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

CIVIL APPEAL NO. ABU0020 OF 2003S
(High Court Civil Action No. HBC 97 of 2000S

BETWEEN:

RAJ PATI

Appellant

AND:

VIJAY SINGH
BRIJ MATI SINGH

Respondents

Coram: Smellie, JA
Davies, JA
Penlington, JA

Hearing: Friday 7th November 2003, Suva

Counsel: Ms R. S. Devan for the Appellant
Mr. S. Chandra for the Respondents

Date of Judgment: Friday 14th November 2003, Suva

JUDGMENT OF THE COURT

Introduction:

This is an appeal from the decision of Scott J delivered on the 1st May 2003 wherein it was found that the appellant had encroached upon the respondent's land. Damages of $10,000.00 were awarded to redress the wrong. The grounds of appeal are stated to be:

"1. the learned judge erred and/or misdirected himself in law and in fact in holding that the responsibility for the excavation, encroachment and consequent loss of support is that of the defendant/appellant.

2. the learned judge erred in law and in fact in failing to properly and/or adequately evaluating (sic) the evidence before making the findings and arriving at his decision."

It will be seen that these grounds are primarily challenges to findings of fact although aspects of the Law of Nuisance were also relied upon by Ms Devan in her submissions before us.

Pleadings:

The respondents as plaintiffs in the Court below and owners of Lot 7 pleaded in paragraphs 3 and 4 as follows:

(3) That the defendant or her agents carried out excavation work on the defendant's land (Lot 6) and which land was at all material times adjacent to the said land (Lot 7).

(4) That as the result of the excavation, the defendant had substantially excavated the said land (Lot 7) and according to the plan and report prepared by the surveyors and engineers, the extent of excavation were as follows namely that the top of the excavation encroached approximately 1.03 metres and the excavations carried out was 200 links in length.

To those pleadings the appellant as defendant in the court below denied paragraph 3 and in relation to paragraph 4 pleaded:

(4) that she denies paragraph 4 and in further defence says that the registered surveyor Mr. Ronald Chan has confirmed that the eastern boundary abutting Lot 7 has not been disturbed.

The evidence:

The first respondent Vijay Singh, when giving evidence on the 17th April 2003 said that he had purchased the property about 5 years earlier (i.e. about April of 1998) at which time encroachment had already occurred. He said he engaged lawyers, surveyors and engineers regarding the problem. A surveyor Mr. Thaggard then in the employ of Messrs Wood and Jepsen Consultants reported in February 2000 after inspection that *"soil excavation along the common boundary of Lot 6 and 7 ..... had been carried out at some stage in the past.....and that part of the land on Lot 7 .....had also been excavated."* Mr. Thaggard's plan shows clearly the excavation which starts on Lot 6 and continues some distance into Lot 7. Thaggard's report and plan were produced without objection by a principal of Wood and Jepsen a Mr. Conrad M. Lenz who calculated the degree of encroachment at 13 square metres.

Mr. Lenz gave evidence that Mr Singh returned to Wood and Jepsen in May 2000 and asked for further clarification. Mr. Lenz attended to this instruction himself and reported very precisely on the boundary between Lots 6 and 7. In his evidence, he said the bank between 6 and 7 at the Princes Street end was 4 to 5 feet high and continued for about 10 metres and then tapered away towards the back. He also said there was clear evidence of excavation on the boundary line *"perhaps within 12 to 18 months of inspecting the property".*

Pausing there. Mr Singh said the excavation was present when he purchased about April of 1998 and in May 2000 – less than 24 months later Mr Lenz estimated that the excavation had occurred perhaps between December 1998 and May 2000.

Mr. Lenz also placed the house on Lot 7 as being 2 to 3 metres from the boundary and expressed the view that unless something was done there would be further erosion that would ultimately pose a threat to the house. Mr. Jepsen the engineer partner of Wood and Jepsen estimated that the cost of a steel reinforced block wall to halt further erosion and recover the lost land would cost $10,000.00. His report was produced without objection.

