IN THE COURT OF APPEAL
FIJI ISLANDS
CIVIL JURISDICTION

Civil Appeal No. ABU 76 of 2006
(On appeal from HBC 335 of 1997L)

BETWEEN : **NATIVE LAND TRUST BOARD**

First Appellant (Original 1st Defendant)

AND : **PONIPATE LESAVUA**

Second Appellant (Original 2nd Defendant)

AND : **SUBRAMANI**

Respondent (Original Plaintiff)

JUDGMENT OF THE COURT

Coram : **Goundar, J.A**
Inoke, J.A

Counsel Appearing: **Mr N Tuifagalele for the First Appellant**
Mr K Vuataki for the Second Appellant
No appearance for the Respondent

Solicitors: **In house solicitors for the First Appellant**
Vuataki for the Second Appellant
Respondent self represented

Date of Hearing: **4th November 2009**

Date of Judgment: **25th February 2010**

INTRODUCTION

[1] On **8 October 2003**, Byrne J delivered a judgment in favour of the Plaintiff, Subramani, for damages in the sum of $383,728 and costs. This appeal is against that judgment. We see no reason why the award of costs should be overturned so this appeal deals only with the award for damages.

[2] The Notice of Appeal filed in July 2006 sets out 9 Grounds of Appeal. All of the Grounds of Appeal are on errors of law so we take it that the facts as found by Byrne J are admitted and we reproduce them, so far as relevant to this appeal, as set out in His Lordship's Judgment of 8 October 2003.

THE FACTS

[3] The Plaintiff who was a farmer and businessman became registered proprietor of native Lease No. 7204 on 14 August 1980 having inherited the lease from his father, Armogam, who became registered proprietor on 30 October 1969. The land comprises one rood and thirty-eight perches or approximately a quarter of an acre in Nawaka, Nadi. The land is described as part of Nailagi No.1 and is owned in fee simple by the Mataqali Nalagi Tokatoka Nawakilevu. The Plaintiff's lease was initially part of a larger lease granted by the Colony of Fiji to John Percy Bayly on 1 January 1921 for seventy-five years.

[4] On 1 January 1930, J. P. Bayly sub-let to one Kandasamy for a period of sixty-six years (less the last seven days) and over the ensuing years various conveyances of the land occurred culminating on 30 October 1969 in a transfer to the Plaintiff's father, Armogam. On his death his wife, Subbamma, as Administratrix transferred the subject lease to the Plaintiff.

[5] The head lessor at all relevant times following various conveyances was one Kamla Wati.

[6] The terms of the sub-lease of Mr. Bayly to Kandasamy and the original lease to Mr. Bayly allowed the tenant to take away any improvements he made on the land.

[7] The Plaintiff always paid his rent of ten dollars per annum direct to the **Native Land Trust Board** ("**NLTB**") as the trustee of the land under the **Native Land Trust Act** [Cap.134] for the benefit of its indigenous Fijian landowners.

[8] Over the year prior to the expiry of his lease which was to be on 24 December 1995 the Plaintiff approached the *Tui Nawaka,* Ratu Meli Naevo, in the traditional manner and made his offerings (*sevusevu*) at a village meeting attended by several members of the *Mataqali.* The Plaintiff who was aged sixty-one at the time of the trial gave evidence that when he went to see the NLTB about renewing his lease he had been told by one of its officers to obtain the consent of the Mataqali and he was given forms to fill in and attach thereto the names and signatures of the Members of the Mataqali. The Plaintiff gave the forms to Ratu Meli Naevo who had accompanied him to the office of the NLTB with the attachment signed by various Mataqali members.

[9] The Plaintiff stated that he paid Ratu Meli Naevo the sum of $1000 by a cheque written to him for which Ratu Meli gave the Plaintiff a receipt; it was understood and agreed by Ratu Meli that this was the consideration for granting an extension of the term of the sub-lease to the Plaintiff.

[10] Evidence was given later by Joseph Rakai, an estate officer of the Board, that as a matter of practice the First Defendant consults with members of the local *Mataqali* to gauge their views as to the renewal of a lease which the Board takes into account in deciding whether or not to grant a renewal.

[11] The Plaintiff testified that he paid the renewal application fees of $33.00 to the NLTB and was told by the NLTB Officer that the application would be processed which might take some time but eventually he would get a new lease and a renewed term. He was told that the rental would be increased to which the Plaintiff agreed.

[12] At various times during the next fifteen months the Plaintiff made enquiries at the NLTB's office about the progress of his application and was told that it was still being processed.

