IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 8 of 1966

Between:

THE ATTORNEY-GENERAL
in and for the Colony of Fiji — Appellant

- and -

WILLIAM LINDSAY ISAAC VERRIER — Respondent

JUDGMENT OF BODILLY, J.A.

This is an appeal from a decision of the Supreme Court issued on 22nd March, 1966, acting in exercise of its appellate jurisdiction in civil proceedings instituted in the Magistrate's Court of Suva.

The facts of the case are simple. The Respondent is the owner of residential premises situated at No.6 Gorrie Street, Suva, which he has occupied for many years. At all material times he has drawn his domestic water from the public water supply which is under the statutory control of the Commissioner of Water Supply. On 26th May, 1965, a servant of the Commissioner entered upon the respondent's premises and disconnected the water because the respondent, so it was alleged, was in arrears in the sum of £1. 1. 9 with his payment of charges for water consumption. It is not disputed by the respondent that this sum was owing but he has stated in evidence that he had received no demand for payment. After considerable correspondence between the respondent and the Commissioner, the respondent instituted proceedings in the Magistrate's Court against the Attorney-General claiming damages. The claim is pleaded in trespass and the respondent contends that the Commissioner had no legal right to disconnect the water and that consequently his servant committed trespass when he entered upon the respondent's property in order to do so; and the respondent claims £5 damages and costs.

In the Magistrate's Court the proceedings took the following course. The record of proceedings was maintained in shortened form pursuant to the provisions of section 63(3) of the Magistrates' Courts Ordinance (Cap. 5). Neither party to the proceedings requested that a full note should be kept and before this Court both parties have stated that they were

and still are quite satisfied with the note which the Magistrate took. At the end of the respondent's case the Crown submitted that there was no case to answer and tendered no evidence. For some reason, which is not clear, possibly by an oversight on the part of the Magistrate, Crown Counsel was not put to election and the Magistrate ruled upon the submission and dismissed the respondent's suit. The respondent appealed. In the Supreme Court the case was argued on the evidence so far adduced in the Court below and the learned Judge found in favour of the respondent and directed that the case be remitted for retrial de novo. He then made certain orders as to costs, namely that the respondent be awarded the costs of the appeal and in the Court below and also the costs of the rehearing in any event.

This appeal is brought against that decision and those orders as to costs.

There are six grounds of appeal. The first two grounds deal with the interpretation of sections 8 and 9 of Water Supply Ordinance (Cap. 89). The appellant contends that those two sections must be construed independently of each other. The third and fourth grounds of appeal allege that the Judge on appeal in the Court below erred in law in omitting to rule that there is no statutory obligation upon the Commissioner either initially to supply water or, having commenced a supply, to continue it. Ground 5 contends that the Judge was wrong in directing a retrial de novo. And finally Ground 6 deals with the orders made as to costs.

I will deal with the grounds of appeal in that order.

The appellant has contended before this Court that section 8 (a) of the Ordinance deals exclusively with the case where the Commissioner may require a consumer to give an undertaking to pay the consumption charges and that in this case, and this case only, as I understand the appellant's argument, is the question of notice relevant. As a matter of construction I think that contention is right. It is to be observed that the reference to thirty days notice is not contained in the head portion of the section which would indicate that it applied to all the lettered paragraphs which came after, but is inserted only in the body of paragraph (a) of the section which, in my view, indicate clearly that its operation is confined to the provisions of that paragraph. That being so, contends the appellant, the provisions of paragraph (b) of that section are untrammelled by any

requirement as to notice at all and the Commissioner is entitled as of right to terminate the supply of water at will at any time without notice. The appellant then contends that section 9 of the Ordinance standing independently of section 8, gives the Commissioner a power of entry to do certain things, one of which, specified in paragraph (d) is the disconnection of water at will, irrespective of the reason.

