

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Action No. 512 of 2005

BETWEEN : **METUISELA CAMA** (as Chairman), **APAKUKI TUISUE** (as Secretary) and **TIMOCI TUILELE** as Treasurer of the **EAGLE OCEAN HARVEST YOUTH GROUP**

PLAINTIFFS

AND : **ATTORNEY-GENERAL OF FIJI**

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Mr. V. Maharaj for the Plaintiffs**

: **Mr. A. Pratap for the Defendant**

DATE OF HEARING : **29th January, 2009**

DATE OF JUDGMENT : **16th October 2015**

JUDGMENT

Introduction

1. On 12 October 2005, Plaintiffs filed Writ of Summons in this action.
2. As a result of Defendant's failure to file Acknowledgement of Service and Notice of Intention to Defend Plaintiffs made Application to enter Judgment against the Defendant by Summons filed on 7 December 2005, which was returnable on 27 January 2006.
3. On 20 January 2006, Defendant filed Statement of Defence.
4. On 27 January 2006, the Application in 2 above was called before his Lordship Justice Coventry (as he then was) when it was directed that the matter take its normal course.
5. On 1 September 2006, Plaintiffs filed Amended Statement of Claim.
6. On 6 September 2006, Defendant filed Statement of Defence to Amended Statement of Claim.
7. On 7 November 2006, Plaintiffs filed Reply to Statement of Defence.
8. On 9 March 2007, Plaintiffs filed Summons for Direction and on 23 April 2007, being returnable date of Summons, Order in Terms of the Summons was made.
9. Plaintiffs and Defendant on 22 May 2007 and on 20 September 2007, filed Affidavit Verifying List of Documents respectively.
10. On 22 November 2007, Plaintiffs filed Minutes of Pre-Trial Conference.
11. On 4 April 2008, this matter was entered for trial by then Master of the High Court and referred to his Lordship Justice Hickie (as he then was) to fix trial date.
12. On 23 April 2008, this action was listed for trial on 11 June 2008 before Justice Hickie (as he then was).
13. This matter was heard on 11 and 12 June 2008, when parties were directed to file Submissions and Judgment was to be delivered on notice.

14. This matter was recalled by the Learned Trial Judge on 17 June 2008, for certain clarifications and parties were directed to file submissions on issue of declaration.
15. On 25 July 2008, his Lordship Justice Hickie (as he then was) delivered his Judgment and adjourned the matter to 29 August 2009, for further directions.
16. On 26 July 2008, Order was sealed on following terms:-
 - “1. That this Honourable Court declares that EAGLE OCEAN HARVEST YOUTH GROUP is entitled as against the State to a lease over 1860 square metres of land situated at Tiri Land West of Queens Road, Lami, LD Ref. No 60/737 subject to a number of conditions to be agreed between the parties within 28 days of the date of this Judgment or, in the alternative, to be imposed by the Court;**
 - 2. That the Plaintiffs have liberty to relist the matter on 7 days notice to seek in the alternative an award of damages should they find that within 28 days of this judgment that they have been frustrated by the Defendant’s representatives in putting above Declaration into effect.”**
17. On 29 August 2008, parties were directed to file submissions and this matter was adjourned to 17 October 2009, at 11.30am for hearing on conditions of lease.
18. On 17 October 2008, parties were directed to file submissions and this matter was adjourned to 20 November 2008, for hearing on issue of compensation and costs.
19. On 20 November 2008, Plaintiffs’ Counsel informed the Court that he intends to call Firstnamed Plaintiff to give evidence and he was directed by Court to file Firstnamed Plaintiff’s brief of evidence by 4 December 2008.
20. This matter was then adjourned to 29 January 2009, for further hearing when parties were directed to file submissions and adjourned for Judgment on Notice.
21. Judgment not being delivered by his Lordship Justice Hickie (as he then was) this matter was called before his Lordship Justice Hettiararchchi on 14

November 2012, who adjourned this matter for judgment to be delivered on notice.

22. Judgment not having delivered by his Lordship Justice Hettiararchchi this matter was referred to this court and was first called on 20 June 2013 when I informed the parties that there was no finding by Court that Defendant frustrated issue of lease as per Order made on 25 July 2008 and that hearing on assessment of damages was pre-mature. I also informed Plaintiffs' Counsel that there is no record of any brief of evidence on file and there was no record of evidence given in Court. Plaintiffs' Counsel then agreed to provide copy of brief of evidence to Court and in the meantime Court located handwritten notes of evidence given on behalf of Plaintiffs.
23. On 15 July 2013, I adjourned this matter for Judgment on Notice.

