IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 3 OF 1992
(High Court Civil Action No. 659 of 1985)

BETWEEN:

SURESH SUSHIL CHANDRA CHARAN
ANURADHA CHARAN — **APPELLANTS**

-and-

SUVA CITY COUNCIL — **RESPONDENT**

1st Appellant in Person
Mr. G. P. Shankar for the 2nd Appellant
Ms T. Jayatilleke for the Respondent

Date of Hearing : 5th May 1994
Date of Delivery of Judgement : 24th May 1994.

JUDGMENT OF THE COURT

The history of this matter goes back to 1983. In that year, on 15th August, the plaintiffs/appellants, entered into a lease of certain premises from the defendant/ respondent. The premises were described as a shop, but they were apparently being used as a restaurant, the Checkpoint Restaurant, at Raiwaqa shopping centre. Money had been borrowed to finance the purchase of the restaurant. The loan was secured by a bill of sale over the chattels in the restaurant.

The lease was for a period of 4 months from the 1st August 1983; there was an option for renewal. On the 28th June 1984 the defendant agreed to "extend" the tenancy for a period from 1st

December 1983 to 30th November 1984, on the terms and conditions "as per the last Agreement dated 15th August 1983...." On the 22nd November 1984 the plaintiffs sought a further renewal of their tenancy, which request was, in a letter dated 13th December 1984, refused. The defendant gave the plaintiffs notice to quit expiring on 1st January 1985. The plaintiffs did not vacate, and on 12th February 1985 the defendant commenced proceedings for vacant possession. It is not necessary to trace the history of these proceedings.

On 29th June 1985 an authority was given by the defendant to the bailiff to distrain for rent, said to be owing by the plaintiffs up to 30th June 1985. On 29th June 1985 the bailiff, acting on authority given to him by the defendant "seized and distrained and impounded" goods on the premises on the basis that rent from 1st December 1984 to 30th June 1985 was owing. This was a somewhat surprising turn of events seeing that the defendant, alleging that the tenancy had come to an end, had given the plaintiffs a notice to quit which come to an end, had given the plaintiffs a notice to quit which expired on 1st January 1985, and had, on 12th February 1985, commenced proceedings to recover vacant possession, no doubt on the basis that the tenancy had been determined and the plaintiffs were trespassers.

Anyway on 29th June 1985 the bailiff went in and cleaned out the premises, taking everything, including foodstuffs, for which distress for rent is not available.

The plaintiffs commenced proceedings on 29th August 1985. Judgement in default of defence was entered on 17th September 1985. On 18th September 1985 the defendant moved to set aside the default judgement. In a reserved decision dated 13th November 1985 the Judge hearing the matter dismissed the application.

In their statement of claim the plaintiffs claimed $7,901.97 for items which the bailiff had listed as having been seized, $348.30 for foodstuffs wrongly seized, and $5,211.55 as the value of other items taken which the bailiff had removed and not listed, total $13,461.82. They alleged loss, inability to carry on the business, which had come to a complete halt; and claimed damages.

The bill of sale had been given by a grantee, "the bank", on 29th July 1983. It is not before us, but it's absence is not material in light of the fact that it appears to have been duly registered, and has not been challenged. It was for a sum lent of $10,000; it covered stock, furniture and fittings of the restaurant (record p. 123).

The grantee of the bill of sale, on 28th January 1986, gave notice of default and directed that the goods covered by the bill of sale be seized. Whether anything was seized, or left to seize, we do not know. However, it seems that a "substantial part" of the goods taken under the distress for rent was handed over to the grantee of the bill (record p. 228), and some or all of these were sold for $501.00. The grantee was owed over $8000.00

according to it when it ordered seizure on 28th January 1986 (record pp. 46, 253, 254).

It can also be noted that an exparte injunction was granted on 17th July 1985 to prevent the defendant from selling the goods which had been seized by it about two weeks before. What happened to it we do not know. It may be that some order was made on 13th November 1985, because on 21st January 1986, the solicitors for the defendant wrote to the plaintiffs referring to the order and "Mr Charan's subsequent promises to pick up the items seized under distress", noting that he had not done so and inviting him to. Perhaps these were the goods then seized under the bill of sale; it is of no consequence. It does not seem to have had any bearing on what was later decided.

