IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC 025 OF 2000

No. 229 of 2006

BETWEEN: **RAM REDDY** father's name Ganga Reddy, Retired of Field 4, Lovu, Lautoka.

Plaintiff

AND: **DIRECTOR OF LANDS**

First Defendant

LAUTOKA CITY COUNCIL

Second Defendant

FIJI ELECTRICITY AUTHORITY

Third Defendant

Messrs Yash Law for the Plaintiff
Office of the Solicitor General Lautoka for the First Defendant
Messrs S B Patel & Co for the Second Defendant
Messrs Munro Lees for the Third Defendant

Dates of Hearings	:	14 and 15 August 2006
Dates of Submissions	:	5 Sept, 26 Sept and 3 October 2006
Date of Judgment	:	31 October 2006

JUDGMENT OF FINNIGAN J

The Plaintiff bought a section and commenced to build a house upon it. He has been prevented from completing his house and he seeks to blame each of the three Defendants and to claim from each of them a wide range of remedies.

The Facts:

What follows is the evidence of the Plaintiff himself and the evidence of the one witness called for the First Defendant. No other witnesses gave evidence.

The case concerns registered title. It rests on documents. So far as liability is concerned, very few documents. Before the hearing commenced Counsel for all parties agreed in pre-trial conference minutes "that all documents to-date discovered (until 14 August 2006) are admitted in evidence without formal proof but without prejudice to the right of all parties to impugn or challenge the truth of their contents". At the beginning of the hearing Counsel for each party handed in four folders of documents. During the hearing some of these documents were referred to by witnesses and some were not. Not one was proved by its maker or by any formal process. Leaving the documents unproved "unless impugned or challenged" can disadvantage both the party trying to rely on them and the Court. This practice is not to be encouraged.

The documents will be referred to as "P.B." (Plaintiff's Bundle) etc.

In 1985 a plot of land in Natabua (Crown Lease 5142) was subdivided into four lots. The four lots are shown in Survey Plan No.

S.O. No. 000813. In April 1996 the Plaintiff purchased Lot 2 in a private sale from the previous owner and with it the plans for a house on that land. Approval for building that house had already been granted by the Lautoka Rural Authority. A set of three power transmission lines ran parallel with the eastern boundary of Lot 2. He inspected the land before buying it and noted the power lines. He first ascertained they did not interfere with the view from the section and noted that the western-most of the lines was either immediately above or just outside his eastern boundary.

Although the lines had been in place for some time (probably years) they were not noted on the survey plan S.O. No. 000813. Neither was any easement in respect of them noted on the Plaintiff's lease in respect of Lot 2, Crown Lease 11008. That remains the situation today. Unknown to the Plaintiff the previous owner had noted the presence of the transmission lines and on 30 April 1992 had written to the FEA (Third Defendant) suggesting it should acquire an easement over Lot 2 in respect of them (3 D.B. tab 21). The Department of Lands at Lautoka (First Defendant) also had entered into some correspondence with the FEA about this.

By now clearly alerted to the absence of any power line easement over this and adjacent lots, officers of the Lands Department corresponded with one another on 27 November and 9 December 1998 about the matter (1D.B. pages 66 & 67) (also 3D.B. tabs 6 & 7). These two memos show that the Departmental officers concerned knew clearly what had not been done, how it was to be done, and the consequences of failing to get it done.

The Plaintiff was in no way concerned or even aware of these things. There was no power line running over his property. He had the

plans of the house re-approved by the Lautoka City Council (Second Defendant), which had succeeded the Lautoka Rural Authority as the relevant local authority. He borrowed money in order to build the first stage of that house and applied for the necessary consent of the Director of Lands. This consent was given. With all necessary approvals obtained the Plaintiff constructed stage one of his dwelling.