Order made on 25 July 2008

24. On 25 July 2008, his Lordship Justice Hickie (as he then was) made Declaration/Orders reproduced at paragraph 16.
25. With greatest of respect, I note the terms of the Order is ambiguous and was made without much regard to the policy and procedure in place for issue of foreshore leases.
26. Some of the pre - condition for grant of foreshore leases stated in Defendant's Submission filed on 22 September 2008 are as follows:-

- “(i) An Environmental Impact Assessment (EIA) is to be undertaken by the Plaintiff to ascertain the suitability of the land to which it will be utilized for;***
- (ii) Lami Town Council approval to be obtained by the Plaintiff;***
- (iii) Detail Plan of the Development to be approved by the Director of Town and County.”***

27. Also at paragraph 3 of Defendant's Submission filed on 22 September 2008, Defendant states as follows:-

“3.0 Development Lease

Subsequent to the fulfillment of the above mentioned lease conditions a developmental lease of 5 years will be issued to the Plaintiff. It is within these 5 years the Plaintiff will utilize the land for the purpose the lease was issued.”

28. Instead of leaving the conditions to be agreed between parties the Court should have made conditions for lease similar to that of a foreshore lease in relation to similar land for foreshore development.
29. On 27 January 2009, his Lordship Justice Hickie heard evidence on assessment of damages.
30. Once again with all due respect I note that the hearing on assessment of damages was premature for the following reasons:-
 - (i) In terms of Order No. 2 the Plaintiff was only to re-list the matter for assessment of damages should they find that within twenty-eight (28) days of the declaration they have been frustrated by Defendant's representative in putting the Declaration into effect;
 - (ii) No evidence was produced by any Affidavit or oral evidence by Plaintiffs to establish that Defendant's representative have in any way frustrated the Declaration to be put into effect.
31. Be that as it may, I will now analyze the evidence in respect to damages claimed by the Plaintiffs as per Order of Court made on 25 July 2008.
32. The Plaintiffs relied to certain degree in an earlier case between the Plaintiffs and the Defendant being Civil Action No. HBC 318 of 1998S and subsequent Civil Appeal No. ABU 0021 of 2004S.
33. It appears that Plaintiffs are of the view that they are entitled to damages in this action just because they were awarded damages in the above action.
34. In Civil Action No. HBC 318 of 1998S Court assessed damages for value of Plaintiffs equipment that was lost and or damaged whilst in possession of then Ministry of Agriculture Fisheries and Forests after Plaintiffs were evicted from the premises occupied by them. The Trial Judge assessed damages at \$50,000.00 inclusive of interest for the value of the equipment. On appeal the

damages being value of the equipment was increased to \$75,000.00 plus interest.

35. Plaintiff in Civil Action No. 318 of 1998S also claimed for loss of income arising from their eviction from the premises occupied by them at the Fisheries Compound in Lami. On 24 February 2004, Judgment was delivered in the above action. On 10 September 1996, Ministry advised Plaintiffs that Ministry wanted to occupy the subject premises for its own purpose and Plaintiffs were asked to vacate the premises and seek alternative premises by end of 1996. On 3rd January 1998, Ministry forcefully evicted the Plaintiffs from Fisheries Compound. His Lordship Justice Scott (as he then was) found Plaintiffs were mere licencees and as such the eviction by Ministry was not unlawful.
36. In relation claim for loss of income Full Court of Appeal stated as follows:-

“On the claim for loss of income, the Judge held that these losses flowed, not from the Ministry’s actions, but from Eagle’s failure to find suitable alternative premises. The notice by the Ministry to Eagle to vacate was given on 10 September 1996. The Ministry evicted Eagle on 3 January 1998, one year and four months later. During the whole of that period Eagle knew that it was going to have to find alternative premises. We agree with the Judge that, to the extent that there may have been some income lost following the eviction, it was primarily due to Eagle’s failure to relocate during the lengthy time that was available for it to do so. The appeal on this ground cannot exceed.”

37. Defendant in the Statement of Defence and Submission filed pleaded and submitted that Plaintiff claim for damages is res-judicata.

