IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0020 OF 2023
[Court of Appeal ABU 39 of 2020]
[High Court HBC 227 of 2007L]
[High Court HBC 257 of 2007L]

BETWEEN : **HONEYMOON ISLAND (FIJI) LIMITED**

Petitioner

AND : **iTAUKEI LAND TRUST BOARD**

Respondent

Coram : The Hon. Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Justice William Calanchini, Judge of the Supreme Court
The Hon. Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Mr C.B. Young for the Petitioner
Mr J. Cati for the Respondent

Date of Hearing: 6 June, 2024

Date of Judgment: 28 June, 2024

JUDGMENT

Temo, AP

[1] I have read the draft judgment of His Lordship Mr. Justice William Calanchini. I entirely agree with his reasons and orders.

Calanchini, J

[2] This is a dispute that involves iTaukei Land. The subject land is known as Mociu Island and is situated in the Mamanuca Group located to the west of the country. The background to the dispute and the history of the proceedings have been discussed in considerable detail in the judgment of the High Court [2020] FJHC 283 and conveniently summarised in the judgment of the Court of Appeal [2023] FJCA 130.

Facts

[3] The Petitioner, Honeymoon Island Limited (Honeymoon) was granted by the iTLTB (the Board) an Agreement to lease Mociu Island on 9 May 2003. Four years later, on 7 June 2007, the Board granted an Agreement to Lease of the same island to Follies International Limited (Follies) and the lease (NL 29018) was subsequently registered under the Land Transfer Act 1971 on 28 July 2008.

High Court Proceedings

[4] Both Honeymoon and Follies commenced separate actions in the High Court at Lautoka. The first action in time was commenced by Follies (HBC 225 of 2007) seeking, among others:

- A declaration that Honeymoon has no legal right or interest over Mociu Island.
- A declaration that Follies holds a valid lease over Mociu Island.
- A declaration that the Board unlawfully took possession of the Island
- Damages, Punitive, exemplary and general against the Defendants.

[5] Shortly afterwards Honeymoon commenced civil action HBC 257 of 2007 seeking, among others, the following:

- A declaration that the agreement dated 9 May 2003 between Honeymoon and the Board is valid and binding.

- An order for specific performance of the agreement dated 9 May 2003.

- Damages including consequential loss.

[6] The learned High Court Judge dismissed the claim by Follies against Honeymoon in action HBC 225 of 2007. Neither party sought to challenge that decision on appeal.

[7] In action HBC 257 of 2007 the Judge dismissed the claim by Honeymoon against the Board and any counterclaims by the Board against Honeymoon. The Board was ordered to pay costs in the cause to both Honeymoon and Follies in both actions. In a Ruling delivered on 26 March 2021 [2021] FJHC 200, the Judge quantified the costs in the amount of $92,400.70 to be paid to Honeymoon. For whatever reason, Follies did not pursue its costs.

[8] The dismissal of Honeymoon's claim in action HBC 257 of 2007 resulted in an appeal by Honeymoon to the Court of Appeal and ultimately the present Petition to this Court. The appeal proceedings have arisen as a result of findings that are summarised by the Judge in paragraph 96 as follows:

> *"However, as I have found, there was an agreement to lease, and the law and the contract meant that Honeymoon Island was entitled to notice of default before that lease could be determined for any breach on its part. That notice was not given, the lease agreement was not terminated, and so the (Board) was in breach of its lease agreement with Honeymoon Island when it denied the existence of the lease, and agreed on June 2007 to give a new lease to Follies."*

[9] The Judge had already concluded that the other claims made by Honeymoon in its Statement of Claim had not been made out. More significantly the Judge had also concluded that, partially as a result of Honeymoon's defaulting under the agreement, the claim of fraud on the part of the Board had not been established.

[10] The learned Judge noted that *"normally such a breach would entitle Honeymoon to damages for any loss caused."* The Judge noted that the amounts paid by Honeymoon were refunded in 2007 and that costs involved in earning income must be taken into account in any calculations that could have been made. The Judge rejected what he described as *"the simplistic way"* that Honeymoon proposed to measure its losses. It is the refusal to award any damages to Honeymoon for the breach of the agreement by the Board that was the subject of the appeal to the Court of Appeal.

Court of Appeal Proceedings

[11] Honeymoon filed a timely notice of appeal on 8 June 2020 relying on two grounds of appeal. The first ground claimed that the trial Judge had failed to discharge his duty to assess damages following his finding that the Board was in breach of its lease agreement with Honeymoon. The second ground claimed that, having acknowledged that Honeymoon would normally be entitled to damages for any loss caused, ignored and/or did not address the claim that Honeymoon was entitled to judgment for $5m being the uncontested evidence as to the market value of the Island.

