IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO: 52 OF 1994
(High Court Civil Action No. 1173B of 1984)

BETWEEN

SURESH SUSHIL CHANDRA CHARAN
ANURADHA CHARAN — APPELLANTS

and

SUVA CITY COUNCIL — RESPONDENT

Mr. Suresh Charan for the Appellants
Mr. R. Gopal for the Respondent

Date and Place of Hearing : 26 February 1996
Date of Delivery of Judgment : 1 March 1996

JUDGMENT OF THE COURT

This appeal is against a judgment of Byrne J. in the High Court by which the respondent was ordered to pay $18,589.78 to the first appellant as damages and the second appellant's claim for damages was dismissed.

In their action in the High Court the appellants, a husband and wife, claimed jointly as partners for damages for wrongful seizure and sale of their goods, the result of a purported levying of distress by a bailiff acting on the instructions of the respondent, for refund of rent paid and for exemplary damages for the illegal seizure and sale. The action has been heard three times in the High Court; this is the third appeal to this Court. At the third hearing in the High Court,

although not previously, the respondent admitted liability for wrongful distress. His Lordship then heard evidence on the issue of the quantum of the compensable loss suffered by the appellants; it was given by the first appellant. The second appellant took no part in the proceedings; however, she had attended and given evidence at the second hearing before the same judge. The first appellant apparently held a power of attorney executed by the second appellant authorising him to represent her; however, His Lordship refused to allow him to do so. The first appellant is not a barrister and solicitor.

The appeal by both appellants is against the quantification of the damages in the judgment, and against the dismissal of the second appellant's claim. The grounds of the appeal are as follows:-

"1. *That having regards to all acts and facts and circumstances and deliberate, unlawful act with malice intent or conduct (sic) of the Respondent, its servants and agents the learned trial judge erred in law in awarding only $1,200.00 (one thousand and two hundred dollars) by way of exemplary damages, which is unreasonable and is incapable of fully adequately and properly compensating the Appellant (sic) and their injury or served (sic) the purpose for which it is granted.*

2. *That having found that the Respondent had acted with deliberate and malice intent (sic) in removing and selling the Appellant's (sic) goods and chattel illegally even on payment of $1500 the learned trial Judge failed in his duty to act*

fairly and reasonably in considering the Appellants' case, contention, evidence and submissions was biased and even openly showed his discontentment on judgment day in ordering the first Appellant to vacate the bar table in the presence of solicitors and prominent members of public without providing alternative seating after having asked the first Appellant to conduct his case from the said bar table.

3. *That the learned trial Judge erred in law in failing to give any weight to the law of distress or the compliance of rule (sic) to levy distress, or any significance to particularly the requirements of Form 5 in considering the Appellant's (sic) case for reasonableness to prove their case when the respondent deliberately and intentionally removed and stripped bare their business premises of all contents including books of accounts and documents.*

4. *That the learned trial judge erred in law and in fact in accepting objections raised on the Respondent's submission but not supported by any evidence but on hearsay.*

5. *That the learned trial Judge erred in law in wrongly applying/relying on the principles enunciated in Liesbosch Dredger v. S.S. Edison (1933) AC 499 which is universally found to be bad law in respect of a claim in modern law of torts (except in contract).*

6. *That under given circumstances and the deliberate act of the Respondent the learned trial Judge erred in law and in fact in not awarding the Appellant damages for loss of profit suffered by the Appellant by reasons of and consequences of the Respondent's wrongful and deliberate act, and when such damages were incurred as the direct result of the wrongful and deliberate act of the Respondent and when the Appellant's evidence was not contradicted by any evidence on behalf of the Respondent.*

7. *That learned trial Judge erred in law in failing to give any consideration (sic) all the relevant facts and material proved and/or established by the evidence of the Appellant and such evidence not having been controverted, contradicted or challenged by any evidence on behalf of the Respondent.*

8. *The learned trial Judge erred in law in rejecting the Appellant's (sic) claim for loss of personal use of equipments as the result of direct interference by the Respondent against the weight of evidence adduced by the Appellant in support of the said claim.*

9. *That learned trial Judge applied wrong principles of law in arriving at decision and his findings and award are against the weight of evidence adduced by the Appellant and they are so unreasonable that they could not be upheld.*

10. *That the learned trial Judge wrongly took into consideration irrelevant and inadmissible matters into consideration (sic) which were improperly and/or unfairly stated by counsel of the Respondent from the bar in her submissions and were not supported by any evidence. The learned judge wrongly considered matters raised by the Respondent by its counsel which required proof by evidence but were not done so that which could be admitted (sic).*

11. *That learned Judge misdirected himself on appearance of the second-named Appellant in dismissing her claim when in fact she was present in person on the first day of trial and thereafter by her attorney at the hearing and ought to have awarded damages and costs to her."*

