IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 6 of 1966

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Between:

LATASI KAMUTA & OTHERS Appellants

- and -

RESIDENT COMMISSIONER
OF THE GILBERT AND
ELLICE ISLANDS COLONY Respondent

M.J.C. Saunders for Appellants
D. McLoughlin, Solicitor-General, for Respondent

JUDGMENT OF MILLS-OWENS, P.

I have had the advantage of reading the judgment of Marsack, J.A. and I agree with the order proposed for the variation of the award and with respect to costs. Clearly, there must, initially, have been considerable doubt whether the record contained sufficient material to enable this Court to substitute its own figure as the proper amount of compensation. Even the concessions made by counsel on the hearing of the appeal appeared to me at one stage to amount to inviting us to act as arbitrators. There is however every reason to bring the litigation to a conclusion and, I agree, strong ground for refusing a hearing de novo. As it appears to me the course taken on the appeal has but barely rendered it possible for us to make a decision on the amount to be awarded.

As to our refusal to hear fresh evidence, it is not a matter of penalising the acquiring authority for its failure to go before the Court below armed with material to substantiate its offer; it is a matter of achieving finality and of avoiding a course which would

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or might encourage inadequate presentation. Paragraph (1) of rule 31 expressly provides for one instance in which a party may adduce fresh evidence, that is to say where essential facts have come to his knowledge after the decision, and otherwise provides that there shall be no 'right' to adduce fresh evidence on an appeal. The rule avoids introducing the additional qualifications which have been laid down in the decided cases elsewhere and, as I think, deliberately avoids doing so, the whole of the rule being carefully devised to meet the circumstances of the area in which it was intended to operate. On this view the provisions of paragraph (2) must, in my opinion, be construed as vesting in the Court the widest discretion. It is desirable that the Court should not tie its hands for the future; obviously cases may arise, of which this is probably one, where it becomes a matter of, so to say, 'greater hardship' in the sense of balancing opposing possible injustices in deciding whether or not to admit fresh evidence. Here the proceedings were commenced on behalf of the acquiring authority and it did not take advantage of the opportunity given by section 10 of the Ordinance of 1954 under which written valuations might have been put before the Court. In my view, the application in this case to adduce fresh evidence was in effect, in the circumstances of the case, an application for an opportunity to litigate the matter afresh and was therefore to be refused.

No objection was raised to an award in the form of an annual sum, nor to treating the owners as if they held the whole 51 acres in common and each suffered damage by reason of severance; nor is any deduction to be made for betterment having regard to the terms of section 11 of the Ordinance.

I would add that in cases such as this there is no reason why proofs of professional evidence should not be exchanged before the trial.

R.H. MILLS-OWENS

PRESIDENT.

SUVA,
16th September, 1966.

IN THE FIJI COURT OF APPEAL

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Civil Jurisdiction

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LATASI KAMUTA & OTHERS Appellants

- and -

RESIDENT COMMISSIONER OF THE GILBERT AND ELLICE ISLANDS COLONY Respondent

M.J.C. Saunders for Appellants
D. McLoughlin, Solicitor-General, for Respondent

JUDGMENT OF WYLIE, J.

I agree with the conclusions of the other members of the Court in this appeal and wish only to add some observations concerning the application for leave to produce additional evidence.

Rule 31 of the Court of Appeal Rules (No. 2) 1956 made by the High Commissioner of the Western Pacific reads:

> "31.(1) It shall not be open, as of right, to any party to an appeal to adduce new evidence in support of his original case, but a party may allege any facts essential to the issue which have come to his knowledge after the date of the decision from which the appeal is brought, and may adduce evidence in support of his allegations.
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> (2) The Court of Appeal may in any case, if it thinks fit, allow or require new evidence to be adduced, either by oral examination in Court, by affidavit, or by depositions taken before an examiner or commissioner."

This rule is in marked contrast to what may be termed the usual rule, as illustrated by Rule 21(2) of the Fiji Court of Appeal Rules, which provides as follows: 75

> "(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:
>
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

The mass of additional evidence which the respondent sought to adduce, does not appear to establish facts (as distinct from expressions of opinion of experts) which came to the knowledge of the respondent after the date of the decision of the High Commissioner's Court, and consequently the respondent very properly did not seek to make use of paragraph (1) of rule 31. However, it is in my judgment necessary to take into account the provisions of this paragraph when considering the circumstances in which the Court of Appeal should exercise the unfettered discretion conferred upon it by paragraph (2) of the rule.