[13] The Plaintiff stated that he owned other land in the area which he could have removed the buildings he had erected on his lease and that this would have cost approximately $30,000 but eventually he would have received approximately the same income as he was receiving from rent at the time the Second Defendant and the members of *his Mataqali* forced him off his lease.

[14] The Plaintiff stated that he would have removed the buildings if he and not been told by the NLTB that his lease would be renewed and, Byrne J, having heard the Plaintiff and the witnesses for both Defendants, was satisfied that the Plaintiff had a legitimate expectation that his lease would be renewed.

[15] The Plaintiff with the knowledge and, and as Byrne J found, the implied consent of the NLTB had re-constructed two buildings following damage to them in a hurricane in 1986, at a cost of $75,000. One building consisted of four flats which were rented for $130.00 per month each. The other building consisted of a shop and flat rented at $400.00 per month and another dwelling in which the Plaintiff resided which at an earlier date had been rented out at $250.00 per month. The Plaintiff also had a garage on the property from which he obtained rent of $130.00 per month.

[16] On 10 July 1997 the NLTB gave a Notice to Kamla Wati requiring her to vacate her head lease within six months. A copy of this Notice was never given to the Plaintiff who was occupying the land, as sub-lessor.

[17] On 30 September 1997, NLTB's officers informed the Plaintiff that NLTB would not renew the native lease and that the Plaintiff was in unlawful occupation of the native lease.

[18] The High Court proceedings were begun on 2 October 1997 following what Byrne J found as fact that officers of the First Defendant together with several members of the Mataqali Nalagi trespassed onto the Plaintiff's land and demanded that the Plaintiff give them immediate vacant possession of the lease and the improvements thereon.

[19] The Plaintiff testified that he saw the Notice to vacate the property which had been given to Kamla Wati for the first time on 2 October 1997. She apparently did not inform the Plaintiff but Byrne J held, as a matter of law, that the NLTB being aware of the Plaintiff's occupancy of the land, was obliged also to notify the Plaintiff of the Notice that had been served on Kamla Wati.

[20] The effect of this, Byrne J held, was that even if the Plaintiff's application for a renewal was rejected he had six months from 10 July 1997, that is, until 15 January 1998 to remove any building that he had erected. The First Defendant did not give him this opportunity although his lease entitled him to such Notice.

[21] The undisputed evidence was that the Plaintiff effected improvements to his buildings consisting of painting, erecting a gate and attaching barbed wire and carrying out plumbing and like improvements to the premises which were to a value of over $3000.

[22] Byrne J was of the opinion also, that it was unlikely that the Plaintiff would not have had his lease renewed had it not been for the death of Ratu Meli Naevo. The Second Defendant succeeded Ratu Meli and informed the Board that the Mataqali wished to resume the land.

[23] In cross-examination, the Second Defendant stated that he did not know the Plaintiff had paid the Board $33.00 as the renewal fee or that the Plaintiff was paying rent at the time he was dispossessed. He said that he thought that the Plaintiff was lying when he said he had applied for renewal but was then forced to accept the evidence which he had heard that the Plaintiff had lodged an application for renewal.

[24] It emerged from the evidence of Joseph Rakai in cross-examination that to the date of trial the Plaintiff had not been informed in writing or at all that this lease would not be renewed. He agreed that the Plaintiff had made his application for renewal in September 1994 and that the sub-lease had expired in December 1995. Thus the First Defendant had had the Plaintiff's application for fifteen months before his lease expired but did not bother to inform him during this time that he would not be given a renewal. Mr Rakai also stated that the First Defendant knew the Plaintiff had the right to remove his building before the expiration of his sub-lease. He also said that he had no reason to doubt the Plaintiff's evidence that a hurricane in 1986 had caused great damage to the buildings on the Plaintiff's land. He also stated that the Board knew the flats on the land had been sub-let by the Plaintiff to other persons and that it never told the Plaintiff that the Board did not consent to these lettings. The Board never complained to the Plaintiff that his actions were illegal.