We shall deal first with ground 11. In the Statement of Claim the cause of action was stated in terms of the appellants jointly. The second appellant did not make any claim

which was distinct from any claim made by the first appellant. The goods seized were their joint property; the resulting loss was not alleged to be different for either of them. The Courts should not impose upon parties costs or inconvenience that can readily be avoided. In the circumstances of the present case, where the second appellant had attended and given evidence at the second hearing but it seems, being in employment, left the presentation of the evidence at the third hearing to the first appellant, His Lordship should not, in our view, have dismissed her claim, at least not without warning the first appellant as her attorney that he might do so if she did not attend and was not legally represented. However, having left the presentation of the evidence to the second appellant, she had to take the consequences of doing so. That is say, the Court, when determining the issues, could have regard only to the evidence before it, which was that given and adduced by the first appellant. In our view, on that evidence she was entitled to have judgment given in favour of the first appellant and herself jointly for an amount of damages. This appeal should, we are satisfied, be allowed to that extent.

We turn, therefore, to consider the appeal in respect of the quantum of the damages awarded. The damages were awarded under four heads; they were:-

Value of goods wrongly seized	$5,533.10
Refund of rent	$ 220.00
General damages	$1,000.00
Exemplary damages	$1,200.00

His Lordship was unable to find what, if any, loss of income the appellants had suffered as the result of being deprived of the goods seized and sold and so made no award of special damages for such loss. Interest on the amount of damages, assessed at the rate of 13.5% per annum, was awarded from the date when the goods were seized, 9 November 1984; the amount of the interest was $10,736.68, so that the total amount awarded was $18,689.70. The refund of the rent is not in issue in this appeal.

So far as the value of the goods seized is concerned, Byrne J. accepted the first appellant's evidence of their value at the time when they were seized. The first appellant presented evidence of their value at the date of the hearing, November 1993; His Lordship declined to rely on it, on the ground that it was hearsay. The first appellant says that the total value of the goods at the time of the hearing was $9,910.12. He says further that damages should have been assessed by reference to the value of the goods at the time of the High Court's judgment. It is, however, unnecessary for us to decide whether that is so or whether there was acceptable evidence of that value before the Court.

At one time in cases of conversion the Courts generally assessed the value of goods at the date of the conversion. However, such an arbitrary rule is no longer applied. The Courts assess as best they can what is a fair recompense in all the circumstances (IBL Ltd v. Coussens [1991] 2 All E.R. 133). In the present case the portion of the interest from 9 November 1984 to the date of the judgment which relates to the value of the goods seized is $7,469.68. So the total compensation awarded in respect of the goods seized was $13,002.78. If the Court had awarded the amount of their value at the time of the hearing, said by the first appellant to be $9,910.12, that would have been considerably less than the amount actually awarded. So the appellants have benefitted, not lost, by having the value assessed at the time of the seizure and then having interest at a fairly high rate awarded. Accordingly, the appeal cannot be upheld in respect of the value of the goods.

A lot of the evidence given by the first appellant related to the loss of income which the appellants suffered as a result of the seizure and sale of the goods. They had been operating a restaurant at Raiwaqa; the goods seized were all the equipment used to store, prepare and cook the food, as well as the food itself and the cash register. There can be no doubt that their seizure prevented them from operating the restaurant from the date when they were seized until they reopened it in March 1985 after replacing them. The replacement goods were

themselves subsequently also seized and sold by a bailiff acting on behalf of the respondent in June 1985; again the seizure and sale was unlawful. That matter was the subject of another action by the appellants, which has been heard and determined. The period of the loss of income, if any, which resulted from the seizure of the goods on 9 November 1984 and their subsequent sale was approximately four months.

The difficulty which faced the appellants in trying to establish loss of income was a lack of any contemporaneous documentary evidence that the business was making a profit. The first appellant had to admit that at the hearing of the action in respect of the later seizure and sale of his goods the respondent produced a letter written to it by him earlier in 1984 complaining that it was not possible for the business to make a profit in the circumstances in which the appellants had to operate it. Although he gave an explanation of the reasons why he had written that letter which was not inconsistent with the business having made a profit, his evidence that the profit was $120 a day was not accepted by the learned trial judge because some of his answers to questions put to him in cross-examination were inconsistent with that and were also inconsistent with one another. His Lordship concluded that the first appellant might have suffered some loss of profit but had failed to satisfy him of the amount of any such loss. Having read the record of the first appellant's evidence, we can

find no basis for finding that Byrne J. erred in deciding not to award any amount for loss of profits. The appeal cannot, therefore, be upheld on ground 6.