Eventually the matter of what the plaintiffs were entitled to recover pursuant to the judgement signed on 17th September 1985 came on for hearing before Scott J. in February 1991. His Lordship refers to "the melancholy history" of the progress up to then. A huge mass of material was placed before his Lordship by the 1st plaintiff which ran into hundreds of pages. The 1st plaintiff gave evidence, much of which was described by his Lordship as "repetitive unclear and confusing". The hearing concluded in August 1991. His Lordship gave judgement on 3rd January 1992.

Before turning to the judgement and the grounds of appeal, it is important to note that in August 1990, said to be pursuant

to an order made by "the Referee", the plaintiffs filed particulars of damage (record pp. 37-38). The first three were (i) loss of use of a video set at the rate of $45.00 per week from 29th June 1985 to the date of the payment (ii) loss of use of a cooler, $12.00 per month, same period (iii) loss of use of a refrigerator $24.00 per month, same period. How or why these were calculated or claimed was not explained to us. It is perhaps interesting and not irrelevant to note that even up to the date of judgement this puts the claim in respect of the video and compensation for it's loss at about $14,625.00, $936.00 on the cooler and $1872.00 on the refrigerator; it would seem, on the evidence that the video was acquired for $1546.70, the cooler for $485.00 and the refrigerator for $463.00. We shall come to these claims.

The next two items in the particulars of damage were:

> *"4. Consequential loss arising out of the Mortgagee sale by Barclays Bank International in the sum of $7797.54 (SEVEN THOUSAND SEVEN HUNDRED AND NINETY SEVEN DOLLARS AND FIFTY FOUR CENTS) and which Mortgagee sale took place in view of the diminution of the securities of the Banks because of losing goods chattels fixtures arising out of illegal seizure and sale of the Defendant, together with interest at 13 1/2% per diem from 29.6. 1985.*
>
> *5. Consequential economic loss arising as a result of the Plaintiffs loan to build a house had to be cancelled because of the unlawful actions of the Defendant and the damages suffered was $13,676.00 (THIRTEEN THOUSAND SIX HUNDRED AND SEVENTY SIX DOLLARS)"*

Items 6 to 9 were:

> *"6. Consequential loss of profit at the rate of at least $120.00 (ONE HUNDRED AND TWENTY DOLLARS) per day from 29th day of June, 1985 until date of payment.*
>
> *7. General damages for:-*
> *(a) Trespass to land, chattels and goods.*
> *(b) Accumulation, pain and sufferings of the Plaintiffs.*
>
> *8. Exemplary and aggravated damages.*
>
> *9. Interest at the rate of 13.5% from the 29th day of June 1985 to the date of payment under Law Reform (Miscellaneous Provisions) Death and Interest Act chapter 27 of the Laws of Fiji."*

There was a claim for costs.

In his judgement the trial judge allowed the total value of the goods as claimed by the plaintiffs, viz $13,461.83. He awarded exemplary damages of $1000.00. He awarded interest at 13.5% from the date of distress until the date of judgement on the total of these two amounts.

There are 7 grounds of appeal. The first two were:

> *"1. That having regard to all acts facts and circumstances and deliberate unlawful act or conduct of the Respondent the award of $1000.00 (one thousand dollars) by way of exemplary damages is unreasonable and is incapable of fully adequately and properly compensating the Appellants.*
>
> *2. That the learned Judge was wrong in not awarding the Appellants damages for loss of profits suffered by the Appellants by reason of and in consequence of Respondent's wrongful act, and such damages are not remotely by (sic) directly and closely flowed from the wrongful act of the Respondent, and in particular the learned Judge misdirected himself on this issue as*

on others, when the Appellants' evidence was not contradicted by any evidence adduced by or on behalf of the Respondent."

Grounds 3 to 6 inclusive are expressed in so general terms it is difficult to see if they raise any separate grounds of appeal. Ground 3 is expressed as follows:

"3.1 That the learned Judge failed to take into consideration all the relevant facts and materials proved and/or established by evidence and such evidence not having been controverted, contradicted or challenged by any evidence by and on behalf of the Respondent;

3.2 That the learned Judge wrongly took into consideration irrelevant and inadmissible matters into consideration which were improperly and/or unfairly stated by Counsel for Respondent from the Bar in his submissions. The Counsel ought not to have been allowed in his submissions to include matters which were required by Respondent to prove by evidence but were not done so."

This ground on its own does not make sense and cannot be said to raise a valid ground of appeal.

