

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0051 of 2012
(High Court Action No. HBC 36 of 2007)

BETWEEN : **I TAUKEI LAND TRUST BOARD**

Appellants

AND : 1. **VILIAME SOGARI**
2. **SHIU RAJAMMA**
3. **REGISTRAR OF TITLES**
4. **ATTORNEY GENERAL OF FIJI**

Respondent

Coram : Calanchini, P
Lecamwasam, JA
Wati, JA

Counsel : Ms. L. Komaitai for the Appellant
Mr. N. Vere for the 1st Respondent
Mr. G O'Driscoll for the 2nd Respondent
Ms.R. Pranjivan for 3rd and 4th Respondent

Date of Hearing : 4 February 2016

Date of Judgment : 26 February 2016

JUDGMENT

Calanchini P

I have read the draft judgment of Lecamwasam JA and agree that the appeal should be allowed and the quantum reduced by the amount proposed.

Lecamwasam JA

(1) This is an appeal filed by the Native Land Trust Board (NLTB) against the judgment of the High Court of Labasa dated 19/06/2010.

(2) The facts in brief are as follows.

The NLTB (Appellant) has given a lease of the subject matter to the plaintiff for a period of 30 years. Subsequent to this lease, the plaintiff alleges, that the NLTB in breach of its statutory and trusteeship duties leased out the same land to the 1st Defendant. At the Pre-Trial stage, the NLTB admitted liability in executing two leases over the same land and undertook to pay the plaintiff, damages he may have incurred due to double leasing of the subject matter. The matter proceeded to hearing only on the issue of assessment of damages. At the end of the hearing High Court awarded damages to the plaintiff as follows:

<i>General damages-Loss of past and future income-</i>	<i>\$456,527.36</i>
<i>Loss of house</i>	<i>\$ 30,000.00</i>
<i>Special damages</i>	<i>\$ 2300.00</i>
<i>Aggravated damages-</i>	<i>\$ 4000.00</i>
<i>Exemplary damages-</i>	<i><u>\$10,000.00</u></i>
<i>Total</i>	<i><u>\$502,827.36</u></i>
<i>Interest on special damages and general damages: - 4% per annum from the date of filing of the action until the date of payment.</i>	

Being aggrieved by the above judgment, the NLTB has filed the instant appeal on the following grounds of appeal:

(3) Grounds of Appeal

The Appellants grounds of Appeal are as follows:

- (1) *Learned Judge erred in law in not properly taking into account the evidence adduced in Court by the parties and appropriately applying the relevant principles of evidence as to the weight of each party's evidence.*
- (2) *The Learned Judge erred in law in not giving any weight to the Appellants evidence in the lower court when such evidence was tendered through an expert.*
- (3) *The Learned Judge erred in law in not apply applying the relevant principles of assessment of Special Damages as all sums claimed pursuant to this head it to be strictly proven by the claimant which in this case was not at all proved and with no evidence adduced.*

- (4) *The Learned Judge erred in law and in fact when it contradicted its Judgment at paragraph 13 and 15 when claim for Special Damages were not proved; however was granted in the sum of \$2300.*
- (5) *The Learned Judge erred in law and in fact at paragraph 18 of the said judgment by confusing what the 1st Respondent had to prove to that of the Appellant from the lower court.*
- (6) *The Learned Judge erred in law in awarding special damages in the sum of \$2300 of which contradicted the reasoning at paragraph 20 of the Judgment.*
- (7) *The Learned Judge erred in fact at paragraph 21 in stating that the 1st Respondent called 2 witnesses at the lower court when in fact 3 witnesses were called by the 1st Respondent.*
- (8) *The Learned Judge erred in law in awarding the total quantum of \$456 527.36 which were too exorbitant.*
- (9) *The Learned Judge erred in law and in fact in failing to consider the evidence by the Appellant's witness in the lower court who is a qualified valuer and an expert witness.*
- (10) *The Learned Judge erred in law and in fact in awarding such an expensive sum in the lower court when evidence adduced by the 1st Respondent in the lower court were challenged by the Appellant.*
- (11) *That the Learned Judge erred in fact and in law in not accepting evidence of the Appellants witness in the lower court as the value of the subject leasehold together with the improvement as per the valuation report tendered by the Appellant.*
- (12) *The Learned Judge erred in fact and in law in arriving at the conclusion that the 1st Respondent value of lost income for a period of over 30 years would amount to &456527.36.*
- (13) *The Learned Judge erred in law and in fact in not considering the Appellants evidence in the lower court as per valuation report of the subject property and the land in the sum of \$30;000.00.*
- (14) *The Learned Judge erred in law and in fact when it failed to consider that the only loss that the 1st Respondent would have incurred would be within the 3 years period of which the latter did not have access to farm the subject land.*
- (15) *The Learned Judge erred in law and in fact when it contradicted its reasoning at paragraph 28 of the Judgment in that the calculations as relied upon by the 1st Respondent in the lower court were on a presumption that proper management is adhered to; which was a hypothetical situation in that regard.*