Res Judicata

38. In Halsbury’s Laws of England 4th Edition (Volume 16) “**res judicata**” is defined as follows:-

“The doctrine of res judicata is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that these must be an end of litigation. It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppels.” (para. 1527)

39. In **Henderson v. Henderson** (1843) Hare 100 which is stated in following terms:-

“In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in , and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or eve accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

40. In **Barrow v. Bankside Members Agency Ltd. & Anor** [1996] 1 ALLER 981 Sir Thomas Bringham MR adopted the rule in Henderson and stated as follows:-

“The rule in Henderson v. Henderson [1843] 3 Hare 100 [1843-60] 1 ALLER 387 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in Court of competent jurisdiction, bring their whole case before the Court so that all aspects of it may be finally decided (subject of course to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or differences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a Defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.” (at 983)

41. In **Arnold v. National Westminster Bank Plc** [1991] 3 AllER 41 Lord Keith stated:-

“Cause of action estoppels arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.

The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened.”

42. In **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208.1998L (23 February 2005) case his Lordship Justice Gates (current Chief Justice) stated as follows:-

“To raise the doctrine of res judicata the defendant must be able to show that the same parties have been before a court of competent jurisdiction and had a decision on the same issues, or at least had had an opportunity of raising related issues.”

43. In **Nagan Engineering (Fiji) Ltd v. Raj** [2010] FJHC 47, Court stated as follows:

“[43] A party who wishes to set up res judicata by way of estoppels must establish six ingredients according to Spencer0Bower & Turner: The Doctrine of Res Judicata, 2nd Edn., 1969, pp. 18,19.

- “(i) that the alleged judicial decision was what in law is deemed such.***
- (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged.***
- (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf.***
- (iv) that the judicial decision was final (my emphasis)***

(v) that the judicial decision was or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppels is raised.

(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppels is raised, or their privies, or that the decision as conclusive in rem.”

44. In Civil Action No. 318 of 1998 Plaintiffs claimed for loss of business income arising as a result of alleged forceful eviction by Ministry of Agriculture, Fisheries and Forests.

45. In this action Plaintiff is claiming damages as an alternative remedy based on Ministry of Lands refusal to issue lease to the Plaintiff.

46. Plaintiffs therefore are not estopped from claiming damages arising out of alleged failure by Department of Lands to issue lease to the Plaintiffs. Hence, the defence of res judicata does not apply.

47. Plaintiffs on 9 December, 2008 filed Brief of Evidence of Metuisela Cama and called both Mr M. Cama and Mr Jitendra A. Singh of Fiji Fish Co. Ltd as witnesses.

48. Mr Cama relied on cheques payable to Plaintiffs by Fiji Fish Co. Ltd and Great Wok of China, requisition from Fiji Fish Co. Ltd from the period 13 August 1994 to 19 February 1996 and Plaintiffs undated Report No. 2 for the period 9 March 1994 to 26 May 1994, forming part of Plaintiffs Bundle of Documents filed on 9 December 2006.

49. It appears that same evidence was produced in Civil Action No. 318 of 1998S.

50. Plaintiffs at paragraphs 7 and 8 of their Submissions filed on 12 February 2009, submitted as follows:-

*“7. It is not always possible to produce complete documentation in order to prove the actual financial loss suffered by the Plaintiffs due to passage of time from the date of actual loss but we adopt the approach taken by Fiji Court of Appeal in respect of Plaintiffs’ previous case, namely, **ATTORNEY-***

GENERAL V/S METUISELA CAMA & OTHERS CIV Appeal No. ABU 0021 of 2004S in which the Court relied on approach taken by New Zealand case of **NEWBROOK V/S MARSHALL** (2002) 2NZLR 606 in relation to assessment of damages, and we quote;

“where there are variables involved as usually occurs in assessment of business profits or losses, if precise figures had to be proved few Plaintiffs could succeed, where, as here, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the Courts. It is not a matter of whether an expert could give a reasoned assessment and could defend the number he or she came up with. The assessment of damages often involves so many unquantifiable contingencies and unreasonable assumption that in many cases realism demands a rough and ready approach to the facts.”