Ground 4 is expressed in general terms:

"4. That the learned Judge applied wrong principles of law in arriving at decision."

This ground does not give any indication of what aspect of the decision is appealed against nor does it indicate the reasons for the wrong decision in law.

Ground 5 is expressed:

> *"5. That the findings and award are against weight of the evidence, and they are so unreasonable that they could not be upheld."*

Again this ground is expressed in general terms without indicating what aspect of the decision it is appealing against.

Ground 6 is expressed:

> *"6. That the learned Judge was wrong in not awarding to the Appellants damages in respect of all the heads or items claimed by the Appellants in the absence of evidence by or on behalf of the Respondent."*

This ground of appeal generally alleges that the trial Judge did not make awards in respect of all heads of claim. This is not correct. The trial Judge made awards in relation to the value of goods distrained for rent and exemplary damages.

In respect of exemplary damages, the plaintiffs have raised specific matters in ground 1.

In respect of loss of profits, the plaintiffs have raised specific matters in ground 2.

The plaintiffs have not raised any ground of appeal in relation to the award given by the trial Judge in respect of the value of goods (award of $13, 461.00) distrained by the

defendant. This will be important when we come to consider whether the plaintiffs are entitled to raise the issue of whether the amount awarded by the trial Judge is the proper award having regard to the facts and the law on the proper value of the goods.

We consider that ground 6 raises issues in relation to consequential loss in respect of money owing to Barclays Bank International (item 4 of particulars of damage) and economic loss arising out of cancellation of the plan to build a house (item 5 of particulars of damage).

Ground 7 is as follows:

> *"7. That the learned Judge misdirected himself on appearance of the second Plaintiff in dismissing her claims when in fact she was present by her attorney at the hearing and ought to have awarded damages to both the Appellants."*

As to the last ground of appeal, the case before His Lordship was completely conducted by the first plaintiff. He held a power of attorney from the second plaintiff. What the Judge said in his judgement was this:

> *"It would be noted that I have made no reference to the 2nd Plaintiff in this judgement at all. The 2nd Plaintiff did not appear and was not represented. I heard nothing in support of her claim and was unable to detect any claim that she might separately have against the Defendant. The 2nd Plaintiffs claim against the Defendant is dismissed."*

What the Judge said about appearance and representation was quite correct. However, the 2nd plaintiff had no separate cause of action. Both plaintiffs joined in the same cause of action. The affidavits filed were on behalf of both plaintiffs (see record p. 67). Mr Shankar who appeared for the 2nd plaintiff on appeal submitted that this was a joint cause of action and conceded that the award would have been for the same amount even if the trial Judge had not dismissed the 2nd plaintiff's claim. It should be noted that the whole amount of the judgement with interest has been paid by the defendant and we understand that the plaintiffs have accepted this amount without prejudice to the appeal now before us (see record p. 243). We consider that this ground of appeal is of no consequence.

As to the first ground of appeal we believe that the law is clear. In a proper case a Court will award exemplary damages to mark its disapproval of the action taken by inter alia a government or quasi-government instrumentality. "Aggravated damages are designed to compensate the plaintiff for his wounded feelings; they must be distinguished from exemplary damages which are punitive in nature and which may only be awarded in a limited category of cases" Hals. Laws 4th Ed. Vol. 12 para 1189. "Exemplary damages are damages which are awarded to punish the defendant and vindicate the strength of the law" (ibid 1190). Of the three available categories of cases in which this type of relief is available only that pertaining to "oppressive, arbitrary or unconstitutional actions by servants of the government" (ibid) applies here. The trial judge awarded

$1000.00. The plaintiffs complain that this award does not reflect the seriousness of the actions of the defendant in all the circumstances of the case. This ground of appeal raises the issue of the proper amount of damages. In considering this matter we are of the opinion that no award in any other jurisdiction will be of any real assistance. The amount fixed by the court must reflect the circumstances of Fiji. Having said that we find ourselves in some difficulty. There has been a lack of precedent on exemplary damages in Fiji. We consider that what happened in this case cannot be described as falling at the lower end of the scale in terms of the seriousness of the actions of the defendant. We take full account of all the circumstances including the fact that there was no assault or injuries caused to the plaintiffs. However, this was an action of a government instrumentality without proper regard to the law, which in fact disrupted the plaintiffs means of living. We also take into account that on 9th November 1984 the defendant had earlier levied distress which was also unlawful. We consider that $1000.00 does not adequately take into account the seriousness of the consequences of the defendant's actions. Doing the best we can we consider that an appropriate award for the circumstances of this case is $3000.00. There is no appeal on the basis that the trial Judge should have awarded aggravated damages.