GROUNDS OF APPEAL

[25] The Grounds of Appeal are as follows:

> **(i) The Learned Trial Judge erred in law in ordering compensation and aggravated damages in circumstances of Plaintiff/Respondent not getting express consent (but what the learned trial Judge called implied consent) to build a concrete non removable dwelling on Defendant/Second Appellant's land as administered by Defendant/First Appellant.**

(ii) **The learned trial judge erred in law in holding that the Plaintiff/Respondent had legitimate expectation to renewal of his lease and that the conduct of Defendant/First Appellant in not renewing Plaintiff/Respondents lease amounted to unconscionable conduct and estopped First Appellant in the circumstance of the case.**

(iii) **The learned trial judge erred in law in not holding and rejecting submission that buildings on Mataqali Nalagi's land after expiry of head lease and Plaintiff/Respondent's sub lease had become fixtures on the land and had passed to the Mataqali so that the Mataqali owned it and no compensation was payable.**

(iv) **The learned trial judge erred in law in holding that Defendants/Appellants had breached Section 40 of the Constitution and were guilty of illegal acts while the Plaintiff/Respondent was not guilty and that the Mataqali had seized the implements.**

(v) **The Learned trial judge erred in law in holding that the First named Defendants/First Appellant's owed responsibilities to the Plaintiff/ Respondent who was a subtenant of First named Defendant/First Appellant's tenant.**

(vi) **The learned trial Judge erred in law in admitting document not part of disclosure being the valuation report of one Shyam Sundaram at trial date and breaching Defendants/Appellants' right of access to court by adjournment for competing valuation report and was therefore discriminatory.**

(vii) **The learned trial judge erred in law in holding that the Native Land Trust Act passed into law on 7th June 1940 did not apply to Plaintiff/Respondent's lease.**

(viii) **In all circumstances of the case the learned trial judge erred in unjustly enriching the Plaintiff/Respondent by an award of damages behind the Defendants/Appellants back not commensurate with the income received by Defendant/Appellants from the land leased and that received by Plaintiff/Respondent during lease of land.**

(ix) **Alternatively if the Honourable Judge was correct in his findings he erred in not ordering removal of buildings and rehabilitation of the land so that the Mataqali could either farm the land or put modern buildings on it.**

THE FUNDAMENTAL PROPOSITION: CHALMERS v PARDOE

[26] Both of the Appellants relied on the submissions filed by the First Appellant as a joint submission. We do not intend to consider each of the grounds individually or in detail, other than the grounds which we think

deserve some mention, because each of them depend on one fundamental proposition. That proposition is that the High Court and this Court is bound by the Privy Council decision in **Chalmers** v **Pardoe** [1963] 3 All E R 552 and cannot assist Subramani because the prior consent of the NLTB was not obtained for the construction of the buildings on the land. The Appellants submit that **Chalmers** v **Pardoe** (supra) clearly establish that such construction amounted to a "dealing with the land" which, without the prior consent of the NLTB, is null and void under **s 12(1)** of the **Native Land Trust Act** and the Regulations made thereunder.

[27] Thus, it is necessary to closely examine **Chalmers** v **Pardoe** (supra). The facts in that case were that Mr Pardoe was the holder of a lease of native land. That land was subject to the equivalent of **s 12(1)** of the **Native Land Trust Act.** Mr Chalmers was not only the solicitor but also a friend of Mr Pardoe. Mr Chalmers, on retirement and because of their friendship, was allowed by Mr Pardoe to occupy part of Mr Pardoe's land and build his home. Mr Pardoe said in evidence that he told Mr Chalmers that he could build provided he got the necessary consent and permission of the NLTB. He was willing for Mr Chalmers to have a sublease or a direct lease following a surrender of that part of the land on which his house was built.[1] They had a falling out and Mr Pardoe claimed that this "friendly arrangement" was a "dealing" in native land and because the prior consent and permission of the NLTB had not been obtained, it was null and void. Mr Chalmers on the other hand argued that he had an equity in the land and that equity should intervene to prevent Mr Pardoe from taking the buildings for nothing.

[28] As to whether the "friendly arrangement' amounted to a "dealing" with native land within the meaning of s. 12 of the Ordinance, Sir Terence Donovan, in delivering the speech of the Privy Council in **Chalmers** v **Pardoe** (supra), explained it as follows:[2]

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[1] [1963] 3 All E R 552, 556G
[2] op cit at 557C

Repeating this term, but without necessarily adopting it, the Court of Appeal held, as their lordships have already indicated, that the least effect which could be given to the "friendly arrangement" was that of a licence to occupy coupled with possession. Their lordships think the matter might have been put higher. "I gave him the land for nothing" said Mr Pardoe. Again, "He could get anything – a sublease or a surrender, which was perfectly correct..." And so on. In their lordships view an agreement for a lease or sublease in Mr Chalmers' favour could reasonably be inferred from Pardoe's evidence.

Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr Chalmers and Mr Pardoe well knew, of erecting a dwelling-house and necessary buildings, it seems to their lordships that, when this purpose was carried into effect, a "dealing" with the land took place. On this point their lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained, it follows that under the terms of s. 12 of the ordinance, cap 104, this dealing with the land was unlawful. It is true that in Harman Singh and Backshish Singh v Bawa Singh [1958-59] FLR 31, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s. 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s. 12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful.

