(11)

IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0065 OF2006S
(High Court Civil Action No. 145 of 2002L)

BETWEEN:

NATIVE LAND TRUST BOARD

Appellant

AND:

GOVIND PRASAD

Respondent

Coram: Scutt, JA
Datt, JA
Powell, JA

Hearing: Tuesday, 8 April 2008, Suva

Counsel: K Vuataki]
N Tuifagalele] for the Appellant

D Gordon] for the Respondent

Date of Judgment: Wednesday, 16 April 2008, Suva

JUDGMENT OF THE COURT

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[1] The respondent was a cane grower and occupied land leased to him by the appellant Native Land Trust Board ("NLTB") pursuant to a 30 year lease expiring on 31 December 1999. He remained on the land thereafter with the knowledge and consent of the appellant with a view to renewing the lease.

[2] A new lease was, the trial judge found, registered but a copy was not made available to the respondent and in about June or July 2000 the head of the land owning unit, Ratu Sakiusa Makutu (the second defendant below), came onto the land and asked the respondent to pay him $5,000. The respondent refused and said that if any money was payable he would pay it to the NLTB.

[3] In August 2001 the Ratu and a number of men accompanying him made serious threats against the respondent and his family unless he vacated the land. The NLTB refused to give the respondent a copy of the lease and on 8 September 2001 the respondent was driven from the land.

[4] The respondent took proceedings as against the NLTB for alleged breach duty in refusing to provide him with a copy of the lease. No Defence was filed and default judgment was entered against both defendants on 15 July 2002. The default judgment adjudged *"that the defendants do pay to the plaintiff special and general damages, interest and costs to be assessed by a Single Judge."*

[5] On 9 June 2005 Singh J dismissed an application by the defendants to set aside that judgment. One of the matters Singh J took into account was that the argument run by the NLTB before him, that the respondent was a trespasser on native land, was at odds with its own admissions in the proposed Defence, namely that the respondent had a lease. When questioned by the judge counsel for the NTLB admitted that an Instrument of Tenancy had been registered in favour of the respondent but contended the NTLB had revoked it and given it to someone else.

[6] A hearing on damages was heard by Finnigan J on 16 March 2006. The second defendant did not appear. Finnigan J delivered his decision on 31 March 2006.

[7] The respondent sought damages of close to $2 million plus interest under multiple heads. Finnigan J:

- Awarded the sum of $250,000 in general damages of which sum the NLTB was to pay 33.3% ($83,325) and the second defendant the balance

- Ordered the second defendant to pay the plaintiff $10,000 as aggravated damages

- Ordered the second defendant to pay the plaintiff $25,000 as exemplary damages

- Ordered the first defendant to be liable for one third of the plaintiff's costs and the second defendant for two-thirds of those costs.

[8] There has been no appeal by the second defendant but by Notice of Appeal filed 27 June 2006 the NLTB seeks to set aside each of the orders made against it on three grounds.

[9] The first ground is that the trial judge *"erred in law in assessing general damages to purchase another lease and establish another farm with no evidence of cost of these two items"*.

[10] The second ground is that the trial judge *"erred in law in awarding damages to be paid by the appellant because it told the respondent to find himself a lawyer on his complaint against second defendant landowner and otherwise refusing to take action"*.

[11] The third ground is that the trial judge *"erred in law in awarding a portion of aggravated and exemplary damages to be paid by the appellant in circumstances where it had told the respondent to get a lawyer to protect his interest and he would not get Instrument of Tenancy because he had not paid sums required under his letter of offer."*

Ground 3 of the Appeal

[12] Ground 3 has been withdrawn. No aggravated or exemplary damages were awarded against the appellant, only against the second defendant below.

Ground 2 of the Appeal

[13] The appellant is not permitted to argue Ground 2. It is in effect an appeal from the judgment of Singh J who refused the NLTB's application to set aside the default judgment on liability.

[14] The appellant says, citing ***Disciplinary Services Commission v Naivelli*** *(2003) FJSC 14,* that in an appeal from a final judgment it is open to an appellant to seek to question any interlocutory or other order which was a step in the procedure leading up to the final judgment.

[15] That may be the case but the proper course for the appellant was to seek leave to appeal the judgment of Singh J within 21 days of that decision. This Court will not entertain any submissions which challenge liability. To do so would require the matter to be remitted to the High Court for a contested hearing, and would render the ordinary appeal process nugatory.

[16] At the 16 March 2006 hearing the respondent gave evidence, inter alia, that he had paid rent for 2000 and 2001. He gave evidence that in early September 2001 *"I went to the NTLB for the lease. They refused to give it to me and said no lease is to be given to me. The NTLB ... said I should take them to Court. They say the lease is registered but I will not get it ...".*

[17] This evidence was not challenged in the cross-examination and the trial judge accepted it and this Court cannot go behind it

[18] At a contested hearing the appellant may have been able to lead evidence which, accepting the above facts, would have led the Court to find that in the circumstances there was no duty on the NLTB to provide the respondent with a copy of the lease. However that did not happen and this Court will not order a new trial to permit the appellant to adduce such evidence and mount such arguments.