I use the expression "unfettered" advisedly. The terms of the paragraph are not qualified in any manner, if the Court thinks fit to hear the new evidence. Being a court of law, this Court must not exercise this discretion in an arbitrary manner and certainly not in a manner which would mean doing injustice in all the circumstances. It does appear, however, that the rule-making authority has expressly enacted the rule in a form which will not enable some of the principles well established in other jurisdictions to be applied without qualification.

In the first place, it is not necessary to show special grounds and some of the principles I refer to have been established because it is necessary to show special grounds. Those principles tend to instance the special grounds on which the relevant Court of Appeal will grant an application to adduce fresh evidence.

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On the other hand, some of the principles, e.g. that it is desirable that the course of litigation should be quickly completed and that it may often cause injustice to allow one party to adduce additional evidence after a full hearing or trial, are of course of general application.

Nevertheless, there is a clear departure from the general application of these principles in paragraph (1) of rule 31. For a party to an appeal may, without any leave from the Court, adduce evidence in support of facts which have come to his knowledge after the date of the decision. Considerations of consequent injustice to the other party and of delays in litigation appear to be irrelevant. On this occasion, no ruling is required as to any limitations that may be appropriate, but it is relevant to observe that the usual limitation that the evidence must be such as the party could not by the exercise of reasonable diligence have known of at the time of the trial, does not seem to be applicable. What is clear is that a party to an appeal is enabled, without leave of the court at all, to adduce additional evidence in circumstances in which leave might be refused under the principles that have been approved in other jurisdictions.

This must be borne in mind in considering what principles might be appropriate when an application is made under paragraph (2) of the rule. The reasons for the form in which this rule is enacted almost certainly concern the long distances, poor communications, the ignorance of most litigants in the area of principles of practice and procedure and the fact that no legal advice or assistance is available to private litigants within the jurisdiction of the High Commissioner's Court. This Court should bear these reasons in mind when asked to exercise its discretion.

On the present application, I prefer to base my reasons for refusing this application in the circumstances of these proceedings on the fact that this particular applicant cannot show (and did not attempt to show) that any of the reasons for conferring additional rights on an applicant, or a wider discretion on the court, have any relevance to the present appli-

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cation. I agree with my brother Marsack that it would not be in the interests of justice to allow this particular litigant to adduce all this additional evidence and, in effect, present a new case, because in my judgment none of the considerations that led to the conferring upon this Court of a wider discretion than usual, apply in the case of this litigant in the circumstances that have been disclosed, and the applicant has not shown that any other circumstances exist that would make it in the interests of justice to grant this application.

I agree with both the observations and the conclusions of the other members of the Court concerning the appeal and the cross-appeal and have nothing to add.

C. WYLIE.

JUDGE OF APPEAL.

SUVA,

16th September, 1966.

IN THE FIJI COURT OF APPEAL

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Civil Jurisdiction

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Between:

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- and -

RESIDENT COMMISSIONER OF THE GILBERT AND ELLICE ISLANDS COLONY Respondent

M.J.C. Saunders for Appellants
D. McLoughlin, Solicitor-General, for Respondent

JUDGMENT OF MARSACK, J.

This is an appeal against a judgment of the High Court of the Western Pacific given at Funafuti on the 11th February, 1966. The action in which judgment was given was brought by the appellants against the respondent for the determination of the amount of compensation to be paid in respect of approximately 51 acres of land at Funafuti compulsorily acquired by the Crown under the Crown Acquisition of Lands Ordinance 1954. The judgment of the learned trial Judge awarded compensation at the rate of £7.18.0 per acre for each year of the period of acquisition of the land by the Crown, namely 20 years; and in addition the sum of £3,000 in respect of the loss of standing crops and trees. The appeal was not concerned with the lump sum award of £3,000 but only with the amount of £7.18.0 per acre fixed as compensation for each year.