8. *We submit that the Plaintiffs are entitled to recover damages resulting from the breach of undertaking to grant foreshore lease to the plaintiffs which were within reasonable contemplation of the parties when the Department of Lands made representation to the plaintiffs that foreshore lease would be granted to the Plaintiffs’ subject only to the compliance of procedures with regards to obtaining of foreshore lease see **VICTORIA LAUNDARY (WINDSOR) LTD V/S NEWMAN INDUSTRIES LTD** (1949) 2KB528, see also **KOUFOS V/S C. CZARNIKOW** (1969) 1AC350.”*

51. Defendant at paragraph 2.3 to 2.4 of their submission filed on 5 March 2009, submitted:-

“2.3 *It is our submission that although damages cannot be assessed to the dollar, however there should be a standard that is used to come to that assessment. This was summed up in McGregor on Damages 16th Edition, 1997 pg. 236 and 360 and are as follows:-*

*“As Vaughan Williams L.J. put it in **Chaplin v. Hicks**, (1911) 2KB 788 C.A. the leading case on the issue of certainty: “The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.” Indeed if absolute certainty were required as to the precise amount of loss that the plaintiff had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of the damages claimed are in respect of prospective, and*

therefore necessarily contingent, loss. Of course, as Devlin J, said in **Biggin v. Permanite**: [1951] 1 K.N. 422 at 438. “Where precise evidence is obtainable, the Court naturally expects to have it [but] where it is not, the court must do the best it can.” Generally, therefore, although it remains true to say that “difficulty of proof does not dispense with the necessity of proof”, (**Aerial Advertising Co. v. Batchelors Peas** [1938] 2 ALL E.R. 788 AT 796, PER Atkinson J.), the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word “reasonable” is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount.”

Further in **Ratcliffe v. Evans** [1892] 2 Q.B. 524 at 532-533, C.A. Bowen L.J said;

“In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage is done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

2.4 *It is our submission that the Plaintiff in presenting evidence at hearing was not able to furnish to the court evidence that would ascertain the actual figures of loss that could be substantiated. The Plaintiffs although have furnished documents to the court, the authenticity of the documents is an issue and as the Defendant reiterate the said once again.” (emphasis are mine)*

52. Whilst I agree with the principle that when there is no precise evidence the court has to do its best to assess damages (**Biggin and Co. Ltd and Anor. v.**

Parmanite Ltd. [1950] 2 ALLER 859) the party claiming damages must provide some sort of evidence to prove its claim even though it is not precise.

53. In this instance, Plaintiff relied on documents subject to Plaintiffs Bundle of Documents filed on 9 December 2009 and Mr Singh's evidence who confirmed the documents and cheques issued by Fiji Fish Co. Ltd in Plaintiffs Bundle of Documents even though he was not employed by Fiji Fish when the said documents and cheques were issued or drawn. Mr Singh gave evidence that he joined Fiji Fish in the year 2003.
54. I hold that Plaintiff has failed to provide evidence which is even vaguely precise to establish any loss or damage suffered or that would be suffered by the Plaintiff as a result of Department of Lands refusal to issue the lease to Plaintiffs as directed by Court.
55. The Plaintiffs should have provided financial statements to establish loss and not documents in the form of cheques, requisitions, invoices and its own undated report dating back to 1996.
56. Plaintiffs in their Statement of Claim claimed for damages at the rate of \$4,000.00 per month.
57. However, Plaintiffs have not particularized the claim for \$4,000.00 per month nor was there any evidence tendered to show how that figure is arrived at.

Conclusion

58. I hold that Plaintiffs have failed to provide any evidence in support of their claim for any damages or loss suffered by it.
59. In relation to costs, I take into consideration the nature of the proceedings and the declaration made by court in respect to issues of the lease in favour of the Plaintiffs.
60. I hold that Plaintiffs, by choosing to enforce the alternative remedy of damages, have waived its right to the declaration in paragraph 1 of Order made on 25 July 2008.

Orders

61. I make the following Declaration/Orders:-

- (i) Declare that Plaintiff, by seeking alternative remedy for damages has waived its right to lease over 1860 square meters of land situated at Tri Land West of Queens Road, Lami, LD Ref. No. 60/737;
- (ii) Plaintiffs' claim for damages and loss is dismissed;
- (iii) Each party is to bear their costs of this action.



K. Kumar
JUDGE

At Suva

16 October 2015

MC Lawyers for the Plaintiffs

Office of the Attorney-General of Fiji for the Defendant