The construction was approved by the Lautoka City Council and he was given approval to occupy it. He found he was unable to do so because it was not waterproof and so he refinanced his loan increasing it by $40,000.00 with the National Bank of Fiji. On 12 February 1999 the Director of Lands consented to registration of that new mortgage (1D.B. page 71) and on the same day (P.B. Doc. 2) he refused consent for completion of the building on the ground that "there is an existing power line passing through your lot.....you must first obtain our consent and also seek building clearance from FEA".

Therein commences the Plaintiff's complaint. Included with that letter was a copy of what appeared to be a survey plan that has some similarities to survey plan S.O. 000813 but is not a copy of it. On that plan is drawn what is said in the plan to be an easement 10.06 meters wide. Part of what is drawn runs across the Plaintiff's lot (3 D.B. tab 8).

Whoever drew this document and for what purpose was not explained in the evidence. The "easement" does not run parallel to or correspond with the actual placement of the three transmission lines.

Although the Department of Lands had been made aware by the previous owner that there was no transmission line easement and although officers of the Department had themselves noted the fact on one of their files no easement had been registered. The significance of this

other plan is impossible for me to determine on the evidence but it was the foundation of the refusal by the Department of Lands to approve the completion of the Plaintiff's house. It was the cause of all the trouble.

The Plaintiff himself contested this refusal in correspondence and attendances at both the Department of Lands and the FEA. Eventually getting nowhere he put the whole matter in the hands of solicitors. For a reason that is not made clear to me by the First Defendant in evidence or submissions it maintained its refusal.

On 1 February 2000 the Plaintiff commenced these proceedings and sued only the Director of Lands. In a simple and direct 6- paragraph Statement of Claim he pleaded that the Defendant was "unreasonably withholding consent for development by the Plaintiff" (and one other claim) which in the circumstances was causing the Plaintiff loss and damages.

In July 2003 the Plaintiff engaged his present solicitors. They obtained leave to amend the Statement of Claim and add the Lautoka City Council and the FEA as Defendants. Both filed Statements of Defence.

On 25 November 2005 trial dates were allocated for the substantive hearing. On 10 February 2006 there was an interlocutory summons by the FEA but that matter did not proceed because on that day Counsel for the FEA (Ms Moody) had arranged a meeting of all parties on the Plaintiff's lot for inspection of the lot by the senior surveyor of the Department of Lands at Lautoka. From observation on that day of the transmission lines and the survey pegs the senior surveyor determined that none of the transmission lines ran over the Plaintiff's land. Subsequently he took measurements and produced a

surveyor's plan drawn precisely according to the measurements (Exhibit D1). Subsequently the same official in the Department of Lands who claimed there was a power line and easement over the Plaintiff's land and initiated the refusal of the Department by his letter dated 12 February 1999 (P.B. Doc 2) wrote a letter giving the Director's consent to continuation of the building (1 D.B – 1st page).

There are clear errors in this letter. For a reason not explained in the evidence it was sent not to the Plaintiff but to the Secretary of the Lautoka Rural Local Authority. The relevant paragraph is as follows;

> *"The Director of Lands acknowledges the Applicant's right to the land and has no objection to the erection of a building on it, subject to the approval of the Lautoka Rural Local Authority and Fiji Electricity Authority and the building not being sited on any disputed land".*

The letter raises some questions none of which were answered in the evidence. Why it was sent to the Lautoka Rural Local Authority and not the Plaintiff, why it was sent to the Lautoka Rural Local Authority at all, what was meant by approval of that authority and what was meant by approval of the Fiji Electricity Authority and the reference to the siting of the building on disputed land - all unnecessary - are all unexplained.

About delivery of this letter to the Plaintiff, Counsel for the Plaintiff stated in her opening "a month ago this conditional approval was communicated to us". Assuming the Local Authority to be Lautoka City Council, its approval has never been lacking at any relevant time. The FEA had made it clear to both the Director of Lands and the Plaintiff that its concern was only with safety margins and on 28 July 2000 it had

specifically advised the Plaintiff (3D.B. tab 15) that his building as planned was not in conflict with any safety requirement of the FEA.