The appellant is an elderly lady who has owned and lived on the property since before 1974. Her evidence was that although she had excavated on Lot 6 she did not do so on the boundary of Lots 6 and 7. She claimed an earlier owner of Lot 7 had excavated when there was no house on the property.

The second defence witness was Mr. Ram Vilash who had lived with the appellant from 1974. He admitted there were excavations on Lot 6 in 1997 but denied that anything was done on the common boundary between Lots 6 and 7.

A Mr. Chan, surveryor, was then called by the defence. It transpired however, that while he was engaged to confirm the position of the boundary pegs he was not asked to determine the relationship between the top of the bank and the boundary. He was not therefore in a position to dispute the evidence of Messrs Thaggard, Lenz and Jepsen.

The findings of fact:

On the above evidence the judge found that there had been an encroachment by excavation along the common boundary. Further that the maximum encroachment was 0.9 of a metre and the estimated loss of support 13 square metres. In addition, the house on Lot 7 was endangered if remedial work in the form of reinforced block concrete wall costing $10,000.00 was not constructed.

All of the above we do not understand to be seriously challenged, if at all, by the appellant.

Furthermore the judge obviously accepted on the basis of the evidence of Mr. Lenz that the encroachment was recent. The *"perhaps"* estimate of Mr. Lenz of between 12 to 18 months before his inspection was obviously too short. Nonetheless a point of time after 1994 and about 1997, when excavations were acknowledged to have taken place, was established on the balance of probabilities.

Over and against that there were the denials of the appellant and Ram Vilash that the excavation in 1997 had affected the boundary between the two properties.

In those circumstances the finding was as expressed on page 3 of the judgment

> *"Having heard the evidence and seen the documents which were produced I have no reason to doubt that an encroachment has indeed occurred on the boundary. I also find that the topography of the boundary is such that the excavation has deprived Lot 7 of the support to which it is entitled. To suggest that the higher lot would be excavated along its boundary by its own owner in order to undermine it seems fanciful. I am satisfied that the responsibility for the excavation, encroachment and consequent loss of support must be that of the defendant whose own relative, the second defence witness, admitted carrying out excavations on Lot 6 in the 1997....."*

In short, as the finder of fact, the judge accepted the evidence called by the plaintiffs and drew the inference that the excavation leading to the encroachment had occurred during the appellant's occupancy and ownership and with her approval or acquiescence. The drawing of that conclusion necessarily involved the rejection of the appellant's denial and that of her relative.

Those findings on that basis were clearly open the Judge and it would not be right for this Court which did not have the advantage of hearing and seeing the witnesses to interfere.

Right to support/nuisance/negligence:

Scott J having found as recorded above applied the rule in ***Dalton v Angus*** 1881 (6) App. Cas. 740 which upheld the right of a landowner to support from adjoining land in its natural state. In addition however the evidence shows encroachment which is more appropriately regarded as nuisance. In principle the actions of the appellant also support an action in negligence – see ***Bognuda v Upton and Shearer Ltd*** [1972] NZLR 741. In his judgment in the Court of Appeal Woodhouse J as page 771 line 39 said:

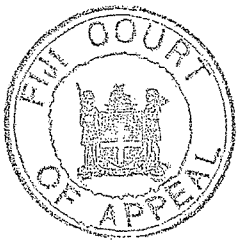
"Surely there could be no more graphic illustration of the neighbour Lord Atkin thought one ought "reasonably to have in contemplation" then an adjoining owner whose building is about to be affected by an excavation at the common boundary."

On any one of the above bases the award of $10,000.00 to build a wall to stabilize the bank, recover the 13 square metres lost and ensure the safety and stability of the house on Lot 7 is amply justified.

Conclusion:

1. The appeal is dismissed.

2. The respondent is entitled to costs of $750.00 and any disbursements reasonably incurred as fixed by the Registrar.



Smellie, JA

Davies, JA

Penlington, JA

Solicitors:

Messrs G.P. Lala and Associates, Suva for the Appellant
Messrs Maharaj, Chandra and Associates, Suva for the Respondents

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