The respondent has filed a notice of cross-appeal asking that the action be remitted to the High Court of the Western Pacific with an order for retrial on the

grounds that there was insufficient material before the Court upon which a judgment could properly be based. In the alternative the respondent seeks an order reducing the sum of £7.18.0 per acre to £4.6.0 per acre.

In his notice of cross-appeal the respondent sought leave to adduce at the hearing of the appeal and the cross-appeal new evidence contained in 17 affidavits; the earliest of which is dated 17th July, 1966, and the latest 16th August, 1966. Counsel were heard on the preliminary point as to whether these affidavits should be admitted in evidence at the hearing of the appeal. The application for leave to adduce this new evidence was refused, and the Court announced that the reasons for this refusal would be given later. The Court then proceeded to hear the appeal, upon the record of proceedings before the Court below.

I now turn to the application for leave to adduce fresh evidence before this Court. For a full understanding of the matter it is necessary to examine shortly the history of the litigation which culminated in the judgment given on the 11th February, 1966.

On the 12th August, 1963, public notice was given that the lands in question were required by the High Commissioner for public purposes, for a term of 20 years from that date. This notice followed a discussion which had taken place between Government officers and the native owners on the 13th April, 1963, when, upon the suggestion of the Resident Commissioner, it was agreed that one landowner should "take a test case to the Court so that the Judge could decide what was a fair rent". On the 11th November, 1963, a paper was submitted by the native owners in which they explained in detail their reasons for refusing the Government's offer of £4.3.0 per acre.

On the 30th August, 1965, solicitors acting for the appellants wrote from Suva that the claimants would be legally represented at the hearing of the claim for compensation. During November 1965 it was agreed between the Administrative Officer, Funafuti and the solicitors concerned, that a suitable date for hearing

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of the claim before the High Court of the Western Pacific would be between the 6th and 15th February, 1966.

From this time-table it appears clear that the respondent had, for over two years before the date of hearing of the claim, been fully aware of the fact that the appellants were not satisfied with the offer made by the Crown, and of the reasons for their dissatisfaction. The respondent had also known for nearly six months prior to the date of hearing that the appellants would be legally represented at the hearing. I conclude therefore that the respondent not only had ample opportunity for an adequate presentation of his case, but also full knowledge that such a presentation would be necessary.

The basis of the application for leave to adduce fresh evidence was, in counsel's submission, the inadequacy of the evidence put before the Court below. The evidence sought to be introduced consisted very largely of what might be referred to as "opinion evidence", in the form of valuations of the land in question - in some cases made subsequently to the trial - and also of opinions as to the suitability of the land in question for the growing of coconut palms. Some of the affidavits referred to records, kept by the Government of the Gilbert and Ellice Islands Colony, of sales and leases of land elsewhere in the Colony over a term of years. At the trial of the action the respondent was represented by the Administrative Officer who, in an affidavit in support of the application to adduce fresh evidence, deposed, inter alia, that relevant papers and reference books were not available to him to consult when the case of the other party was presented; and further, that on account of the pressure of his normal duties he had been prevented from devoting as much time to the action before, during and after the hearing as he should have desired.

At the hearing of the appeal it was conceded by the learned Solicitor-General that the Crown had been at fault in the Court below in failing to present its case adequately. It appears to me that the application for leave to call fresh evidence is due entirely to the fact that the respondent had not taken the opportunity afforded to him of calling all the evidence which

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was readily available, and would have been called if the case had been adequately presented.

Counsel for the respondent expressly bases his case for the introduction of fresh evidence, on Rule 31(2) of the Court of Appeal Rules (No. 2 of 1956) under the Pacific Order in Council 1893. This reads:

> "31.(2) The Court of Appeal may in any case, if it thinks fit, allow or require new evidence to be adduced, either by oral examination in Court, by affidavit, or by depositions taken before an examiner or commissioner."

Counsel emphasises that the discretion granted to the Court under that rule is unfettered. There are, we think, good grounds for counsel's submission that the rule was deliberately made less restricted than in the case of the corresponding rule in force in England or in Fiji, because of the widely scattered nature of the Western Pacific territories and of the fact that there are no resident solicitors in practice in the territories covered by the rule. There are two legal officers attached to the High Commission of the Western Pacific, but they are resident at Honiara in the British Solomon Islands Protectorate, not in the Gilbert and Ellice Islands.

