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

CIVIL APPEAL NO. ABU0040 OF 2006S
(High Court Civil Action No. HBC0344 of 1998)

BETWEEN:

CREDIT CORPORATION (FIJI) LIMITED

Appellant

AND:

WASAL KHAN

First Respondent

MOHD NASIR KHAN

Second Respondent

Coram: Devendra Pathik, JA
Izaz Khan, JA
Andrew Bruce, JA

Hearing: Friday, 27 June 2008, Suva

Counsel: V. Kapadia for the Appellant
M. Gordon for the First Respondent

Date of Judgment: Tuesday, 8th July 2008, Suva

JUDGMENT OF THE COURT

---

1 This is an appeal from a judgment of Finnigan J sitting in the High Court of Fiji at Lautoka. Judgment was delivered on 22 March 2006.

2 The judge ordered that the Appellant which was originally the 2nd Defendant (Credit Corporation (Fiji) Ltd) at trial pay to the plaintiff damages (including exemplary

damages) interest and costs. The Plaintiff was Wasal Khan. The 2nd Respondent to the appeal, who was in the action as a third party under a Third Party Notice, took no part in the appeal.

3 The action concerned the seizure by the Credit Corporation of a Caterpillar D6D bulldozer.

Ground 1 - ownership of the bulldozer

4 One of the issues that the learned trial judge had to determine was the ownership of the bulldozer. The judge found in favour of the Plaintiff. While, originally, this was a ground of appeal before the Court of Appeal, counsel for the Credit Corporation told the court that he was "not pressing" this ground of appeal. When pressed as to the meaning of "not pressing", it became apparent that the appeal on this ground would not be argued while not formally abandoned. After a careful review of the judgment of the learned trial judge, it is plain that that his determination as to the ownership of the bulldozer was purely a matter of fact and the "non pressing" of this ground of appeal was a recognition of the difficulties that the Appellant would have faced in attempting to overturn this aspect of the judgment.

5 In any event, the Court has reviewed the findings of the learned judge in relation to the ground of appeal that challenged his findings that Wasal Khan was the owner of the bulldozer. With respect, those findings are unassailable and this ground of appeal is dismissed.

Facts necessary to resolve the remaining issues

6 In the light of the position with respect to the approach we have adopted to the ground of appeal challenging the finding of the learned judge that Wasal Khan was the owner of the bulldozer, only a brief summary of the facts is necessary for the purpose of this judgment. What is critical to note from the judgment of the learned trial judge is not only that he found that Wasal Khan was the owner, it was critical to note who by reason of this was *not* the owner. For reasons which will shortly appear,

it is important to note that the judge found that Nasir Khan was not the owner of the bulldozer.

7 It is no understatement to say that the ownership arrangements with respect to this bulldozer were somewhat fluid.

8 As early as August 1982, the bulldozer appears to have been the subject of a Bill of Sale on purchase by Nasir Khan to Carpenters. However, by 22 October 1996, the Credit Corporation entered into an asset purchase agreement with Nasir Khan in respect of this bulldozer. $70,000 was loaned to Nasir Khan in this transaction. The obligations to repay the loan appear not to have been met to the satisfaction of the Credit Corporation and efforts were undertaken by the Credit Corporation to take possession of the bulldozer from August 1998. Eventually, the bulldozer was seized on 28 October 1998 by a bailiff employed by the Credit Corporation. On 20 November 1998 Wasal Khan and one Arsala Khan, trading as Khan's Bulldozing Works instituted proceedings in the High Court for recovery of the bulldozer. The basis for the claim was that, in truth, Wasal Khan was the owner of the bulldozer.

9 On 23 December 1998 the High Court ordered that the Credit Corporation were to forthwith and immediately return the bulldozer into the possession and custody of Wasal Khan. The order was by consent.

10 The evidence was that at about 10 p.m. on 23 December 1998, the bailiff in the employ of the Credit Corporation attended at the address of Wasal Khan with the bulldozer (literally) in tow and sought to return it. It would appear that Wasal Khan refused to accept the bulldozer stating, apparently, that due to the lateness of the hour, he was unable to inspect the bulldozer. Thereupon the bulldozer was taken to the security yard of an agent of the credit Corporation.

11 The evidence was that about a week later, Wasal Khan inspected the bulldozer at the yard but took no action to take possession of it. There was an unedifying exchange of correspondence between those acting for Wasal Khan and the Credit Corporation which came to nothing. It would appear that nobody did anything much to either

take possession of the bulldozer or to bring about its return for about 7 1/2 months. It would appear that on 6 August 1999 the bulldozer was finally returned.