His Lordship also declined to award the first appellant damages for loss of personal use of the refrigerator which was seized. The first appellant's evidence was that he and his family used the refrigerator for their own food and that it would have cost them $24 a week to hire a replacement. However, he gave evidence also that they did not hire one and that his claim was for the "notional costs" of hiring one. If he had hired a refrigerator, he could have recovered the cost of doing so as special damages (Strand Electric and Engineering Co., Ltd v. Brisford Entertainments Ltd. [1952] 1 All E.R. 796). As he did not do so, however, the deprivation of the use of the refrigerator was simply one matter to be taken into account in assessing general damages for the wrongful seizure and sale of the appellants' goods. We note that His Lordship did not refer to it in giving his reasons for assessing the general damages as $1,000.

In its judgment in respect of the appellants' appeal against the High Court's decision in their action regarding the unlawful distress which occurred in June 1985 this Court observed that the law in respect of exemplary damages was clear, It said:

"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 the appropriate award for the circumstances of this case is $3,000.00."

In awarding $1,200 as exemplary damages Byrne J. observed that the value of the goods seized in the case before him was approximately two-fifths of the value of the goods seized

in June 1985. He, therefore, set the amount of the exemplary damages at two-fifths of the $3,000 awarded in respect of the June 1985 seizure and sale. Such an approach is, in our view, fundamentally unsound as the value of the property seized does not necessarily reflect the degree to which the "actions of servants of the government" are "oppressive, arbitrary or unconstitutional."

The circumstances of seizure and sale of the appellants' goods in November 1984 and the reason why they were wrongful were not the same as those relating to the June 1985 seizure and sale. In the latter case the respondent had issued a notice to quit by 1 January 1985 and in February 1985 had commenced proceedings to recover vacant possession on the basis that the appellants were trespassers; so there was no legal basis for levying distress for rent. In November 1984, however, the appellants were tenants of the premises and their rent was in arrears. The illegality in the seizure of their goods lay in failure by the bailiff to comply with his statutory obligations in the levying of the distress. In our view, that failure was considerably less serious, and certainly less oppressive, than the purported levying of distress in June 1985 for which there was no lawful authority whatsover. We do not regard the award of any exemplary damages as appropriate; however, the respondent has not appealed against it. Consequently, although we disapprove of the basis on which His Lordship fixed the quantum of the

exemplary damages in the present case, we consider that the actual amount he set should stand. Ground 1 of the appeal must, therefore, be dismissed.

In awarding $1,000 general damages His Lordship referred to shock or pain and suffering which the first appellant might have suffered as a result of the seizure and sale of the goods and the consequences of that seizure and sale. He found that the first appellant had "recovered long ago" from any shock, pain or suffering which he might have experienced. We can find in the record no evidence that the second appellant experienced shock or pain and suffering. She was employed in the public service; although she assisted in running the restaurant, the first appellant was principally in charge of the business.

In our view $1,000 was a reasonable assessment of the general damages suffered by both appellants, including for loss of profits, if any, and for loss of personal use of the refrigerator. The appeal cannot be upheld on ground 8.

Ground 3 is relevant only to the award of exemplary damages. As we have stated above, the approach of the learned trial judge to the assessment of the quantum of exemplary damages was incorrect. His Lordship should have given consideration to the matters referred to in ground 3. However, having done that ourselves, we have come to the conclusion, as we

stated in respect of ground 1, that the amount awarded by him as exemplary damages should not be increased.

We shall not deal with ground 5 as, even if we decided that the learned trial judge did err as alleged, that would not cause us to uphold the appeal, in view the conclusion we have reached in respect of ground 6.

Ground 2 alleges bias on the part of the learned trial judge. There is no suggestion that he had any conflicting interest in the subject matter of the action or had prejudged any issue. The allegation in this ground is that he treated the first appellant discourteously. The appellants have lodged no affidavit to support that assertion. Even if it is true, the conduct alleged falls far short of bias. Nothing in His Lordship's judgment affords any support for the allegation that he failed to act reasonably in considering the case of the first appellant. Any error he made was not such as to disclose bias. The appeal cannot, therefore, be upheld on ground 2.

Grounds 4,7,9 and 10 lack precision and detail. We have found nothing in the record of the hearing or the judgment to support any of them.

For the reasons we have given this appeal is wholly dismissed in so far as quantum of damages is concerned but it is allowed to the extent that the judgment of the High Court

in favour of the first named appellant is to be altered so that it is in favour of both appellants jointly. As the appellants have failed on the substantive issue before this Court the respondent is entitled to costs. We assess these at $500.00. In fixing this figure we have taken into consideration the fact that the appellants have succeeded in relation to the second appellant's entitlement.

Orders

(1) Appeal against quantum of damages dismissed.

(2) Damages and costs awarded in the High Court to be in favour of both appellants jointly.

(3) Costs in this Court to respondent in the sum of $500.00.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Sir Edward Williams
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal

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