[19] We note in passing the decision in ***Caparo Industries PIC v Dickman*** (1990) 2 WLR 605 at 617-618, where the court found that a particular statutory trustee did not owe a duty of care to its tenants to ensure landowners would abide by the law or be held responsible for unlawful acts of the landowners.

[20] That case does not decide whether or not the NTLB has a duty to provide tenants with a copy of their lease, at least where one hasn't been provided already. It is not a matter, given the default judgment on liability, that this Court has to decide either.

Ground 1 of the Appeal

[21] The trial judge assessed general damages of $250,000 on the basis *"Primarily, that he (the respondent) has been deprived of his 30 year lease and with it the security of a family home for his whole extended family and an income for that family for the conceivable future"*.

[22] The trial judge found that as well the respondent was deprived of the opportunity to work, that his dignity and self-esteem have reduced and that his previous good health is now marred by a general debility which arises directly from his mental state caused by the loss of land, home, occupation and income.

[23] The respondent gave evidence of actual expenditure on the forfeited land and an estimate that the house he built on the land would cost $75,000 to $80,000 if built today. He gave evidence of the tonnage of unharvested sugarcane at the time of his

eviction. He gave evidence that his total 470 to 500 tonnes and that in 2001 the FSC paid farmers $60.79 per tonne.

[24] The trial judge found a lot of the claims made by the respondent amounted to a repetition and he did not award damages by performing any precise mathematical calculation. However he took the evidence into account and in paragraph 21 of his judgment assessed *"a sum which I am comfortable to say expresses in a general way my view of the financial and personal injury and loss suffered by the plaintiff in the unjustified eviction.* ***This sum is intended to enable him to purchase another lease and establish another farm and a home, but I have no evidence of what these things cost.*** *My assessment in general damages is $250,000."(emphasis added)*

[25] Precise evidence of the respondent's loss was never going to possible in this case and in cases such as this the court must do the best it can: ***Biggin & Co v Permanite Ltd*** *(1951) 1 KB 422*

[26] The highlighted sentence in paragraph 21 of the judgment is less than helpful. The measure of the plaintiff's loss is the value of the existing lease to him not the cost of "replacing" that lease. It is doubtful whether admissible evidence of a replacement lease could be obtained. It assumes that other land is the same and that land is available for lease and that the plaintiff is able to "establish" a farm on it. Such an exercise would be extremely difficult if not impossible, particularly bearing in mind that the existing farm was established over a 30 year period.

[27] If the trial judge had attempted to quantify the cost of purchasing another lease and establishing another farm and home on it, he would have made an appellable error. However the trial judge does not do this. In our opinion he is merely expressing a view that the damages he awards would enable the respondent to establish another farm, but he proceeds to assesses damages in a general way taking into account all the respondent's evidence including evidence of personal injury.

[28] There was ample evidence for the trial judge to draw upon in arriving at general damages of $250,000 including the value of the respondent's house and that the respondent and his family would be deprived of receiving income, in 2001 terms, of $30,000 per year for the 29 years the lease was still to run. This latter figure computes to $870,000 alone. These figures of course would then be discounted. The respondent was 62 years old, farming is uncertain and commodity prices unpredictable and the future is impossibly so, and of course the income figure must be discounted for costs of production.

[29] The trial judge ought to have pointed to the evidence of damage that he had before him with some particularity and he did not do so. However where a trial judge gives inadequate reasons for a decision, and where it is apparent that there is a perfectly rational explanation for the decision, an appeal court will draw the inference that this is what motivated the judge in reaching his decision: ***English v Emery Reinbold & Strick Ltd*** (2002) 3 All ER 385 at p395-6

[30] It seems to this Court that with the evidence he had before him, taking into account the loss of home and income alone, the trial judge was more than justified in awarding general damages of $250,000.

[31] The appellant takes the point that section 40 of the Agricultural Landlord and Tenant Act ("ALTA"), which applies to agricultural tenancies, provides that where a tenant has made improvements and seeks to obtain compensation from the landlord for such improvements, the tenant shall not be entitled to compensation unless he has served a notice on the landlord specifying the improvement within a month of the improvement being completed.

[32] This is not a case where the tenant seeks compensation for improvements. It is a case where he seeks damages from the NTLB for its alleged breach of duty and submitted as a part measure of his damages the value of some improvements.

[33] In any event the trial judge did not assess damages by adding up the value of improvements done, but instead, as set out above, took a general approach in awarding damages. For example as far as the general damages are attributable to the cost of a house, they are for the cost of building a new house not compensation for the expenditure on the old one.

[34] For avoidance of doubt the Court stresses that finding of liability in these proceedings was a result of the respondent obtaining default judgment on liability. Neither the court below nor this Court has made an examination of the duties of the NLTB, if any, with respect to tenants of leased land. This case is not authority for the proposition that the NLTB must provide tenants with copies of their leases.

[35] The appeal should be dismissed, the appellant pay cost of this appeal if not agreed than taxed.

Scutt, JA

FIJI COURT OF APPEAL

Datt, JA

Powell, JA

Solicitors:

Vuataki Qoro, Lautoka for the Appellant
Gordon and Company, Lautoka for the Respondent

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