If those two sections are to be read independently of each other in all respects as is contended, section 8 (b) would only entitle disconnection when a default was made in the payment of a sum of money due. But section 9 (d) would entitle the disconnection of water at will even though nothing was due, where for example a consumer may have overpaid his account previously and in fact be in credit. If this interpretation is to be accepted section 8(b) becomes superfluous to the legislation altogether, because it would not matter whether default was made or not, the result would be the same. It is an established rule of construction that effect must where possible be given to each provision of an Ordinance. In my opinion effect can only be given to section 8(b) if it is read as a qualification of the powers of entry granted by section 9(d). This interpretation does no violence to the statute. On the contrary it removes what is otherwise an apparent inconsistency and makes good sense of the sections. In my judgment, therefore, where the reason for the disconnection of water is a default in payment of money alleged to be due, and it is not suggested in this case that there was any other reason, then the relevant portion of section 9 (d) can only be invoked if the conditions specified in section 8 (b) are established, namely that money is due and payment is in default.

If I am correct in this view, then in order to determine whether the Commissioner, through his servant, trespassed upon the respondent's premises or not, it becomes necessary to consider whether the respondent was at the time of the entry in default of payment of money due. Owing to the course which the proceedings took in the Magistrate's court, only the evidence of the respondent is before this court. He has given evidence that he did not at any time receive a demand for payment of the sum of $1. 1. 9 until the Commissioner's servant entered his premises to disconnect the water when he was informed, upon enquiry, that the disconnection was due to his failure to pay that amount. He says that he immediately tendered a cheque for the sum but that the Commissioner's servant refused to accept it and took away the water. It has

been stated in the case that a bill was posted but there is no evidence of that. There is only the evidence of non-receipt. Assuming therefore, for the purposes of this judgment, that the respondent in fact received no notice in the form of a bill or demand that the sum in question was owing, can it be said that he was in default? In a case such as a water supply, or a continuous supply of any other commodity, it seems to me that money cannot be considered as due for payment until the amount has been ascertained. This is done by measuring from time to time the quantity of the commodity consumed and computing the price. In the meantime further quantities of the commodity are being consumed all the time for which money is accruing but it cannot in my opinion be said to be due until another act of measurement and computation takes place. That seems to me to be the first leg of section 8 (b), namely the determination of the point at which money becomes due. The second leg of that paragraph requires determination of the question when is the consumer in default of payment? In my opinion a person can hardly be said to be in default unless he is made aware of the amount which is due. Where a person buys a pound of sugar it might be said that he is aware of the amount due ab initio and as a debtor it is his duty to come to the creditor, but that can scarcely be the case where the amount due is ascertained by the reading of a meter by the seller and the seller elects the time at which he will take the reading and compute the price. In the absence therefore of evidence to establish that the respondent had been made aware of the amount due or, but for his own wilful default or neglect, would have been made aware of it, I do not consider that he can be held to be in default of payment.

It has been mentioned in the case, though owing to the course which the proceedings have taken no evidence has yet been heard on the matter, that a bill was posted. In the absence of specific statutory provision, and there is none contained in the Ordinance in question here, I can find no general proposition of law that the posting of a communication gives rise to an irrebutable presumption of receipt. at the most proof of posting might be taken as prima facie evidence of receipt.

For the above reasons I do not find, in the absence of further evidence, and I am not forgetting that evidence for the appellant has not yet been heard, that section 8 (b)

of the Ordinance is satisfied and consequently, as I have already found that section 9 (d) must be read subject thereto, on the plain construction of those two sections I am of opinion that it has not been established at this stage of the case that the Commissioner was entitled as of right to enter upon the respondent's property for the purpose of disconnecting the water for the reason alleged, namely default in payment of money due.

As far as this aspect of the case is concerned that could be the end of the matter, but grounds 3 and 4 of the appea allege that the learned Judge was wrong in not specifically finding that no statutory obligation lies upon the Commissioner either to supply water initially or, having commenced, to continue to do so. I shall express my opinion therefore on those two grounds also.