The second amended Statement of Claim was issued on 27 January 2006. At that time, as pleaded in para. 18 the First Defendant was still continuing to refuse approval but that had ceased by the time of the hearing. This was notified by letter dated 21 March 2006 to the Lautoka Rural Local Authority, as above (1D.B. 1st page).

The Submissions

At the time of final draft of this judgment no submissions had been received from counsel for either the Plaintiff or the 1st Defendant. I have caused inquiries to be made and am satisfied that none have been received at the Court Registry.

These submissions would have been useful. The nub of this case is the Survey Plan S.0.000813. It clearly shows (accepting the uncontested photocopy documents put in as evidence) that there is no power line easement over the Plaintiff's plan. There has never been an easement. The Crown Lease 11008 has no easement. The registered documents are the law. The error of the Department of Lands was simple and fundamental. The proof of the claim should have been simple.

Counsel for the Plaintiff however instead of putting in certified copies of the public records embarked on a voyage of discovery with photocopies of documents of unknown origin and many of no relevance. This is the very error made by the Department of Lands in confusing (what I presume is) the Register Survey Plan S.O.000813 with another plan made showing a non-existent easement (which is 3D.B. tab 8). The Department of Lands wrongly relied on that latter plan and that is what

caused all the problems. Nearly a day was wasted by counsel for the Department (1st defendant) and counsel for the Plaintiff in asking a senior surveyor of the Department of Lands to read and agree with counsels' interpretations of documents in the Department's files. As counsel are well aware, this procedure was clearly not welcomed by the court but they both persisted in it. On the evidence that existed at that time an oral judgment could have been delivered on that day. Once that witness verified the observable fact that the line was not where another Departmental Officer wrongly claimed it was, which he stated in a plan that he put in at the beginning of his evidence, he had established the Plaintiff's case against the 1st Defendant and had exonerated the 2nd and 3rd Defendants and the hearing should have ended. Both counsel for the Plaintiff and for the 1st Defendant lost sight of the simple fact and its simple proof. It is indeed hard for me to understand why anything was in issue between them other than the quantum of damages to be paid by one to the other. I regret that now, 6 weeks after the hearing, I still have no submissions about that from either of them.

The submissions of the 2nd Defendant are full and helpful and the Court appreciates the inclusion by counsel of a photocopy of the one main authority upon which he relied. I pause to say that I accept all of these submissions but find it unnecessary to refer to them for the purposes of judgment. Suffice it to say that no liability was established in the evidence against the Lautoka City Council, nor could it have been.

As Mr. Patel states in his written submission for the 2nd Defendant, the onus has been on the Plaintiff to establish a case in negligence against the 2nd Defendant and as Mr. Patel shows in detail, he has failed to do that.

Counsel for the 3rd Defendant has filed excellent submissions also. I pause to comment that it was the efforts of this lawyer which brought the case to the point where it could be litigated. When the Plaintiff, even with help of his lawyer, found he could not get anybody to listen to him and the case was set down for hearing it was this lawyer (Ms. Moody) who arranged for all parties to go to the site and see the power line. It was she who arranged for the 1st Defendant's surveyor to take measurements and draw a plan for the purposes of the hearing. This was the 1st Defendant's witness and the plan is exhibit 1D1. It was the Solicitors for the 3rd Defendant who wrote on 16 December 2004 to the Plaintiff's solicitors giving full detailed reasons why the action should not continue against the FEA (P.B. doc 11).

Her submissions are comprehensive and these also I have read with great interest. It is again unnecessary to refer to them in detail but I do refer to the summary of the 3rd Defendant's case which appears at page 2. Counsel submits, by reference to the Plaintiff's evidence, that the evidence shows there is no trespass by the 3rd Defendant's power lines on the Plaintiff's land at all, that there has been no nuisance from the existence of those lines that do exist, that there has been no proof of any negligence claimed against the 3rd Defendant and that there has been no case made out against the 3rd Defendant in damages. I accept all those submissions.