Although the discretion granted to the Court by the rule quoted is not subject to the restrictions imposed by the narrower rules in force in England or in Fiji yet, in my opinion, a party making such an application must show, in order to succeed, that the interests of justice demand that the application should be granted. The inherent danger of allowing a party to re-open a case already decided, and to present it differently, has always been recognised. As Jessel, M.R. says in Sanders v. Sanders (1881) 19 Ch.D. 373 at p.380:

> "The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the court below. That he might have shaped his case better in the court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court."

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This was quoted with approval by Their Lordships of the Privy Council in Leeder v. Ellis (1953) A.C. 52 at p.66.

It is true that in Rule 9(2) of Order 58, defining the powers of the English Court of Appeal with reference to the admission of fresh evidence, there is a definite provision that in the case of an appeal from a judgment after trial or hearing on the merits no further evidence shall be admitted except on special grounds. Those special grounds are well settled. They were stated by Denning, L.J. in Ladd v. Marshall (1954) 1 W.L.R. 1489 C.A. at 1491:

> "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be uncontrovertible."

In Shedden v. Patrick (1869) 22 L.T.N.S. 631 at p.634 the general principle which should be applied in dealing with applications of this character is defined in the broadest terms by Lord Chelmsford in this way:

> "It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence, which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial."

Although, as has been stated, the cases cited were determined upon the construction of the rule specifying that permission can be granted only for special reasons, and there is no such limitation in Rule 31(2) under which this application is brought, yet the judgments clearly indicate that in no circumstances should leave to adduce fresh evidence on appeal be

lightly granted. Respect has always been shown in the Courts to the principle interest reipublicae ut sit finis litium. Even if the discretion of the Court under Rule 31(2) is unfettered; even if "special reasons" have not to be established to the satisfaction of the Court before leave is granted; yet I am firmly of opinion that this Court should not grant leave to adduce fresh evidence unless satisfied that in all the circumstances of the case injustice would be caused by refusing leave.

In the present case it appears that all the facts which it is proposed to adduce by way of new evidence were in the possession, if not of the Resident Commissioner, at least of the Administration which he represents. The valuations and opinions which have been obtained since judgment was delivered could easily have been obtained before the case was heard. No doubt legal assistance would, if requested, have been made available from the Headquarters of the Western Pacific High Commission, which is the controlling authority for the territories of the Western Pacific including the Gilbert and Ellice Islands Colony. I am satisfied that the respondent had adequate notice both of the main contentions of the claimants and of the fact that they would be legally represented at the hearing. I am satisfied that if the application made by the respondent for a new trial, with the almost inevitable introduction of this large volume of fresh evidence, were granted, substantial injustice would be caused to the appellants. I find myself unable to accept the submission of the learned Solicitor-General that this case falls within the principles laid down in Crook v. Derbyshire (1961) 3 All E.R. 786, where leave to call additional evidence on appeal was granted on the ground that this evidence had become relevant only during the course of the trial, and the necessity for it could not reasonably have been anticipated earlier. In my view the respondent was in possession of all facts material to the inquiry and could have adduced them in evidence at the inquiry if he had thought fit.

In my view, the Court's decision to reject the additional evidence tendered and the application for

retrial was properly based upon the facts of the case as presented to the Court, and a finding that any other decision would work an injustice to the appellants. 70

It now becomes necessary to consider the appeal and the cross-appeal on the basis of the evidence given in the Court below. I agree that in some respects evidence of a more detailed character might well have been given, and that the task both of the trial judge and of this Court might thereby have been rendered considerably easier. But on a careful consideration of that evidence and a study of the text-book, Piggott on Coconut Growing, which it was agreed by counsel could be read by this Court and accepted as authoritative, it is in my opinion possible to come to a conclusion as to the amount of compensation which should be awarded.

Clearly the award made by the trial Judge cannot stand, if only for the reason that he has made a mathematical error in calculating that a yearly net revenue of £33 per acre, capitalised at 6 percent, would give a capital value per acre of £138. That in fact is the main burden of the appellant's case on appeal.

