

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 112 of 1985

Between: .

BA TOWN COUNCIL

Appellant

- and -

BECHARBHAI HOLDINGS LTD. & ANOR.

Respondent

Mr. J. Reddy & Mr. B.C. Patel for the Appellant
Dr. M.S. Sahu Khan for the Respondent

Date of Hearing: 10th July, 1986

Delivery of Judgment: 18th July, 1986

JUDGMENT OF THE COURT

Holland, J.A.

In 1967 the Ba Town Council subdivided a block of land owned by it into 22 lots of which 19 were commercial lots. It is not apparent what was created as Lot 20 but Lot 21 was shown on the plan as "Rear Lane 20 ft. wide" and ran from the public car park and road to the rear or South of Lots 1 to 16 terminating at the Western side of Lot 17. Lot 22 was to the South of Lot 21 and also terminated at the Western side of Lot 17. Lot 22 appears to be a bank of the Elevuka Creek Diversion described as tidal. The plan provided rear access by way of the lane comprising Lot 21 to each of Lots 1 to 16 and access to the side of Lot 17, which together with Lots 18 and 19 were of

greater length than Lots 1 to 16. The plan provided no rear access to Lots 18 and 19 and as previously stated only side access to Lot 17.

Although Lot 21 on the plan bore the description "Rear Lane 20 ft. wide" that was not strictly accurate. It widened at the rear of Lots 11 to 14 acquiring a bulbous shape no doubt to permit vehicles to turn around. At its junction with the Western boundary of Lot 17 it was 30.78 links in width or approximately 20 feet 4 inches.

The respondent ultimately became the lessee of Lots 17 and 18 on which it erected a supermarket with two rear doors on its West wall designed for loading and unloading supplies by means of Lot 21. The respondent's building comprises practically all of Lots 17 and 18 except for the area South of a line drawn extending the Southern boundary of Lot 21 across Lots 17 and 18. The two doors in the West side of the building are alongside the East end of Lot 21 from a distance of 1 foot 6 inches from the Southern end of the building to a distance of 8 feet 7 inches from the corner. For some years since the building was erected the respondent has been able to use Lot 21 to permit vehicles to back into some steps and a ramp to the doors to enable goods to be unloaded.

Some time after the leases of Lots 17 and 18 were completed but before the respondent had completed the erection of its building the respondent entered into an agreement with the lessee of Lot 19 giving it access across the rear of Lots 17 and 18 not occupied by the building. This access was described as 12 feet from the retaining wall built by the respondent to protect its building and land from the Enevuka Creek. That right of access was essentially 12 feet South of the extension of the Southern

line of Lot 21, and would contemplate the use of part of Lot 22 in order to obtain access to the right of way given over Lots 17 and 18 around the rear of the buildings on Lots 17 and 18. This arrangement was recorded in a Deed dated 2nd September, 1971 made between the respondent and the lessee of Lot 19 and the Ba Town Council. The cost of establishing the access way and of any survey were to be borne by the lessee of Lot 19. The respondent received payment of \$500 from the lessee and \$1,000 from the Town Council no doubt as consideration for giving up its exclusive rights over the strip of Lots 17 and 18 and the cost of erecting the retaining wall.

The respondent has freely used Lot 21 from the time of the erection of its building and the lessee of Lot 19 has used the right of way over the rear of Lots 17 and 18 until in or about 1979 when the appellant prepared a new subdivision plan affecting Lots 15, 16, 17, 21 and 22 of the earlier subdivision. The Council proposed to realign the access way contained in Lot 21 to join up with the right of way given by the respondent over Lots 17 and 18 which commenced from the Southern extremity of Lot 21. It accordingly proposed to divert the access lane in Lot 21 by swinging it to the South to finish approximately 20 feet further South than was previously the case. A triangle of land comprising .5 of a perch was proposed to be added to Lot 17 to allow very restricted access to the two doors on the Western side of the building but otherwise the access lane would only serve the rear of the building on Lots 17 and 18 on which there are no doors and where they could not easily be provided because of the internal structure. A large part of Lot 21 adjoining Lot 16 would be added to that Lot and a correspondingly smaller part of Lot 21 would be added to Lot 15.

The Bu Town Council contend that this new subdivision will provide symmetry to the line of the access lane at the rear of Lots 1 to 19. It will deprive the respondent of all but limited access to its loading doors on its West wall and will add substantially to the size of Lots 15 and 16 on which no buildings are yet erected.

The land is subject to the provisions of the Land Transfer Act. Although the Deposited Plan clearly showed Lot 21 as a "Rear Lane" no specific easements were registered or indeed granted.

Nevertheless we agree with the conclusion of the trial Judge, Dyke J., that the respondent agreed to lease Lots 17 and 18 as part of a subdivision of the Town Council with a provision by way of access to the erection boundary of Lot 17 by means of Lot 21. It was submitted that the Town Council in depositing the plan providing for Lot 21 as an access lane was creating a road.