[29] In respect of Mr Chalmers' claim for an equitable charge or lien over the land because of the substantial buildings he had erected on the land, the Privy Council in **Chalmers** v **Pardoe** (supra) said this:[3]

> **The claim is based on the general equitable principle that, on the facts of the case, it would be against conscience that Mr Pardoe should retain the benefit of the buildings erected by Mr Chalmers on Mr Pardoe's land so as to become part of the land without repaying to Mr Chalmers the sums expended by him in their erection...**
>
> **There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.**
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> **(my emphasis)**

[30] It is clear from the above passages from **Chalmers** v **Pardoe** (supra) that that case is authority for the proposition that an arrangement between the head lessee and his sub-tenant of native land, where the head lessee grants the sub-tenant a licence to occupy coupled with possession, is a "dealing" within the meaning of s. 12 of the **Native Land Trust Act** and is therefore null and void if the prior consent of the NLTB is not obtained. In such a case, as between the head lessee and the sub-tenant, the Court of Equity will not assist the sub-tenant.

[31] The case is **not** authority, as Mr Vuataki and Mr Tuifagalele submitted, for the general proposition that equitable principles do not apply to dealings under s. 12 in respect of which prior consent of the NLTB had not been obtained.

APPLICATION TO THE PRESENT CASE

[3] At p 555B

[32] It seems to us that the situation which is covered by the general equitable principle authoritatively confirmed by the Privy Council in **Chalmers** v **Pardoe** (supra), namely that, **where the owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money**, is exactly what happened in this case, except that the money in this case was expended on the whole of the land.

[33] As Byrne J found as a matter of undisputed fact, the NLTB and Ratu Meli Naevo knew and actively encouraged the Plaintiff to renovate the buildings on the land with the promise that his lease would be extended. In such a case, the general equitable principle affirmed by the Privy Council in **Chalmers** v **Pardoe** (supra) must apply and the NLTB and the land owners cannot deny that the Plaintiff had an equity in the land for which he is entitled to compensation if they are unable or unwilling to re-convey the land to him.

[34] Further, we think **Chalmers** v **Pardoe** (supra) is distinguishable from the present case because of the facts. In that case, in contrast to the present case, the NLTB and the landowners played no active part in the grant of the sublease. It is our respectful opinion that the principle in **Chalmers** v **Pardoe** (supra) is an exception to the general rule and is not a rule of general application to cases involving native land where **s. 12(1)** of the **Native Land Trust Act** is in issue. As we have said above, it is not true that in all cases where s. 12(1) is invoked, the Court will not assist the tenant or the subtenant.

[35] Having come to this view on **Chalmers** v **Pardoe** (supra) and the facts as found by the learned trial Judge, we find that His Lordship made no errors in law in coming to the view that the NLTB's conduct was unconscionable and sufficient to give rise to an estoppel preventing it from denying the Plaintiff's right to renewal of his lease and awarding damages for

compensation for loss of the property confiscated by the Defendants. Although, we think, with respect, the better view is that the Plaintiff had an equity in the land, in accordance with the general principle, which is compensable in damages.

[36] It would also follow that it matters not that the lease or sublease had expired or extinguished. The equity attached to the land by operation of law and not through or by virtue of the lease or sublease.

THE AWARD OF COMPENSATION FOR THE LOSS OF THE BUILDINGS

[37] The Appellant's argument that the improvements were fixtures and attached to the land and therefore belonged to the landowners so that the landowners do not have to pay for compensation for what they already own is unsustainable because of the learned trial Judge's findings of undisputed facts and our view that the narrow principle in **Chalmers** v **Pardoe** (supra) does not apply to the present case.

[38] The Appellants also complain that His Lordship erred in law in admitting the valuation report of the improvements on the land into evidence at the trial without giving them an opportunity to tender a competing valuation by granting an adjournment. Firstly, the conduct of the trial is at the discretion of the trial Judge and will rarely, if at all, be overturned by this Court. Secondly, the issue of compensation is central to this case. The Statement of Claim was filed in 1997. The Appellants had 6 years to prepare for the trial which took place over 5 days on various dates in February, March and April 2003. There can be no element of surprise or prejudice in this case and we are not surprised at all that Byrne J refused to adjourn the hearing.

[39] We find that it was quite proper for His Lordship to admit the valuation report into evidence and to base his assessment of damages in this respect on that report.

