend time. The relevant rules are as follows:

**2.04           Dispensing with compliance**

The Court may dispense with compliance with a requirement of these rules either before or after the time for compliance arises.

**3.03           Extending or reducing time**

- (1) The Court may extend or reduce a time fixed by these rules or fixed, extended or reduced by an order.
- (2) Subject to rule 7.06, the Court may extend a time under subrule (1) before or after the time expires whether or not an application for the extension is made before the time expires.

34. On my interpretation of rule 3.03, I have a discretion to enable me to extend the time for the providing of the notice pursuant to rule 14.04(1) until 21 August 2003 when TS Lee & Associates provided notice purportedly pursuant to that rule. Factors relevant to the exercise of my discretion are:-
1. Although the stickers were affixed on 2 May 2003, the actual seizure only occurred on 20 August 2003;
  2. That in any event a valid notice of claim has been given for one of the items seized, namely the forklift, and all of the items seized were seized at the same time;

3. The first defendant provided to the bailiff a document as directed by the bailiff on 3 May 2003 and then had reason to believe that he had satisfied the bailiff's requirements;
  4. Documents in support of TRW's claim were provided to the bailiff at a very early stage and although those documents did not comply with rule 14.04(1), at the very least the bailiff was then on notice of the existence and nature of TRW's claim;
  5. The bailiff acknowledged that had TRW produced the receipt for the purchase of the Suzuki motorcycle that he would not have seized that item;
  6. That in any event a valid notice of claim has been given for one of the items seized namely the forklift;
  7. That promptly upon being made aware of the bailiff's actions on 2 May 2003, TRW sought and acted upon legal advice received by her; had she been given advice in relation to the requirement of notice under rule 14.04(1), she would have given the required notice.
  8. There is no evidence of prejudice, other than by delay, to the bailiff or the judgment creditor. The matters in sub-paragraphs 1 and 2 above seem to highlight that.
35. The following factors would impact negatively on the exercise of a discretion namely:-
1. The possibility that the transactions by which TRW acquired the items, other than the Suzuki motorcycle, may be voidable;
  2. The possibility that the circumstances of the acquisition by TRW of the Suzuki motorcycle may make her title voidable;

3. The possibility that TRW, if not favoured by the exercise of my discretion, may have an action in negligence against her solicitor;
  4. The actions taken by the first defendant on 20 August 2003 to prevent the bailiff seizing the tractor and sprayer.
36. Weighing up all these factors and being of the view that it is not the role of this Court, for the reasons discussed above, to finally determine the question of ownership of the subject items, it is appropriate that the extension of time referred to above should be given to TRW.
37. I so order. That has the effect of retrospectively barring the bailiff's current application given that is made under rule 14.05 and that is predicated on the basis that notice is not given. In any event rule 14.05 only enables a bailiff to apply for a restraining order. The rules do not automatically entitle the bailiff to such an order in default of notice under rule 14.04(1). It remains in any event a matter for the exercise of my discretion as to whether such an order would have been made on the current application. The same matters which I considered relevant to the exercise of the discretion to extend time have equal application in terms of the discretion to grant or refuse the current order. I would in any event have exercised my discretion to decline the bailiff's application.
38. That leaves a number of peripheral matters to deal with. In my view the procedure to be followed from here is for the bailiff to seek an interpleader order pursuant to rule 14.08 (subject of course to the actions of the execution creditor pursuant to rule 14.06). The powers then available to the Court pursuant to rule 14.09 will allow, in my view, determination of the issue of ownership of the subject property. Separate proceedings in another jurisdiction will be required if there is a finding that those transactions are voidable.

39. My view that this Court cannot, in the current application, determine ownership rights effectively means that the issue as to whether the goods in question are “...personal property necessary for adequate living and continuation of work...” within rule 44.03(1 (b) must be deferred to another day. Clearly the bailiff’s right to seize the goods depends on a finding that the property is in fact the property of the first defendant and not any other persons.
40. A submission was also made in relation to section 27(1) of the Partnership Act. That section provides that execution may not issue against partnership property unless the judgment is against the firm. If there is a partnership in this case then the partnership is between TRW and the first defendant. TRW is not a party to the substantive proceedings, nor is the firm named as a party. It therefore seems obvious that execution could not be levied against partnership property absent an appropriate order from the Supreme Court. Although this issue was raised in the submissions it was not adequately ventilated before me in any event. I do not consider that the issue was clearly raised and that the evidence as to whether the goods are partnership property is not sufficient to enable a finding to be made.
41. Mr Cantrill also submitted that I should direct that the plaintiff immediately return the seized items. As I have stated above this application is to determine only whether TRW should be restrained from commencing proceedings against the bailiff. To that extent, I am of the view that it is neither the role of this Court nor is it appropriate to make a finding in terms of ownership. The effect of the orders that I make is to enable all those other issues to be ventilated in other proceedings or in another application. As I have said, I think a bailiff’s interpleader application is the appropriate procedure to follow hereafter. I note that on such an application the Court has specific powers to make relevant orders. Alternatively, and failing the bailiff seeking an interpleader order, it is open for TRW to take separate

proceedings in relation to trespass to goods and or conversion and no doubt to seek a declaration as part of those proceedings.

42. The last ancillary issue is the question of costs. When Mr Trigg dismissed the application to stay execution on 27 August 2003, the costs of that application were reserved and have continued to be reserved to date. Given the issues involved in that and the possibility of an application by the plaintiff's solicitor for costs personally against Mr Lee, it may be appropriate that the matter be referred back to Mr Trigg for determination of that issue. In terms of the costs of the current application, the applicant has received a favourable exercise of a discretion to redress her failure to strictly comply with the requirements of the Rules. The bailiff's actions have been in accordance with his rights consequent upon that failure. In my view, and subject to hearing the parties further on this issue, an appropriate order should be that each party bears their own costs.

43. In summary therefore:-

1. I dismiss the bailiff's application for an order pursuant to rule 14.05 of the Local Court Rules.
2. I extend the time for TRW to give notice pursuant to rule 14.04(1) to 21 August 2003;

44. I shall hear the parties as to the costs of the current application and of the application to stay execution filed 22 August 2003.

Dated this 6<sup>th</sup> day of January 2004.

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**V M LUPPINO**  
STIPENDIARY MAGISTRATE