I think that there is such an obligation. It is true that nowhere does the Ordinance specifically state that there shall be an obligation upon the Commissioner to supply and conversely there is no saving provision whereby it is declared that nothing in the Ordinance shall be construed as implying such an obligation. The provisions of the Ordinance must therefore be examined as a whole in order to seek the true tenor of the relevant provisions. Speaking for myself I have no hesitation in finding that such an obligation arises by implication. For the appellant it was contended that the provisions of the Ordinance are merely permissive in relation to supply because the supplier of the water is the Crown in its Government of Fiji. I will concede that where a Government department enters the market to provide a public amenity it is usual, indeed it may be necessary, to cover the action by statutory authority. But that does not mean that the statute in question is not subject to the ordinary rules of construction. It is well known that, and there are a great many cases in which, particular permissive expressions such as "the authority may" or, as in this case, "it shall be lawful" etc. have been construed in the context of a particular statute and circumstances as having obligatory effect. I think that this is the case here. I am fortified in this view not only by the wording of sections 8, 9 and 10 of the Ordinance which go into considerable detail as to the circumstances in which the Commissioner may disconnect a supply of water once commenced, and in the case of default in payment the duration

of the disconnection, but also by the provisions of By-laws 2, 3 and 4 of the Water Supply By-laws 1955, which prescribe the manner in which a member of the public shall obtain a water supply initially. These provisions appear to me to imply that once an application is received by the Commissioner in the form prescribed in By-law 2 and the fee prescribed in By-law 3 has been paid, then the Commissioner may only refuse to grant the application in the circumstances specified in By-law 4. Unless an obligation is implied it seems to me that sections 8, 9 and 10 of the Ordinance and By-law 4 of the By-laws are rendered largely meaningless. For the above reasons I think that the learned Judge was right to make no contrary ruling on the matter.

As to ground 5, our attention has been drawn to certain authorities, in particular Yuill v. Yuill (1945 Probate 15) dealing with the matter of election. I think it quite clear that where counsel in a civil matter has not for any reason been put to his election his right to call evidence is not lost. It only becomes lost if he in fact elects not to call evidence. It is unfortunate that counsel was not put to election expressly in the Magistrate's Court as time and expense might have been saved. But however that may be, as I would for the reasons above stated uphold the decision of the learned Judge of the Supreme Court to the effect that the Magistrate was wrong in nonsuiting the respondent upon the submission of no case to answer, I think that the case must be remitted to the Magistrate. The complaint in this ground of appeal is that the learned Judge directed a retrial de novo. Why he did this is not clear, but with respect I think that he was wrong and I would direct that the case be remitted for continuation as though no submission had been made.

That brings me to the final ground of appeal which relates to the orders as to costs. The case is only part-heard and I cannot find that the Crown has acted up to this stage in any way improperly so as to justify penalising the appellant in costs. The learned Judge appears to have based his order as to costs on the ground that had not the appellant made a submission that there was no case to answer, the case would have been concluded there and then in the Magistrate's Court. I cannot approve of this ground because the appellant was fully entitled to take that course. He was merely exercising a procedural right and cannot on that ground only be penalised

in costs. Costs rest in the discretion of the Court but that discretion must be exercised judicially. It is true that had the Magistrate put Crown Counsel to election expense and time might have been saved. But that was the duty of the Court and any extra expense arising from omission to do so cannot be placed upon the shoulders of one party rather than the other. I think it unfortunate that Crown Counsel, if he was aware of the procedure, did not specifically draw the attention of the Magistrate to the matter at the time, especially having regard to the fact that he was opposed by a lay litigant in person who would be unlikely to know of such procedural niceties. But I do not think the matter can be taken further than that.

In the result I would dismiss main grounds of the appeal to the extent that the case be remitted to the Magistrate with a direction that the hearing be resumed as though the submission of no case to answer had not been made; and I would vary the orders as to costs by directing that the costs before the Magistrate remain be awarded in his discretion but that the Respondent be entitled to the costs of the appeal before this court and also in the Supreme Court.

(Sgd) Jocelyn Bodilly

JUDGE OF APPEAL

SUVA.

June, 1966.

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- and -

WILLIAM LINDSAY ISAAC
VERRIER — Respondent

JUDGMENT OF MARSACK, J.A.

I have had the advantage of reading the judgments of Gould, V.P. and Bodilly, J.A. and concur for the reasons set out in those judgments that the appeal must be dismissed and the case remitted to the Magistrate's Court on the terms set out in their judgments. I agree with the order as to costs proposed by Bodilly, J.A.

Sgd) C.C. Marsack.

JUDGE OF APPEAL

SUVA,
13th June, 1966.