12 In the period of inactivity between 23 December 1998 and 6 August 1999, judgment in default of defence was obtained by Wasal Khan. Immediately thereafter the Credit Corporation sought to set aside the default judgment. On 17 February 2000, Gates J (as he then was) heard the application to set aside as the default judgment. Regrettably, Gates J did not give his ruling until 25 February 2005. The action then proceeded to trial in September 2005. On 22 March 2006 Finnigan J delivered the judgment of the High Court and it is that judgment against which the Credit Corporation now appeals.

Grounds 3 and 4: special damages and general damages

13 The principal complaint of the Appellant in relation to the assessment of general damages was that, despite the fact that there was no claim for special damages pleaded by Wasal Khan, a significant proportion of the award of general damages was, in reality, special damages. It is well established in cases such as ***Monk v Redwing Aircraft Co Ltd*** [1942] 1 KB 182; ***Haywood & Another v Pullinger & Partners Ltd*** [1950] 1 All ER 581; and ***British Transport Commission v Gourley*** [1956] AC 185 that in order to found a claim for special damages, the claim must be specially pleaded. Not the least basis for this rule is fairness: to ensure that the party against whom such damages are claimed has proper and particularised notice of the claim.

14 For this purpose, general damages consists in all items of loss which the Plaintiff is not required to specify in his pleadings in order to permit proof and recovery in respect of them at the trial. Special damage consists in all items which must be specified by him before they may be proved and recovery found. The basic test of whether damages are general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence or the specific amount of the claim that which he will be confronted with at trial. In this regard, in ***Ratcliffe v Evans*** [1892] 2 QB 524, 528, Bowen LJ held that special damage "means

the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the Plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial." In the court below, Finnigan J followed a decision in ***Sharma v Dominion Wire & Cables Ltd*** HBC 352 of 1998. He cited in particular from a passage in that judgment which in turn quoted from McGregor on Damages, 17th edition, paragraph 43-010. One part of the passage quoted was: "where the precise amount of a particular claim of damages becomes clear before the trial, either because it has already occurred and so crystallised or because it can be measured with complete accuracy, its exact loss must be a pleaded as special damage."

15 It does not appear that there was any attempt at trial to apply to amend the proceedings to include a claim in relation to special damages.

16 There appears to have been an argument at trial as to whether the pleadings could be construed as including a claim for special damages. The judge held "I am not prepared to construct out of the pleadings a recognizable claim for any particular special damages as invited by [counsel for the plaintiff]." (Record, page 21) the judge concluded: "There is no basis for any award in special damages."

17 The complaint of the Appellant is that having correctly stated the position the judge went on to award general damages even though they were, in reality, special damages. They point, in particular, to passage where the judge said: "the Plaintiffs want to be compensated for income lost by the unlawful seizure and claimed incapacitation of the machine by the Defendants. For this they need to prove by evidence the amount that they actually lost or might reasonably be expected to have lost and to prove that the amount is due to them after allowing full credit for any mitigation of the loss that was within their power." (Record, page 24) Later on, the judge observed: "I now come to consider what I should allow in general damages. It seems to me that some of these sums I have calculated could have been claimed as special damages because they are within the definition in McGregor [on Damages]."

(Record, page 39) The judge said that he recognized that he needed to proceed with caution.

18 In this context, the judge noted ***Ilkiw v Samuels & Others*** [1963] 2 All ER 879. In that case, special damages were actually pleaded but they were limited to a very small sum. What the pleadings in that case as to special damages did not take account of was a very large claim for loss of earnings pre-trial. It was recognized in the Court of Appeal that the loss of earnings which should have been pleaded by way of special damage could not be treated as general damages. In his judgment in the present case, the learned trial judge quoted a passage from the judgment in ***Ilkiw v Samuels & Others*** of Willmer LJ as follows:

> If I thought that, in coming into that result, the judge was doing no more than taking into consideration this man's overall loss of earning capacity, past, present and future, as merely one factor to be considered amongst the other factors in awarding a global sum by way of general damages, I should certainly have hesitated before saying we ought to interfere with that approach.

19 The problem is that in ***Ilkiw v Samuels & Others*** (above), Willmer LJ (with the concurrence of Dankwerts & Diplock LJJ) went on beyond the passage quoted and held that in reality the general damages award in that case was indeed special damages disguised as general damages. The appeal in ***Ilkiw v Samuels & Others*** was allowed on that basis. ***Ilkiw v Samuels & Others*** is a rigorous application of the rule and not any form of exception to it.

20 The judge was entitled to take the facts which would have founded a claim for special damages as evidence which could assist him in assessing general damages. This proposition is subject to the qualification that this does not entitle a court to award as general damages which are in truth special damages and should therefore have been subject to the rigours of pleading that follows.