Before we consider the grounds relating to consequential losses, that is to say items 4, 5, and 6 of the particulars of damage (record p. 37-38), perhaps we should consider an argument by the plaintiffs on appeal that the value of goods taken was

greater than that which had been claimed in the statement of claim (record p. 110) and which had been allowed in full by the trial Judge (record p. 228). The first plaintiff claimed before the trial judge that the value of goods is value of goods at the date of judgement. The defendant argued that the value of goods is the value on the date they were removed (record p. 228).

We point out that the trial Judge fully set out these arguments in his judgement and assessed the value of goods at $13, 461.00 (record p. 228). The plaintiffs have not appealed against the decision of the trial Judge. They are not entitled to raise this issue on appeal. This matter was only referred to by the 1st plaintiff and counsel for the 2nd plaintiff in passing on reply. Therefore it is not necessary for us to deal with the issue of law whether, in an action for damages for conversion, the value of goods should be assessed at the date of conversion or at the date of judgement.

The trial Judge dealt with item 4 in the particulars of damage, that is, the money owing to the bank under the bill of sale. He refused to allow any sum by way of damages under this head. He assigned 5 reasons for doing so. In effect four of them, we believe, contributed to a finding that the damages claimed on this head were too remote. We are not disposed to disagree with him. The fifth reason the Judge described as "parasitic".

In so far as one can make sense out of item 4 of the particulars (see above), it seems to claim that the amount owing

to the grantee of the bill of sale arose by reason of the fact that the goods covered by the bill of sale were not available to the grantee of the bill when it exercised the right to seize and sell, because they had been taken under the wrongful distress; therefore the amount owing to the grantee was due by reason of the fact the goods were not available to it.

The steps which were required for the plaintiffs to succeed on this ground were these: (i) wrongful seizure of the goods had prevented the plaintiffs from making a profit (we shall come to this later) (ii) that prevented the plaintiffs from paying the instalments due under the bill (iii) that meant that they fell into arrears (iv) that gave the grantee the right to seize the goods (v) it could not do so because the goods had been taken elsewhere (vi) therefore it could not sell the goods (vii) therefore that resulted in the debt becoming due and owing to the grantee for the recovery of which the plaintiffs were suing the defendant.

First of all, whatever may be the correct rules to apply in relation to damages for conversion by the defendant, which was the claim here, one doubts the loss claimed is the direct result of the tort, or otherwise a consequence falling within the rules of remoteness. But leave that on one side.

We think the basic starting point for the consideration of this problem is that the plaintiffs owed money to the bank; it had been lent to buy the business under an agreement dated 29th

July 1983 (record p. 123). The debt did not arise because the plaintiffs owned goods; it arose because of a loan. The lender took security for payment by means of a bill of sale over the goods which the plaintiffs acquired by means of the loan; the presence or absence of the goods made no difference to the loan, except that it might never have been granted unless there was some such security. The grantee knew that the borrowers were going to run a business and use the goods to do so, probably that they were intending to repay the loan from income generated by the business. The loss of the goods did not affect the loan; that loss may have resulted in the closure of the business, hence failure to make repayments; but that did not affect the loan, except that it may have accelerated the repayment becoming due. The fact that the lender was denied the opportunity of recourse to the goods did not affect the loan; a grantee is not obliged to seize some or all or any of the goods for which it holds security; it owes no duty to recoup its loan out of sale of the goods and it is not obliged to do so; the plaintiffs could not have required the lender to seize the goods, sell them, give credit for their value, and hence reduce the indebtedness. That was solely the prerogative of the lender.

The plaintiffs claim against the wrongdoer is that it, the wrongdoer defendant, as a result of the wrongful removal of the goods, became liable to pay to the plaintiffs the amount of the loan owing to the lender, because it had deprived the lender of the opportunity to reduce it by taking the goods. The wrongful action deprived the lender of money that could have been put

towards repayment (the value of the goods wrongly taken). The plaintiffs say that therefore the wrongdoer defendant must in effect pay the debt to the plaintiffs, and at least so much of it as represents the value of the goods.