Counsel for the 3rd Defendant also supplied a booklet of copies of the five authorities upon which she relies. I have looked at these but it is unnecessary to refer to them for present purposes. In her submissions (at pages 3-6) she provides what she calls a detailed summary of the evidence. This is an accurate summary which I accept. Related to that is a submission (at page 2 and pages 15 – 17) in respect of damages. This is helpful.

Conclusions

Clearly on the facts found and set out above the Plaintiff has established a cause of action against the 1st Defendant. By the time the action came on for hearing it had recognized it may be in error and had written the letter to the Lautoka Rural Authority in which it grudgingly "acknowledge[d]" the applicant's right to the land and [had] no objection to the erection of a building on it.....", but this was still subject to conditions clearly unnecessary and intended to do no more than protect the Departmental Officers from any claim that they might have been careless and incompetent, which they clearly had been.

The 1st Defendant is liable to the Plaintiff in the claims made at para 16 of the Amended Statement of Claim that "the power line which the 1st Defendant claims exists over the property as envisaged in their Crown Lease Diagram now does not exist over Lot 2 as per the Diagram but runs along the boundary line of Lot 2". It is also liable in the claim made at para 18 that "despite the approval of the 3rd Defendant [the FEA] the 1st Defendant continues to object (which it did at the time of the amended claim but had ceased by March 2006) to the extension and/or construction of Stage 2 of the Plaintiff and his wife's Residence".

The rest of the Plaintiff's claim against the 1st Defendant is set out at para 19:

> 19. " By the combined negligence and breach of Statutory Duties of the First, and/or Second and/or Third Defendants and/or the Sole negligence of the First Defendants and/or the Second Defendant and/or the Third Defendant caused the Plaintiff and his wife to purchase Lot 2 and construct a partially complete dwelling within an area covered by the 3rd

Defendant's Purported Easement Reserve over which passed three (3) cables of 33,000 voltage.

PARTICULARS OF NEGLIGENCE

FIRST DEFENDANT

(i) The First Defendant failed to inform the Plaintiff's of the existence of the Purported Easement Reserve affecting Lot 2 at the time of the Sale and purchase and/or Transfer of the said Lot.

(ii) The First Defendant carelessly and without carrying out proper inquiries gave the Plaintiff a set of plans at the time of transfer of Lot 2, which omitted to show the Purported Easement Reserve affecting it.

(iii) The First Defendant knowing that the Plaintiff purchased the property for the purpose of Building a dwelling failed to check or inquire or properly check or inquire whether the Crown Lease Diagram forming part of the transfer document was correct.

(iv) The First Defendant knew when giving consent to build and/or from its inspection of the construction works that the building was being built on a Purported Easement Reserve but failed to inform the Plaintiff's or take any action at all.

(v) The First Defendant encouraged and assisted the Plaintiff to build, partially on the Reserve affecting Lot 2.

(vi) The First Defendant refused to consent to construction on Stage 2 of the Plaintiff's building despite the Third Defendant not objecting to the same and advising that sufficient clearance for safety was provided.

(vii) The First Defendant refused to and continually refuses to resurvey Lot 2 despite being informed by the Plaintiff that the Purported Reserve shown on their Crown Lease Document is incorrectly marked.

(viii) The First Defendant failed to carry out its duties diligently and/or properly and/or at all."

Only claims (vi) (vii) and (viii) succeed on the evidence.

Para 20 of the amended Statement of Claim pleads that the Plaintiff and his wife have suffered substantial loss and damage as a result of the negligence of the 1st Defendant and/or the other Defendants and pleads nine particulars of loss and damages. Some of these were made out in the evidence, some were not.