21 The loss of earnings asserted by Wasal Khan were perfectly quantifiable both as to amount and as to the duration. The judge recognized they could have been pleaded and calculated as special damages. This court would go considerably further than that. In simple language, they *had* to be presented as special damages. The claim for

deprivation of loss of profits by the bulldozer being in the custody of the Credit Corporation from late December 1998 until August 1999 was perfectly quantifiable and the judge clearly undertook this exercise. Future losses of profits were not part of the equation. Those could probably have been dealt with as general damages had there been an unascertainable end to that loss of earnings or loss of earning capacity - as might have been the case in a personal injury action so far as, for example, post trial loss of earnings. However what was at stake in the instant case was a bulldozer. Once brought back into the working capacity that it might have had at the time of its wrongful seizure by Credit Corporation, then issues in relation to loss of profits were, as a head of damage, well and truly at an end. Equally, the time between wrongful seizure and the consent order was entered was eminently the subject of calculation and brought that within the rubric of special damages. In the result, where this court differs from the judge concerning this topic is in relation to only one passage of his judgment. The judge said that these amounts could have been pleaded as special damages. On definitions cited, including the definition accepted by the judge, we conclude these items had to be pleaded as special damages. Indeed, the very decision that the learned judge very carefully considered ***Ilkiw v Samuels & Others*** (above) rules out the treatment of pre-trial loss of earnings (albeit in the context of a personal injury action) as anything other than special damages. That is the very basis upon which the Court of Appeal in that decision allowed the appeal and reduced the award of damages.

22 The normal measure of damage for wrongful interference with goods is the diminution of value of the goods (if any) together with compensation for loss of use of the goods. Much of this not only should but, indeed, must be pleaded as special damages and the inescapable logic of the absence of pleading in this regard is that not much is left as a basis for the award of damages.

23 The absence of proper pleading in this case had the result of depriving Wasal Khan of an element of real justice in this case. It appears to us that desire clearly underlay the attempt by the judge to do justice in the absence of what is fundamentally required

by the law by way of pleading. There was nevertheless some wrongful interference with the property rights of Wasal Khan. Doing the best that we can in the face of the state of the pleadings, a not ungenerous level of compensation, absent special damages, would have been $20,000.

24 It follows from this that we do not need to consider grounds 5, 6, 7 and 8 as to the calculations for repairs and loss of income. Further, we no longer need to consider in detail ground 9 which concerns the failure to mitigate damage.

Exemplary damages

25 The judge awarded sum of $25,000 as exemplary damages. A claim for exemplary damages, was not pleaded. It is common ground that the first point at which the issue of exemplary damages arose was in final submissions. The complaint of the Appellant Credit Corporation is twofold. First, they submitted that exemplary damages could only be considered if the claim was pleaded. Further, they complain that even if that was not right that on the settled principles applicable in Fiji, this was not a case for exemplary damages. The case for the Appellant is that ***Rookes v Barnard*** [1964] AC 1129 represents a correct statement of the law of Fiji.

26 As to pleading, in ***Lucky Eddies Ltd v Lateef*** (Civil Appeal 59 of 1992) the Court of Appeal held in unequivocal terms that the law of Fiji is clear: where exemplary damages are claimed they must be separately pleaded. As has already been noted, there was no explicit pleading for exemplary damages in the present case.

27 The fact that the issue of exemplary damages first arose in the context of the closing submissions rather underlines the reasons why there is a necessity to plead exemplary damages. As a matter of elementary fairness, given that exemplary damages are supposed to be punitive of the party against whom such damages are claimed, that party ought to have clear notice of the claim. Exemplary damages, on any view of the law, involves an examination of the motives, conduct or manner of inflicting the injury suffered by the Plaintiff.

28 It is also worth noting that in the course of the judgment the Court of Appeal in ***Lucky Eddies Ltd v Lateef*** (above), the distinguished members of that Court held that they were disposed to follow the decision in ***Rookes v Barnard*** [1964] AC 1129 but as the full scope of the law in relation to exemplary damages was not fully argued before them, the judges sitting in that quorum of the Court of Appeal were not prepared to finally declare that ***Rookes v Barnard*** represented the law of Fiji. Although it was contended by counsel for the Appellant Credit Corporation in the instant case that ***Rookes v Barnard*** did represent the law in Fiji, that submission proceeded on a slight misreading of ***Lucky Eddies Ltd v Lateef.***

29 The Respondent submitted that ***Rookes v Barnard*** has not been accepted uncritically in the common law world. That is right. Indeed, the High Court of Australia in ***Uren v John Fairfax & Sons Ltd*** (1966) 117 CLR 118 declined to follow ***Rookes v Barnard***. It was submitted by counsel for the Respondent that in fact ***Uren v John Fairfax & Sons Ltd*** (above) represented the law of Fiji. As we have indicated, while the Court of Appeal in ***Lucky Eddies Ltd v Lateef*** were prepared to proceed on the assumption that ***Rookes v Barnard*** was correct, they were careful not to declare that it represented the law in Fiji. They left that open for further argument.