Now the damages payable by the wrongdoer to the plaintiffs being the value of the goods has put the plaintiffs in the same position as if those goods were available to pay off the loan, or part of it. If the plaintiffs were both to recover by way of damages the value of the goods, as they have, and then also to recover their value again because they were not available to pay off the loan, they would recover the value of the goods twice.

This can be put another way. Had the defendant been entitled to take the goods, then they would have been taken to satisfy a debt owing to it. The fact that those goods were no longer available to satisfy some other debt would have been immaterial. The same reasoning applies had the bank been able to get its hands on the goods first. The goods were wrongly taken. Instead, the plaintiffs have got their value. So the plaintiffs cannot be heard to complain that they got their value, but they should have also had the goods as well to satisfy the other debt. That is not reasnable. The real claim is that by wrongful removal of the goods the plaintiffs were unable to make payments under the bill out of profits, which in turn resulted in a premature crystallisation of the debt, which in turn caused them some loss. Whether such a head of damages would have lain in this case we do

not have to decide - it was not claimed. We shall deal with the loss of profits later.

The situation described in this rather lengthy explanation was probably adequately dealt with by the trial Judge in the following terms (record p. 230):

> *"Fifthly, it is clear to me that even if the inability to repay the loan is a loss flowing from the Defendant's tort, and of this I have some doubt, it would be parasitic and therefore on that ground also irrecoverable."*

An interesting examination of this topic, including criticism of Lord Denning's criticism of the term "parasitic damages", is to be found in McGregor on Damages 15th Ed. (1988) paras 106, 213, 214, 217 (see also Hals. Laws 4th Ed. Vol. 12 para 1167). But in the light of what we have said we do not think it necessary to pursue this matter further. We agree with his Lordship's decision that item 4 of the particulars of damage could not succeed.

Item 5 of the particulars of the damage may be very shortly dealt with. The proposition that the defendant should be required to pay damages to the plaintiffs because they had to cancel some plan which is not even remotely connected with the goods, and which cancellation caused them not to be able to achieve or acquire something, has only to be stated to be dismissed. It ranks with the claim, solemnly put forward by the plaintiffs,

that the defendant should also be liable to pay their daughter's fees at the University.

The final matter embraces items 1, 2, 3 and 6 of the particulars of the damage and ground 2 of the grounds of appeal, namely loss of profits.

It now seems to be established that in conversion a plaintiff may recover consequential damages. In the statement of claim the plaintiffs claim that by reason of the wrongful distress they were unable to carry on the restaurant business and that it had ceased to operate. In the amended particulars of damage they claimed consequential loss of profits "at the rate of at least $120.00 per day" from the date of seizure until the date of payment. The judge calculated that as amounting to no less than $250, 380.00.

Counsel for the 2nd plaintiff submitted that the 1st plaintiff had given evidence that the loss was $120.00 per day and that there was no evidence to contradict this. It was submitted for the defendant that on the whole of the evidence the restaurant was not making any profits. The trial Judge concluded that "on the evidence placed before me I was not at all satisfied that the 1st plaintiff's business was in fact making $120 per day net profit or anywhere near that amount."

The evidence of the 1st plaintiff commences on page 194 of the record. In cross-examination on page 195, after stating that he was making $120 per day profit, he admitted that he gave evidence in another action that the takings per day in the restaurant were $106 and the expenses $109 (record p. 195).

Further he was cross-examined on a letter addressed to the Town Clerk saying that the business was not doing well. The letter is dated 2nd October 1984 (record p. 244-245). He explained that he wrote the letter "exaggerating" (record p. 195).

In our view the trial Judge was entitled to look at all the evidence including evidence in cross-examination and make an appropriate finding as to the credibility of the 1st plaintiff. We have reached the conclusion that it was open to the Trial Judge to come to the conclusion he came to.

In our opinion the trial Judge was correct in refusing to allow any sum for loss of profits. We would dismiss this ground of appeal.

The formal order of the court will be: appeal is allowed in respect of exemplary damages and we would substitute an amount of $3000.00. We further order that interest of 13.5% will apply to this amount until payment.

In view of the fact that the plaintiffs have only been successful in small part of the appeal, we consider in the circumstances the parties should bear their own costs.

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Sir Mari Kapi CBE
Judge of Appeal

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Mr. Justice Gordon Ward
Judge of Appeal

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Mr. Justice Ian Thompson
Judge of Appeal

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