

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0031 OF 2001S
CIVIL APPEAL NO. ABU0041 OF 2001S
(High Court Civil Action No. HBC 306 1992S)

BETWEEN:

REGISTRAR OF TITLES

Appellant

AND:

SHARDA PRASAD AND OTHERS
f/n RAM ASRE

Respondent

Coram:

Reddy, P
Davies, JA
Ellis, JA

Hearing:

Tuesday, 12th November 2002, Suva

Counsel:

Mr. J. Udit and Ms M. Rakuita for the Appellant
Mr. A.K. Singh for the Respondent

Date of Judgment:

Friday, 15th November 2002

JUDGMENT OF THE COURT

Appeal ABU0031 of 2001S is an appeal from a judgment of a Judge of the High Court of Fiji. On a claim for damages brought by the present respondent, Sharda Prasad, against the present appellant, the Registrar of Titles, his Lordship assessed damages of \$225,000 and added interest of 6% from 7 July 1992, the date of the writ, making a total award of \$326,250.

On 21 October 1991, Mr Prasad had entered into a contract to purchase a vacant block of land on which he intended to erect a two storey house. He paid a deposit of \$500. He lodged a caveat to protect his interest. However, the proprietors of the land sold the property to other purchasers and a transfer to them was registered, notwithstanding the lodgment of the caveat. Mr Prasad instituted proceedings against the two former proprietors, the other purchasers, a mortgagee and the Registrar of Titles. The proprietors, the purchasers and the mortgagee denied liability and the proceedings against them were not brought to trial. The Registrar of Titles admitted liability for negligence and the case against him proceeded as an assessment of damages.

In such a claim for damages, it is essential that full details of the plaintiff's claim be provided to the defendant well before the trial commences. The statement of claim merely said:

"The Plaintiff has spent much time and effort in making all necessary arrangements to purchase the said land and has suffered loss and damage and continues to suffer loss and damage as a result of the aforesaid actions of the Defendants."

Mr Prasad's witness statement contained no calculation of loss but merely said:

"Apart from arranging the funds to purchase the land, I also had the plan drawn to built the house on the said land (Documents No. 92-93)."

"Further from 1991, I have been paying rents and if I would not have lost the said land. I would have built my house and would have all the rents I paid to a third party."

Such a lack of pre-trial disclosure inevitably results in confusion at the trial. It did so in the present case and led ultimately to serious errors in the judgment.

At the trial, Mr Prasad gave evidence that he had intended to build a two storey house on the land and that he would have lived in the bottom flat and would have rented out the upper storey. He said that the price of the land was \$20,000, that, in 1991, it would have cost \$100,000 to build the house and that he would have invested at least \$120,000 in the property. He said that he had arranged to borrow most of the purchase price from a financier and that he would have obtained the \$100,000 to build the house by mortgaging the property and by obtaining support from a brother-in-law. Mr Prasad said that he bought the property not only to live in but as an investment. If he had been offered a good price he would have sold it to make a profit.

Expert valuers gave evidence that the property had a value of \$25,000 in October 1991 and that, at the date of the trial in 1998, the land had a value of \$55,000 or \$60,000 and, with a two storey building on it, was worth \$225,000.

This evidence established a loss of the deposit of \$500 and of a further \$5,000, being the value of the land in 1991 less the purchase price of \$20,000 which Mr Prasad had agreed to pay.

The claim for any additional loss of profits over and above \$5,500

encounters problems. In the statement of claim, it was alleged that Mr Prasad had sought a replacement block of land but few were available and they were significantly more expensive. This statement does not appear in Mr Prasad's witness statement and it does not appear in the record of the evidence at the trial.

There are additional problems with the claim for loss of profits. There was no expert evidence as to the cost of building a two storey house, and no expert evidence that the subject land had any special potential for profit making. Nor was there any evidence as to the cost of finance or any evidence from an accountant calculating a loss of profits taking into account out-goings, such as mortgage payments, income, such as rent, and inflation.

There are strong reasons for thinking that the claim for the additional loss of profits should have been dismissed. It was not particularised or quantified and the basis for the claim had little support in the evidence. In his address in this appeal, Mr A K Singh, counsel for Mr Prasad, has put forward calculations of his own. However, they were not put to the trial Judge and were not considered by him. Moreover, they are incomplete. They do not take all relevant matters into account.

Surprisingly, the trial proceeded on the footing that a compensable loss of profits had occurred. Written submissions put on behalf of the Registrar of Titles conceded an award of \$25,250 plus interest of 6% from the date of the writ of summons to the date

of judgment. This Court therefore turns to consider the particular calculations adopted by the trial Judge.

The trial Judge calculated the loss of profits at \$225,000. A crucial error in his Lordship's finding appears in these passages:

"I am satisfied that if the Plaintiff had been able to build his house on the land he would have sold it and would have been likely to obtain a price of \$225,000.00.

The Defendants called no evidence to rebut that called by the Plaintiff and I therefore hold that \$225,000.00 is an appropriate award to compensate the Plaintiff unless I am prevented in law from so finding."