[12] The Court concluded that compensation would be limited only to the loss of use of the Island for the duration of the term of the lease and must be proved under ground 1. As for ground 2 the Court of Appeal concluded that the claim for $5m in damages, based on the fee simple value of Mociu Island was unsustainable. The Court concluded that there was insufficient evidence before the Court for the trial Judge to award damages by way of compensation for loss of use. Although the appeal did not succeed on those grounds, the Court awarded nominal damages in the amount of $500.00 to Honeymoon with no orders as to costs.

Leave to appeal to the Supreme Court

[13] In paragraph 5 of its Petition for leave to appeal filed on 23 August 2023 Honeymoon has listed two grounds upon which the petition is based. These grounds are:

> *"(a) The Court of Appeal erred in law in not assessing the damage as best as it can with evidence before it in the form of the Denarau Real Estate Market Appraisal of the Island at FJ$5m.*
>
> *(b) The Court of Appeal erred in law in putting no weight to the market appraisal at FJ$5m when that value could have been challenged under cross examination or by providing rebuttal evidence when the Respondent had every opportunity to do so."*

[14] In written submission filed by Counsel on 21 May 2024, and in his oral submissions before the Court, Mr Young challenged the award of nominal damages as being inappropriate in the present case.

[15] Pursuant to section 98(4) of the Constitution an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave. The jurisdiction to hear and determine an appeal is conditional upon the Petitioner having been granted leave to appeal by the Supreme Court. Under Section 7(3) of the Supreme Court Act 1998 the Supreme Court may grant leave to appeal only if a petitioner satisfies one of the criteria set out in section 7(3). Section 7(3) provides that:

> *"In relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant leave to appeal unless the case raises:-*
>
> *(a) a far reaching question of law;*
>
> *(b) a matter of great general or public importance;*
>
> *(c) a matter that is otherwise of substantial general interest to the administration of civil justice."*

[16] In **Native Land Trust Board –v- Shanti Lal, Apisai Bansi and Susu** [2012] KJSC 11; CBV 9 of 2011 reported at [2012] 1 FLR 489 Marsoof J noted at page 493:

> *"- - - - special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave."*

[17] It follows that it is necessary to consider the threshold issue as to whether the grounds of appeal in the Petition satisfy the strict criteria set out in section 7(3) of the Supreme Court Act. The two grounds of appeal listed in the Petition are similar to the grounds raised in the Court of Appeal. In effect the grounds raise two issues. The first is the failure of the trial Judge to assess damages by doing the best that he can. The second issue is the failure to assess damages in the context of the land valuation of $5m as the loss suffered by Honeymoon. It is clear that the grounds of appeal do raise an issue that affects property involving a considerable amount of money, putting aside for the present purposes the issue of the award of $500.00 as nominal damages.

[18] The Board (iTLTB) is the trustee of approximately 87% of the land mass of Fiji and that land is held on trust for the benefit of the traditional land owning units (mataqali). Any issue that involves the possibility of a large payment as a result of an unfavourable Supreme Court decision is a matter of great public importance. On the issue of damages, the award of $500.00 as nominal damages is a decision that cannot be said to be "*plainly right*." For the above reason I would be prepared to grant to the Petitioner leave to appeal to the Supreme Court.

Damages for breach of contract

[19] In paragraph 96 of the High Court judgment the trial judge confirmed his earlier conclusion that the Board was in breach of the Agreement to lease dated 9 May 2003.

[20] It has long been the position at common law that damages in contract are awarded for the purpose of compensating a plaintiff, that is to put the Plaintiff in the same position as if the contract had been performed: **Robinson v Harman** (1884) 1 Exch. 850. Of course there is the corollary of that principle in that a plaintiff is not entitled, by an award of damages, for breach of contract, to be placed in a superior position to that which he or she would have been in had the contract been performed: **Ellis Town House Pty Ltd –v-Botan Pty Ltd.** [2017] NSWCA 20 at 25.

The Board's Breach

[21] The date of the breach of Agreement between Honeymoon and the Board is 7 June 2007 being the date when the Board signed an Agreement to lease with Follies. The Board agreed to issue a lease for 95 years at the initial annual rental of $12,000.00 until 2008 when it was to increase to $18,000.00 to be reviewed every five years thereafter. However, Honeymoon had continued to conduct its business until August 2007 when Follies obtained injunctive relief restraining Honeymoon from visiting Mociu Island in its day-trip excursions. It would appear that the injunction granted by the Court was subsequently discharged by the Court of Appeal in 2008. In the transcript of evidence at page 1241 a director of Honeymoon, Mr William Gock, stated that after the injunction was discharged by the Court of Appeal on 4 July 2008, Honeymoon had not attempted to resume its day trip to Mociu Island. He claimed as the reason for not doing so was the presence of a warning sign on the island and the presence of the landowners on the Island. It can be inferred from the evidence that this reflected the attitude of the landowners towards Honeymoon on account of the failure to make the payments as they fell due under the Agreement.