- (16) *The Learned Judge erred in fact when it failed to consider the reasoning at paragraph 29 which was a hypothetical situation where it states ... ' production for the next 30 years could have remarkably increased if the land continued to be fertilized as advised by the Fiji Corporation Ltd field Officers.*
- (17) *The Learned Judge erred in law and in fact at paragraph 33 of the Judgment in dismissing the Appellant evidence as not credible and in not taking into considerations the Appellant evidence adduced in Court.*
- (18) *The Learned Judge erred in law at paragraph 34 of the Judgment when an expert witness was indeed called by the Appellant as its witness to counter the calculation method compiled by the Ministry of Agriculture.*
- (19) *The Learned Judge erred in law and in fact at paragraph 36; 37 and 38 of the Judgment when it failed to consider that the 1st Respondent is a Police Officer by profession and that this factor would affect the calculation of the potential future economic loss.*
- (20) *The Learned Judge erred in law and in fact in not taking into account that the 1st Respondent had no farming experience nor did the latter have any practical experience in farming.*
- (21) *The Learned Judge erred in law and in fact in assessing aggravated damages in the sum of \$4000 which is excessive as at paragraph 43 of the said Judgment.*
- (22) *The Learned Judge erred in law and in fact in awarding the exemplary damages in the sum of \$10;000.00 which is excessive as at paragraph 48 of the said Judgment.*
- (23) *The Learned Judge erred in law and in fact in incorrectly interpreting the Appellant's valuation report at paragraph 49 of the Judgment; to solely refer to the improvement and the estimation of the income collected during the period of the lease.*
- (24) *The Learned Judge erred in law and in fact when it solely relied on the 1st Respondent oral evidence and there being no mention of the appellant's oral evidence in the Judgment.*
- (25) *The Learned Judge erred in law and in fact in the failing to consider the qualification of the 1st Respondent in the lower court that the latter not being a registered sugarcane grower.*
- (26) *The Learned Judge erred in law and in fact in failing to consider that the 1st Respondent occupation was that of a Police Officer and not a everyday farmer.*
- (27) *The Learned Judge erred in law and in fact when it failed to take into account the factors on natural disasters occurring within the period of the lease and that this would have impeded the revenue collection for any cane farmer.*

- (28) *The Learned Judge erred in law and in fact in failing to take into account all relevant matters to the case and all evidence adduced during the hearing of the assessment of damages.*
- (4) On perusal of the above, as certain grounds of appeal were found to overlap, the counsel for the Appellant at the stage of argument undertook to classify similar grounds of appeal together, for ease of reference. The Learned Counsel has in her written submission obliged the court in this regard.
- (5) In essence, the Appellant's grievance is that the damages awarded are excessive and exorbitant. I therefore, shall proceed to examine each of the sums awarded by the High Court, to determine the equitability of the Appellant's claim.
- (6) Firstly, on an examination of the judgment of the High Court it is found that in assessing damages Court has relied solely on the valuation report of the plaintiff's witness namely Kanito Matagansau. This report merely contains a valuation of income while being oblivious to the corresponding expenses. Out of the three methods of calculation of income, the Court has relied on the first method and awarded FJ dollars \$456,527.36 which corresponds with the expected income for the 30 year period. However it is needless to say that in order to generate an income one has to expend funds, therefore expenses also become an important component of the calculation of damages. Especially in the field of agriculture one cannot be unmindful of the expenses such as wages for manual labour, fertilizer expenses and expenditure on agricultural implements etc. In his valuation report Mr. Kanito Matagansau has not focussed his attention on expenses incurred in agricultural work of this nature. Therefore, this court is compelled to advert it's attention to other evidence, if any, for such guidance. The valuation report filed on behalf of the NLTB (original 2nd Respondent) sheds some light in this regard, i.e the report of the 'Northern Property Valuation and Consultant' prepared by registered valuer Mr. Torronibau. In the said report under 'farm productivity' (page 239) he has assessed the gross income for 4 years to be \$5000.00 and expenses to be 50% of the income and the net profit to be \$2500.00 and whereas expenses component was not considered at all by Mr. Kanito Matagansau. Although Mr. Torronibau gives the expenses to be 50% I cannot agree with Mr. Torronibau's assessment of the expenses which equals a staggering 50 % of the income. From a pragmatic point of view, such a percentage of expenses would be unacceptable which would severely deter people from taking to

agriculture due to heavy expenditure involved. This assessment is therefore compels to the Court to come to its own reasonable conclusion on expenses and determine realistic awards for expenses. Therefore now the Court is compelled to fix a reasonable amount for expenses. Given market realities, I consider calculating 33% or 1/3 of the income as the cost of expenses, to be reasonable. Out of \$456,527.36 the amount calculated by the valuer for the Plaintiff, as general damages 1/3 would be approximately \$152,175.00 and when that amount is deducted the answer is \$304, 352.00 would be the amount for general damages - loss of past and future income.