Section 157 of the Land Transfer Act provides:-

" 157. Any proprietor sub-dividing any land subject to the provisions of the Act for the purpose of selling or leasing the same in sub-divisional lots shall lodge with the Registrar a map or plan of such land if so required. Such map shall exhibit distinctly delineated all roads, streets or ways appropriated or set apart for any other public purpose, and all permanent drains and also all sub-divisional lots into which the said land may be divided, marked with distinct numbers or symbols, and shall also show the areas and shall comply in every respect with the prescribed requirements for plans. In case a portion only of the land comprised in any certificate of title shall be sub-divided, the existing certificate of title shall be cancelled to the extent of such portion and a fresh certificate of title shall be issued for the same. "

Section 160 of the Land Transfer Act provides:-

" 160.-(1) If the map or plan referring to the sub-division of land contains any road or street not referred to in the grant or certificate of title, the proprietor shall make application to the Registrar to register the dedication of the road or street, and the Registrar shall enter a memorial of the dedication in the register and on the duplicate certificate of title or grant....."

We are not satisfied that the Town Council in designating Lot 21 as "Rear Lane 20 ft. Wide" was delineating a road or a street or a way appropriated or set apart for any public purpose but we are of the clear view that it was by way of contract with all parties intending to deal with it by reference to the subdivision plan undertaking to make Lot 21 available to those persons by way of Rear Lane access. What was said by Richmond J. in the New Zealand Court of Appeal in J.D. BAIRD v. HENRY JACKSON AND OTHERS (1884) 2 N.Z.L.R. (C.A.) 271 at p. 275 is apposite even though in the present case before us there has not been shown to be an intention to create a public road:-

"Here we have a sale by auction of a number of allotments in an intended new suburb of the city of Wellington, and in accordance with the law the vendors deposited a plan of the intended subdivision, showing the roads giving access in different directions. The Lots are all defined by numbers corresponding with the plan. The memorandum of transfer of the allotments purchased by the Plaintiff refers to the numbers on the plan, and the Certificate of Title does so also. Section 107 already referred to requires that "such map shall exhibit, distinctly delineated, all roads, streets, &c., set apart for public use." That has been done. We do not say the deposit of such a map is ipso facto a dedication to the public of all roads shown upon it. It might be evidence for a jury towards establishing a dedication.

We do not decide that such a step is a dedication; but after the sale of allotments in such a subdivided piece of land the purchasers do acquire a right of insisting that all roads there shown shall be set apart for public use. The statute has been made part of the contract, and the parties contracted with reference to the provision. The reference is of the clearest possible kind, and the provisions of the sections are, so to speak, incorporated with the contract. Upon such a sale, however, the existence of the roads remains merely a matter of contract between the vendor and vendee. The dedication is not necessarily complete. In the present case, the purchaser is not willing to recede from the rights which his contract has given him. As evidence, if it were needed, of the intention of the parties, we find in the present case that all the roads on the plan have been partly formed. Under these circumstances, it is out of the question for the vendors to recede from the engagements they have entered into, but there can be no objection to their making the interim use of the land they propose, so far as they can do so without obstructing the roadways. "

In Fiji, as in New Zealand an easement over land under the Land Transfer Act can only be created by easement certificate procedure under Section 159 or by way of formal memorandum of transfer. However a registered proprietor can create an equitable easement in favour of another or others as was demonstrated in Carpet Import Co. Ltd. v. Beath & Co. Ltd. (1927) N.Z.L.R. 37 and Sutton v. O'Kane & Others (1973) 2 N.Z.L.R. 304.

In this case the Ba Town Council in offering for lease a number of lots by relation to a plan describing Lot 21 as a rear lane adjoining all but two of those lots rendered it inequitable and unconscionable that it should be permitted to prevent or in any way obstruct the rights of those lessees.

Section 39 of the Land Transfer Act provides that the estate of the registered proprietor is paramount and

".....shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except -

- (a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and
- (b) so far as regards any portion of land that may be wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and
- (c) any reservations, exceptions, conditions and powers contained in the original grant. "

The relevant Certificate of Title for Lot 21 shows the Ba Town Council as registered proprietor. There is no easement registered on the title granting a right of access or way to the proprietor of Lot 17 or to any other persons. Nevertheless the indefeasibility of title of the registered proprietor given by the Land Transfer Act does not affect the right of the respondent and others to bring against it a claim in personam founded in law or in equity, for such relief as a Court acting in personam may grant. See Frazer v. Walker (1967) N.Z.L.R. 1069 at 1078 and Boyd v. Mayor etc. of Wellington (1924) N.Z.L.R. 1174.

It follows that the respondent has a contractual right to use Lot 21 as a rear lane and the Ba Town Council has no right to lease or otherwise deal with any part of Lot 21 so as to exclude or obstruct the respondent's right of use. It is accordingly unnecessary to consider issues of implied easement of necessity as was argued in the Supreme Court or the question of estoppel.

The respondent indicated in the Supreme Court that it was prepared to agree to surrender its right to use part of Lot 21 so long as it retained reasonable vehicular access up to the doors in the Western side of its building. That is a matter for negotiation between the parties. The appellant also relied on Section 109 of the Local Government Act empowering it to make streets and to stop up streets. As the respondent and others had obtained contractual rights in respect of the whole of Lot 21 and there is no evidence that Lot 21 is a public street the Section cannot assist the defendant.

The appeal is dismissed essentially for the reasons given by Dyke J. in the Supreme Court. The respondent is to have costs of the appeal to be fixed by the Registrar.

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 Judge of Appeal

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 Judge of Appeal

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 Judge of Appeal