At para 21 the Plaintiff pleads that the actions of all three Defendants "had a high-handed disregard to the Plaintiff's rights and the Plaintiff claims punitive and exemplary damages", and he gives five particulars of the claimed actions. The 1st Defendant is named in four of them as having failed to exercise proper care as having abused power and exercised "bullying tactics". Among the remedies claimed those that can

be claimed against the 1st Defendant are general damages special damages punitive and exemplary damages, interest at 13.5% and costs.

Assessment of Damages

I accept that a case has been made out for assessment of damages against the 1st Defendant. There is however not a great deal of evidence in support of the claim. The Plaintiff now lives in New Zealand and while he does suffer some ongoing consequences of the refusal of the 1st Defendant to allow him to build the second stage of his residence from about April 2000 until March 2006, there was no reason for him not to occupy the first stage of the building which he had built as a separate residence before this trouble began. He says he could not live in stage one of the residence because it leaked water. That was a matter for him. So far as I can gather from the evidence he could have been living in this building from the time the first stage or first level (basement) was completed which he said was "sometime in 1997". He had approval from the Local Authority to occupy it. This was given on 14 April 1997 (3DP tab 5).

He said he was living with his in-laws in Lovu. He moved to their separate house when he saw that there was a problem and he says he paid them a monthly contribution of $250 plus other costs which he says amounted to $300 to $400 per month. He stayed there until 2001 when their Native Lease expired and then he said he moved to his house at Natabua and stayed there for 3 years. When his relatives got their lease back in Lovu he moved back there. Because there had still been no resolution of the problem and he had no chance of selling the property he says he left it vacant so that he could got rid of it. He said that at the beginning of this year he had a caretaker there but the caretaker is now

not there. He is paying ground rent to the Lands Department and city rates to the Lautoka City Council.

About the payment to his relatives he said that in 2001 it was agreed that he would take over the house in which he was living and stay there for good but he opted to stay on a temporary basis and pay $350 to $400 for it. When he lived in the Natabua house for about 3 years he seems not to have paid but he thought it was early 2004 that he returned to the relatives' house and when asked by his counsel if he still lives there he replied Yes but added "whenever I come". Its transpired much later that he now lives in New Zealand. He claims nonetheless that he still gives contributions to his relatives for their house and land.

He stated in cross-examination that it is correct to say that he suffered no loss as a result of anything done by the Lautoka City Council. He also said it is correct to say that there was nothing to stop him erecting the second stage of the building and letting the FEA and Lands Department sue him if they wanted to. He agreed that he had approval from the Lautoka City Council to move in and could have done so but said he decided not to because at that time the roof was leaking and decided to complete the building before moving in. He tried to rectify the leaks by putting on plaster and chemicals but the floor of the second stage was never designed to have the same effect as a concrete roof.

In cross-examination by counsel for the 3rd Defendant he was referred to 3D.3. tab 14 and tab 15. This is a copy of his letter dated 25 July 2002 to the FEA in which he told them of his problem. He had constructed a concrete house on the ground floor and had provision for another flat on the first floor. He had been stopped by the Lands Department until prior approval had been obtained from FEA. He acknowledged that 3 days later on 28 July 2000 the FEA replied to his

letter telling him he had sufficient clearance for safety and the FEA had no objection to his continuing with his building. He said he took this letter to the Lands Department and they refused to accept it. He acknowledged that when he thereupon issued proceedings he sued the Lands Department. It was only in 2003 that the FEA and the City Council were added by his solicitors.

It is on that evidentiary basis that I must assess whatever damages may be payable by the 1st Defendant. The submissions of Ms. Moody for the FEA are in point. She submits that the only evidence of damage is the Plaintiff's claim that he paid approximately $400 per month to his relatives in "contributions" for about 3 years. She points to his evidence that he had in fact been staying with those relatives before this began and began making the claimed contributions only after the time relevant to these proceedings. She points also to his evidence that he intended to occupy the building when he sought Lautoka City Council approval for occupation in March 2000 and when that approval was given in April 2000. She also pointed out that despite his claim that he could not then live in the house because it leaked, he had lived in it for 3 years when he was unable to occupy his relatives' house. I recall also evidence from the Plaintiff that he did not occupy the basement flat after approval because he needed a proper driveway and the landscape needed sorting out and it all took time, and then he lodged his application with the National Bank of Fiji for a further loan which is what caused the dispute to start.