This calculation completely omitted the outgoings involved, the cost of the land \$20,000, the cost of the building \$100,000 and the cost of finance. No evidence was given as to the cost of finance but, if \$60,000 is taken into account, the loss of profits would be reduced by \$180,000, giving a loss of \$45,000. Even that figure fails to take account of changes in monetary value due to inflation. The fact that a house and land which cost \$120,000 in 1991/2 could be sold for \$225,000 in 1998 would not show that a profit of \$105,000 was gained unless money values remained static. Inflation must be taken into account to reflect the real accrual.

Another problem is that the trial Judge allowed interest at 6% from the date of the writ. The interest awarded was \$101,000.

However, the loss as calculated was not a loss which accrued prior to or on the issue of the writ. The loss assumed that the land would have been purchased, that a house would have been built on it and occupied and that the property would have been sold in 1998 at about the time of the trial. The sale of price, \$225,000 reflected 1998 values, not 1992 values. Having regard to the manner in which the loss was calculated, no award of pre-judgment interest was called for.

Another matter which was not taken into account by the trial Judge was that Mr Prasad's contract of purchase was entered into with one only of the two proprietors of the land. Mr Prasad sued for enforcement of the contract but that part of the action did not proceed. The trial Judge held that the contract was entered into by the one proprietor, Mr Singh, for and on behalf of himself and his wife, the other co-owner. That may have been a good guess but the contract was not so expressed and the defence filed on behalf of Mrs. Singh denied it. As Mr and Mrs Singh sold the property to the other purchasers, presumably for a higher price or on better terms, there is a possibility that Mr Prasad may not have acquired the property even had his caveat been effective. That possibility should be allowed for by a percentage reduction in the profit calculated.

In the light of all these difficulties, the Court considers that it would be unsafe to do other than accept the concession made on behalf of the Registrar of Titles to the trial Judge that there was a loss of \$25,250. The evidence does not disclose a sound basis for any greater figure. The Court would not accept the concession as to 6% interest

from the date of the writ. Such interest could be allowed only if the loss was calculated by reference to events which occurred prior to the issue of the writ, as would occur if the loss were calculated at \$5,500 being the deposit and the difference between the value of the land when purchased and the price which Mr Prasad agreed to pay for it.

In these circumstances, the damages awarded should be varied by deleting the sum of \$326,250 and substituting therefore the sum of \$25,250.

Appeal ABU0041 of 2001S raises the issue of interim payments. On 18 January 2001, the trial Judge ordered that the appellant, the Registrar of Titles, make an interim payment of \$125,000 to the respondent, Mr Prasad. On 7 June 2001, the trial Judge ordered the Registrar of Titles to pay a further \$200,000 by way of interim payment. On 8 August 2001, his Lordship vacated that second order and directed the Registrar of Titles to pay a \$30,000 by way of interim payment. In total, \$155,000 was paid by way of interim payments.

ABU0041 of 2001s is an appeal by leave from the order of 8 August 2001. There is no appeal from the first order of 18 January 2001 although the submissions of Mr J.J. Udit, with whom Ms M. Rakaila appeared for the Registrar of Titles, seek relief in relation to all interim payments.

As the issue of interim payments must be the subject of an order of this

Court, it is unnecessary to deal with the appeal from the order of 8 August 2001 and that appeal will be dismissed. However, it is worth observing that the result of the principal appeal shows how inappropriate it was that the orders for interim payment should be made.

The interim payments were, of their nature, interim or interlocutory payments. The respondent's right to retain the moneys depended entirely upon the result of appeal ABU0031 of 2001S. When, by order of this Court, this appeal is allowed and the assessment of damages below is varied by substituting \$25,250 for the figure of \$225,000, the respondent will be bound to repay the excess received over a total of \$25,250 and interest of 3% thereon from 26 January 2000, the date of the Judgment in the High Court. The justification for the excess interim payments having failed, the excess retained will be money had and received to the use of the appellant, money which the respondent is liable to repay to the appellant under principles of unjust enrichment.

This matter necessarily arises in the appeal as the orders for the making of the interim payments were interlocutory orders in the appeal, which a Judge of the High Court was authorised to make under the inherent jurisdiction of the High Court and under Rule 34(1) of the Court of Appeal Rules.

Thus, this Court has jurisdiction to and should deal with the matter by ordering that the excess money be repaid. Having regard to history of the matter, it is

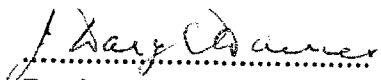
inappropriate that any order with respect to interest on the interim payments should be made.

The orders of the Court therefore are:

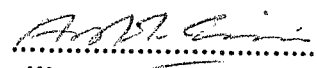
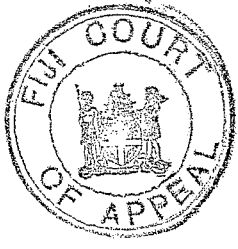
1. Appeal ABU0041 of 2001S is dismissed.
2. Appeal ABU0031 of 2001 is allowed.
3. The Judgment below is varied by substituting \$25,250 in place of \$326,250 for the damages awarded.
4. The respondent shall pay the appellant's costs of the appeal which are fixed at \$500.
5. The respondent shall repay to the appellant within 21 days such interim payments received as exceed \$25,250 plus 3% interest from 26 January 2000.
6. The Court remits to the High Court any remaining issue which arises from the making and receiving of the interim payments.



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Reddy, P



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Davies, JA



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Ellis, JA

Solicitors:

Office of the Attorney-General Chambers, Suva for the Appellant
A K Singh Law, Nausori for the Respondent