30 In ***Uren v John Fairfax & Sons Ltd*** (above) McTeirnan J held that that the following from the then current edition of Mayne & McGregor on *Damages* represented the law of Australia:

> Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.

Taylor J thought the law of Australia was as follows:

> The law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complained of, the conduct of the defendant had

been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights. Various expressions had been employed to describe such conduct and the law, though, of necessity invested with a degree of flexibility, was sufficiently certain.

31 In contrast, in ***Rookes v Barnard*** (above) the House of Lords sought to limit the scope of exemplary damages to the following categories:

(1) Where exemplary damages are authorised by statute.

(2) Where the defendant's conduct has been calculated by him to make a profit for themselves that may well exceed the compensation payable to the plaintiff.

(3) Where the plaintiff had suffered from oppressive, arbitrary or unconstitutional action by servants of the government.

On any view, that test for the application of exemplary damages is substantially narrower than that which obtains in ***Uren v John Fairfax & Sons Ltd*** (above). It is to be noted that ***Rookes v Barnard*** (above) appears to have been a deliberate narrowing of the law by the House of Lords.

32 As in ***Lucky Eddies Ltd v Lateef*** (above), we did not have the benefit of hearing full argument on which of these two lines of approach should truly represent a correct statement of the law of Fiji. Further, if this court was to make such a determination, it would need to consider some of the cogent criticisms of the law of exemplary damages and the suggested need for a reconsideration of aspects of that law which are to be found in the decision of the High Court of Australia in ***Gray v Motor Accident Commission*** (1998) 196 CLR 1.

33 However, it seems to us that none of the aspects of conduct on the part of the Credit Corporation either taken by themselves or cumulatively are sufficiently bad to fall within the test for exemplary damages to be found **in *Uren v John Fairfax & Sons Ltd*** (above) even if it was held to represent the law of Fiji. It is true that the original acceptance of Nasir Khan as the true owner of the bulldozer (which an acceptance is the underlying basis for Credit Corporation parting with their loan of $70,000 to that person) could be characterised as sloppy or even negligent. That was the underlying cause for the interference with property rights of Wasal Khan: the belief that the

Credit Corporation had the right to repossess the bulldozer because it believed it had a valid form of right over that chattel. However, none of that gets even close to the concept which underlies exemplary damages. Accordingly, we hold that this need of damage was not justified in this case - even if it had been pleaded properly.

Interest

34 There is now a clear line of authority including decisions of this court which require that if interest is to be claimed and awarded, it must be properly and explicitly pleaded. These decisions include ***Usha Kiran v Attorney General of Fiji*** (Court of Appeal, civil appeal 25/1989); ***Tacirua Transport Co Ltd v Virend Chand*** (Court of Appeal, civil appeal 33/1994); ***Attorney General of Fiji v Waisele Naiqualevu*** (Court of Appeal, civil appeal 22 of 1989) and ***Renuka Shankar v Chandar Gopalan Naidu*** (Court of Appeal, civil appeal 3 of 2001). The latter case declared that this position had become the established practice of the court of Fiji. Again, as a matter of fairness, interest ought only to be considered upon the basis of giving proper notice to a defendant by pleading such a claim. Interest should not have been allowed in this case.

Indemnity costs

35 The learned judge ordered that costs be awarded to the Plaintiff on the basis of "full reasonable solicitor/client costs to be agreed or assessed ". At paragraph 77 of the judgment (record, page 41) the judge held that the actions of the Credit Corporation were "wrong and without any legal justification, the result of its own careless actions.". This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. It must not be forgotten that regardless of how sloppy the Credit Corporation might well have been in lending as much as $70,000 to Nasir Khan, they had every justification for defending this action. This is not the place for this Court to articulate an exhaustive summary of the circumstances in which indemnity costs would be appropriate. The judge was wrong to award them in these circumstances. He should have awarded costs on the ordinary party and party scale.

Orders

36 This court orders that:

(1) the appeal be allowed;

(2) general damages reduced to $20,000;

(3) the award of exemplary damages be quashed;

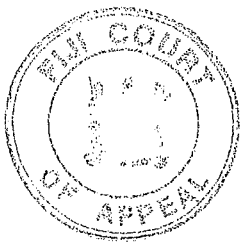
(4) the award of interest be quashed;

(5) the Plaintiff/Respondent to have the costs of the action before the High Court fixed on the party and party scale, to be taxed if not agreed;

(6) the Appellant to have the costs of the Appeal, to be taxed if not agreed.

Pathik, JA

Khan, JA



Bruce, JA

Solicitors:

Sherani and Company, Suva for the Appellant
Gordon and Company, Lautoka for the First Respondent