Decision

Against that background it is difficult to make an assessment. I do not find any authorities directly in point among those supplied by the two counsel who made submissions. Clearly the Plaintiff has suffered a substantial detriment. Whether or not he now lives in New Zealand he

owns property here and has legal entitlement from all relevant authorities to complete his building, which is apparently two residences, and occupy it. He was however deprived of the right to complete and occupy the second stage from the time the City Council gave its approval in April 2000 until the 1st Defendant finally withdrew its unjustified refusal in March 2006. This is a period of 6 years. He was not deprived of his right to occupy the first stage, and he did so for 3 of those years. I could make an arbitrary assessment based on judicial notice of rentals being paid for like residences in and around Lautoka. I should also in my opinion assess aggravated damages for the contumelious and unjustified stand taken by the 1st Defendant as a result of its own mistake. I do not see it as a case for punitive or exemplary damages. (Counsel for the Plaintiff might note they are the same thing.) There is however no pleading or claim for aggravated damages, not even for further or other relief. As for the implied claim for reimbursement of money paid to the relatives, I think on balance that evidence is rather too vague and is unsupported by any documentary corroboration at all. This could have been provided in one of several forms e.g. cheque butts or receipts. In any event it seems to me to be rather too closely related to the claim, i.e. appears to have been paid only after the time the Plaintiff may have thought there might be a prospect of recovering it.

I believe the Plaintiff intended his sons to occupy one of the two parts, but I start from the assumption that this property had a view and was potentially lettable as to one of the residences after the second stage had been built. This might during the period 2000 to 2006 have been let at around $1,000 per month. Over a period of 6 years the gross income by that calculation would have been $72,000. I award that arbitrarily assessed sum as general damages against the 1st Defendant.

The reasons for assessing aggravated damages in addition appear to me to be clear in enough in what I have already said. The Department's officers inexplicably continued to resist both the Plaintiff and the FEA in negligent and careless reliance on a plan that contradicted their official Survey Plan. Consistent with awards made in other cases in this court against the Government officials for contumelious behaviour I would have awarded under this head $15,000.

Conclusion

The damages award then is $72,000. The plaintiff seeks interest at 13.5% under the Law Reform Act, Cap 28. In **Knight v Reilly & Anor** ABU 0003 of 2004, judgment 26 November 2004, the Court of Appeal sanctioned 5% in a commercial dealing and I shall award that rate. The period is the date of the Writ (1 February 2000) till today, 5 years and 10 months. The amount is $21,000.

The Plaintiff is entitled to his reasonable costs as against the 1st Defendant. To avoid further dispute I fix these arbitrarily. Taking account of the 2 day hearing I assess them at $6,000.

Counsel for both the other Defendants sought indemnity costs against the Plaintiff. In my view these claims are well justified. In evidence the Plaintiff conceded that he had suffered no loss as a result of anything done by the Lautoka City Council and so far as the FEA is concerned his solicitors have been on notice since 16 December 2004 that (for reasons stated in a letter referred to above which is P.B. doc 11), the solicitors for the FEA would if the action proceeded seek costs against the Plaintiff on an indemnity basis. I therefore order that the Plaintiff pay indemnity costs to each of these Defendants. That is to say, he will pay all reasonable legal fees and all reasonable disbursements

incurred by each of those Defendants in defending these proceedings from filing of statements of defence until now. If these reasonable bills of costs are not agreed between counsel and then they will be assessed and settled by the Deputy Registrar.

D.D. FINNIGAN

JUDGE

At Lautoka

31 October 2006