It is accepted by counsel on both sides that the method of assessing the amount of compensation to be paid per acre per year for the required period of 20 years should be primarily to determine the productive value. No figures are available to show exactly how much copra the land in question is reasonably capable of producing. In Piggott's handbook, page 8, the average annual yield of copra per acre in "some important producing areas" is set out in table 5. The figures range from 0.48 per ton in the Philippines to 0.16 in the French Pacific atolls; and the average of all the figures quoted in the table amounts to 0.34 tons to the acre. Piggott however comments that these figures are very low, and that under good conditions and with proper management a plantation should have an annual yield of about 0.9 tons of copra per acre. The actual area under coconuts in the Funafuti atoll is not known; but on the assumption - which was accepted as reasonable in the argument before us - that one-third of the entire area is covered with coconut plantations, then the

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average annual yield is 2.25 cwt. per acre or 0.112 tons. This figure is based upon the Government statistics of the total copra production on Funafuti.

In the absence of detailed and accurate evidence as to not only current production of copra from the area in question, but also the figure to which that production could be raised by employment of the most efficient farming methods, any estimate of production must necessarily be somewhat conjectural. For the purpose of the assessment of compensation the respondent is prepared to accept a figure of 10 cwt. or 0.5 tons per acre. In my opinion, on the figures supplied, this figure is a very reasonable one and I think the Court could properly act upon it. If this figure is accepted it means that the total annual production from the 51 acres concerned would be 25.5 tons, which at the agreed value of £28 per ton at Funafuti would mean an annual yield of £714. It is conceded by both parties that the figure fixed by the learned trial Judge as the cost of production, namely one-third of the proceeds, is reasonable. Deducting therefore one-third of this sum of £714 by way of production costs we are left with a figure of £476 per annum as the net revenue from the 51 acres. It is also agreed by the parties that the proper rate at which this should be capitalised is 8 percent. This then will give a capital value of the land in question as £5,950. From this must be deducted the improvements necessary to produce the income. Accepting the average density of coconut palms on the atoll as 76 to the acre, then at the agreed figure of 10/- per coconut palm the total amount of deduction to be made for improvements is £1,938. This leaves a balance, representing the unimproved value, of £4,012. Applying again the 8 percent rule this gives an annual value of £321, namely £6.5.2 per acre.

In the judgment under appeal two sums were added to the figure calculated upon the productive value. These were:

(a) £5 per acre for "severance value", payable at 5/- per acre per annum;

(b) £15 per acre for "special potential".

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As far as severance value is concerned the Crown concedes that some amount is properly payable, and has offered £3 per acre as a reasonable amount under this head. It is impossible to give an exact valuation of what is called "severance value". No reasons were put forward by the Crown for fixing the figure at £3 per acre. The learned trial judge had the advantage of personal observations of the land concerned and of the conditions applicable. In these circumstances there seems no good reason for disturbing the finding of the learned trial judge; and consequently I would allow the further sum of 5/- per acre per annum under this head.

With regard to what is referred to in the judgment as "special potential", I can find no evidence in support of any such claim. At the hearing of the appeal counsel for the appellants conceded - very properly in my view - that there was no evidence justifying this allowance. In these circumstances I think that no extra payment should be made under this head.

In the result I would adjudge that the proper amount payable per acre per annum over the 20 years for which the land is required by the Crown is £6.10.2d. As the award of £3,000, in respect of damage suffered from loss of standing crops and trees, is not attacked by either party, that portion of the award will not be affected by the judgment of this Court.

Accordingly in my judgment there should be an order dismissing the appeal and allowing the cross-appeal in part. The judgment of the Court below should be varied by substituting the figure of £6.10.2d. for £7.18.0d. as the compensation payable per acre for each year of the period of 20 years.

Although the respondent has been partly successful in this appeal I am of opinion that the costs of the appeal should be borne by the respondent. It was conceded by the learned Solicitor-General that this would be a proper order to make in view of the fact that the case was not properly presented by or on behalf of the Crown before the learned trial judge. In my view there should

accordingly be an order that the appellants' costs of the appeal be paid by the respondent. If the parties are unable to agree upon the quantum of these costs then they should be fixed by the Registrar of this Court. 73

C.C. MARSACK

JUDGE OF APPEAL

SUVA,
16th September, 1966.