Assessment of Loss

[22] This evidence is summarised in paragraph 53 of the trial judgment. The evidence consisted of a comparison of figures between August/September 2006 with those for the same months for 2007. The trial Judge correctly concluded that this evidence alone was not sufficient to establish the impact on Honeymoon's "*bottom line*" as a result of the injunction. There was no documentary evidence to establish records of sales, overheads incurred in running the tours or financial accounts covering the period of the injunction. There was no evidence to establish that any noticeable reduction in customer numbers that Honeymoon experienced for its Island tours was attributable to Mociu Island being dropped from the list of islands visited. The comparison showing the reduction in the numbers of passengers could equally be attributed to the coup in December 2006. As result of that coup, all tourist operators experienced substantial decline in business. As the trial Judge noted, all the information relevant to its loss was in the control of Honeymoon. How could such evidence as to loss be challenged in cross-examination? The onus was on Honeymoon to adduce that evidence to establish the loss. This was not a case where the Court could be expected or even should be expected to do that which Honeymoon had failed to do. Honeymoon's submission amounts to an attempt to force the Court to "*do the best it can*" when Honeymoon had failed to lead any meaningful evidence as to the impact of the breach on its business. There was no explanation from Honeymoon for that failure to adduce evidence that should have been readily available to establish its loss.

[23] The evidence at the trial indicates that following the discharge of the injunctions granted to both parties by the Court of Appeal in 2008, Honeymoon did not seek and has not sought to include Mociu Island in its day trip tours to the islands in the Mamanuca Group. Other resort operators within the Mamanuca Group are "*using*" Mociu Island. At page 1242 of the Record, Mr Gock stated that as at 18 June 2018 Plantation Island Resort, Musket Cove Island Resort, Malolo Island Resort, Likuliku Island Resort, Castaway Island Resort and Mana Island Resort were all "*using*" Mociu Island as part of their day trip activities. This has obviously been made possible by negotiating with Follies and/or

subsequent owners of a registered lease over the Island. There was no evidence at the trial to conclude that Honeymoon could not have reached the same arrangement. Honeymoon has not only failed to mitigate any loss it may have suffered, it has also shown no interest in Mociu Island as a tourist attraction.

[24] From the evidence it can be inferred that, as a result of its default in making payments as they fell due, Honeymoon had alienated the traditional landowners of Mociu to the extent that any consent that was required to allow Honeymoon to include Mociu on its tours would not be granted. Whatever the reason, there was no direct evidence as to why Honeymoon had discontinued its interest in Mociu Island. As a result, the evidence did not establish on the balance of probabilities that Honeymoon had been deprived of a commercial opportunity. There is no evidence to conclude that Honeymoon was pursuing damages for "*loss of opportunity*."

[25] The trial Judge stated in paragraph 64 that there was no evidence of what happened in the years after 2008 and that he "*was not prepared to guess*." It is appropriate to add that the Court should not speculate about Honeymoon's intentions beyond the trial into the future.

Summary

[26] The evidence of the market value of Mociu Island at $5m was adduced to assist the Court to do "*the best it can."* It is of no assistance whatsoever. The failure of Honeymoon to provide any helpful evidence to assess loss incurred during the period when the injunction was in force, and the complete lack of evidence to explain why Honeymoon has not attempted to engage with Follies and subsequent lessee to ensure that Mociu Island was included in any day trip tours it was conducting or proposed to conduct, indicate that there is no merit in this appeal. Furthermore the trial Judge has indicated that even if it had been possible to assess the amount of the loss it would be necessary to offset that assessment by taking into account the remaining outstanding rental payments and other payments due under the agreement together with the loss of interest due to the Board as a result of those payment arrears. Honeymoon is left with no more than nominal damages. Consequently I would dismiss the appeal.

Goddard, J

[27] I am in complete agreement with the findings and conclusions in this judgment.

Orders:

1. *Leave to appeal is granted.*
2. *Appeal is dismissed.*
3. *Judgment of the Court of Appeal is affirmed.*
4. *Petitioner is to pay costs to the Board fixed in the amount of $10,000.00 within 30 days of the date of this Judgment.*

Hon Acting Chief Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT

Hon Justice Lowell Goddard
JUDGE OF THE SUPREME COURT