COMPENSATION FOR LOSS OF INCOME

[40] It would also follow as a matter of law that the Plaintiff is entitled also to compensation for the prospective loss of rental income from the land. We find no error in His Lordships assessment of compensation in this regard.

AGGRAVATED DAMAGES

[41] As for the award of aggravated damages for wrongful dispossession, His Lordship, after quoting the law from **Patel** v **Native Land Trust Board** [1976] FJCA 6; Civil Appeal No 40 of 1976 (23 November 1976)[4] that "aggravated damages represent in addition to the proved pecuniary loss additional compensation for the injury to the feelings or dignity of a plaintiff where his sense of injury is increased or exacerbated by the manner in which or motive for which a defendant did the acts complained of", gave his reasons[5] for the award as follows:

> **I have no doubt that the Plaintiff understandably felt that he had been unfairly treated by the First Defendant who as a trustee in law to act fairly not only in the interests of the Fijian landowners but also in the interests of tenants of landowners, or to be more accurate, of the Board. In my judgment it has failed to carry out its responsibilities towards the Plaintiff and I therefore award the sum of $5,000 as aggravated damages.**

[42] As to the **quantum** of aggravated damages, the Court of Appeal in **Patel** v **NLTB** (supra) said this:

> **We are mindful of the principle that this Court will interfere on a matter of quantum of damages if it is satisfied that the learned judge in the Court below has acted upon a wrong principle of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damage suffered.**

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[4] Gould VP, Marsack and Spring JJA
[5] At para 41 of the Judgment

The award in that case for aggravated damages more than 30 years ago was $3,000. As in that case, we think Byrne J, who has considerable experience in Fiji in such matters, has fully considered the facts and the law and find no justification for overturning His Lordship's award for aggravated damages.

LEGITIMATE EXPECTATION

[43] It is clear from the facts as found by His Lordship that the Plaintiff expected his lease to be renewed. Whether such an expectation gave rise to a claim in damages under the doctrine of legitimate expectation as formulated in **Waltons Stores (Interstate) Ltd** v **Maher** [1987-8] 164 CLR 387, 406[6] is immaterial because the facts clearly support a case of breach of a simple contract, or collateral contract, entitling the Plaintiff to compensation for damages naturally flowing from the breach. For this reason, we do not think it is necessary to come to a concluded view on the question of whether a case for legitimate expectation has been made out in this case and leave it to be decided in an appropriate case in the future.

BREACH OF S. 40 OF THE 1997 CONSTITUTION.

[44] It is not necessary also for us to express an opinion on whether the Judge was correct in holding that s. 40 of the 1997 Constitution had been contravened.

LANDOWNERS' CONCERNS

[45] Mr Vuataki expressed concern that his client, who, in a general sense, represents the native landowners in this country, is at risk if the Court does not apply the principle in **Chalmers** v **Pardoe** (supra). We respectfully ask Counsel: "What risk?" The NLTB is charged by law to represent and look

[6] Per Mason CJ and Wilson J

after the interests of the landowners. It happens all too often in this country that the tenants and subtenants of native land suffer the wrath of landowners when land disputes arise, such as what happened in this case. It is clear in our view, as it was to the learned trial Judge, that the NLTB had failed in its duty to protect the interests of the landowners in the present case. So, in answer to Mr Vuataki's concern, his client's remedy is against the NLTB and not the tenant or subtenant. His client is not without recourse to anyone.

[46] In the present case, Byrne J ordered the NLTB to pay compensation to the Plaintiff. It has been paid. And, rightly so in my opinion, for the reasons we have given above. We trust, and Mr Tuifagalele, Counsel for the NLTB, did confirm, that the NLTB will not recoup this compensation payment from the land rent and other income due to the landowners. It must be borne by the NLTB out of its own funds.

CONCLUSION

[47] It our respectful opinion that the decision in **Chalmers** v **Pardoe** protects the interests of the landowners because tenants who fail to notify the NLTB of dealings in the land under lease will get no assistance from the Court.

[48] However, if the NLTB or the landowners themselves directly involve themselves in such dealings, as was in this case, then as a matter of general equitable principle, it would be quite unconscionable, in our respectful view, for them to be able to escape the consequences of their actions when things go wrong by pleading illegality under the Act.

[49] The end result is therefore the appeal is dismissed. The Respondent has taken no interest in this appeal so he is not entitled to costs.

ORDERS

[50] The Orders that we make are therefore as follows:

1. The appeal is dismissed.

2. There is no order as to costs.

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Daniel Goundar, JA

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Sosefo Inoke, JA