- (7) Although the Learned High Court Judge has ordered \$30,000.00 for the loss of the house, that sum cannot be awarded to the original plaintiff as the house was not built by him and it had been standing on the property prior to the plaintiff entered into the lease with the NLTB. This vitiates the need to award compensation for the loss of the house to the Plaintiff 1st Respondent. The compensation awarded in this regard should therefore be deducted from the overall award made by the Learned High Court Judge. In the calculation of damages the Learned High Court Judge has also failed to advert his attention to the annual rent that has to be paid by the original plaintiff to the NLTB if the lease had subsisted. Therefore to keep the lease alive, plaintiff would have had to pay the rent of \$800.00 per annum. Hence the total lease amount due for the demised period would be (\$800.00 into 30) \$24,000.00. This sum also has to be deducted from the award set by the Learned High Court Judge.
- (8) It is an accepted principle in Law that an Appellate Court will not lightly interfere with the findings of fact arrived at by a Trial Court. However, where a Trial Court is found to have misdirected itself on the assessment and evaluation of evidence as to the quantum of damages as has occurred in this case, an Appellate Court would be in a position to interfere with the findings of the Trial Judge.
- (9) Rule 22(3) of the Court of Appeal Rules states thus “*The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require*”. Therefore, being fortified by the provisions of Rule 22(3) (supra) I would hold that the Learned High Court Judge has erred on facts as to assessment of damages.

Hence I would order an amount of Fijian dollars \$206,175.00 (\$152,175.00 – projected expenses for the demised period, \$30,000 for the loss of the house, \$24000.00 annual rent payable on the demised property = 206,175.00) to be deducted from the award already made by the Learned High Court Judge. Hence I answer following issues relating to general damages (as given by the Appellants) No. 1, 2, 3, 8, 9, 10, 11, 12, 14-20, 24-28 in the Appellant's favour being issues under general damages.

- (10) The remaining issues 4, 5, 6, 7, 13, 21, 22, 23 are the other issues to be answered. Out of the remaining issues 4, 5, and 6 overlapped to certain a degree which therefore I will proceed to examine together.
- (11) As the Learned High Court Judge has not erred in respect of grounds 4, 5, and 6, I disallow those grounds. Although some contradiction is seen in reasoning, in paragraph 13 of the Judgment, the Learned High Court Judge says "... though cross-examined, this evidence remained unchallenged". If he believes the evidence to be credible, the Learned High Court Judge is at liberty to act on such evidence. As far as issues 4, 5, and 6 are concerned Judge has not erred and therefore I disallow those issues.
- (12) Issue 7 relates to a question of the number of witnesses who have given evidence before Court. Triviality of the ground number 7 precludes me from dwelling on the matter, as an examination of such ground would not have a material impact on the outcome of the appeal hence I disallow it.
- (13) Issue No. 13 relating to the valuation report, has been dealt with under general damages and therefore warrants no further examination.
- (14) Issues 21 and 22 refer to aggravated damages and exemplary damages. I answer these two issues in favour of the Appellant as aggravated damages and exemplary damages cannot be awarded in actions for breach of contract. As per Halsbury's Laws of England Fourth Edition 1186, 1190. Hence \$4,000.00 (aggravated damages) plus \$10,000.00 (exemplary damages) must be deducted from the award.

(15) Issue No. 23 I have already dealt with this matter and disallowed the award of damages of \$30,000.00 in respect of the house.

(16) The Appellant wishes to move for a new trial (according to the written submissions of the Learned Counsel) on the ground that the Counsel who appeared for the Appellant (2nd Respondent) before the High Court was not authorised by the management, to undertake payment of any damages incurred, and such undertaking has caused a great injustice and loss to the Appellant. However, when a Counsel appears for a party he represents the client and the client is bound by the undertakings of the counsel and therefore now the Appellant cannot be allowed to blow hot and cold at this later stage. This is a belated application which cannot be allowed.

(17) The 1st Respondent (original plaintiff) has also filed a cross appeal. But the counsel who appeared withdrew the cross appeal at the argument stage before the Court of Appeal.

(18) Having dealt with all pertinent issues and relevant facts, in conclusion I would allow the Appeal to be extent that the quantum of damages is varied. In the circumstances of the case I would order parties to bear their own costs.

(19) Hence having gone through all the calculations of the Learned High Court Judge I would hold in awarding damages as stated in my judgement. The following amounts ought to be deducted from the damages the Plaintiff is entitled to

Expenses component	\$152,175.00
Loss of house	\$ 30,000.00
Rent	\$ 24,000.00
Aggravated damages	\$ 4,000.00
Exemplary damages	<u>\$ 10,000.00</u>
Total Deduction	<u>\$220,175.00</u> out of \$502,827.36
Damages Awarded	\$282,652.36

Hon. Justice Wati

I agree.

Orders of Court

1. Appeal is allowed.
2. Damages awarded in the court below are reduced by \$220,175.00 = \$282,652.36.
3. Parties to bear their own costs.



W. Calanchini
.....
Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

S. Lecamwasam
.....
Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

A. Wati
.....
Hon. Madam Justice A. Wati
JUSTICE OF APPEAL