

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

CIVIL APPEAL NO. ABU0021 OF 2003S  
(High Court Civil Action No. HBC 409 of 1996L)

BETWEEN:

NATIVE LAND TRUST BOARD

*First Appellant*

FILIPE KUBUYAWA

*Second Appellant*

AND:

VED PRAKASH

*Respondent*

In Chambers:

Smellie, JA  
Davies, JA  
Penlington, JA

Hearing:

Wednesday 12<sup>th</sup> November 2003, Suva

Counsel:

Mr. G.E. Leung and Mr. T. Bukarau for the Appellants  
Mr. G.P. Shankar for the Respondent

Date of Judgment: Friday 14<sup>th</sup> November 2003

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JUDGMENT OF THE COURT

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This is an appeal from an order made by a Judge of the High Court of Fiji after hearing an interlocutory application.

The respondent, Ved Prakash, was lessee of certain land from the Native Land Trust Board, the first appellant, pursuant to a Native Lease which commenced on 1 July 1968 for a term of 25 years. After the expiration of the lease on 30 June 1993, the respondent remained in possession of the land paying rent. He had erected a substantial concrete

shop and dwelling on the land which he estimated to be worth \$200,000. The respondent had sought but was unable to obtain a renewal of the lease.

The second appellant and other members of the land owning unit sought to enter the land and threatened to build a structure on it. On 10 December 1996, the respondent issued a writ claiming a declaration that the first appellant was bound to renew the lease, an injunction restraining interference with his use and occupation of the land and damages. On the same day he made application for an interim or interlocutory injunction.

That application and an application for judgment in default of service of the defence came before the trial Judge in chambers on 6 March 1999. On 6 October 2000, His Lordship dismissed the application for judgment in default of service and we are not concerned with that. His Lordship ordered, in his discretion, that the injunction be refused but he declared that the respondent was entitled to seek compensation for his property pursuant to s.40 of the Constitution, irrespective of the provisions of the Native Lands (Leases and Licences) Regulations. His Lordship adjourned the matter for assessment of compensation in accordance with s.40 of the Constitution.

That order was made without there being any claim for relief in the proceedings raising s.40 of the Constitution, without any reference in the proceedings before his Lordship to that provision and without any submissions thereon being sought from counsel for the parties. When proceedings are conducted in this way, in direct breach of the rules of natural justice, they invariably go astray.

Section 40 of the Constitution provides:

***“40.-(1) Every person has the right not to be deprived of property by the State otherwise than in accordance with a law.***

- (2) The acquisition of property under a law referred to in subsection (1):***
- (a) is permissible for public purposes only; and***

- (b) *is subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as is determined by a court or tribunal to be just and equitable taking into account all relevant factors including:*
- (i) *the use to which the property is being put;*
  - (ii) *the history of its acquisition;*
  - (iii) *its market value*
  - (iv) *the interests of those affected; and*
  - (v) *any hardship to the owner.*
3. *In this section:  
Property includes an interest in property."*

Insofar as that section deals with compensation, it concerns the compulsory acquisition of property by the State, which acquisition deprives a person of property which is his. The section requires that the acquisition and deprivation occur only pursuant to a law, that it be undertaken only for a public purpose and that just and equitable compensation be paid.

Not only was this provision not relied on in the statement of claim, it did not apply to the circumstances outlined in the statement of claim. No acquisition by the State was alleged. For that matter, the State was not a party to the proceedings.

The trial Judge said:

*"In considering section 40, the court is of opinion that it protects tenants with properties under expiring native leases and allows them to seek fair compensation for improvements they have made to the land during their occupancy. In the court's respectful opinion, the present state of affairs where the landowners acquire ownership of permanent structures on expiring leases that cannot be removed is akin to a form of compulsory acquisition. The tenant often has very little choice in the matter. Subsection (1) makes specific reference to deprivation of property "by the state otherwise than in accordance with a law." What has to be borne in mind is the principle encapsulated therein: the protection of private*

*property against arbitrary interference whether it be the government or from any other institution."*

However, that approach misreads s.40. Even if the provision is given the "liberal and enabling interpretation" required by authorities such as Coburn v. Human Rights Commission (1994) 1 HRNZ120 at 137-8 and Northern Regional Health Authority v. Human Rights Commission (1997) 4 HRNZ37 at 56, its requirement of compensation does not extend beyond the confines of a compulsory acquisition by the State. Provisions to the same general effect are found in s.51(xxxi) of the Australian Constitution and the fifth amendment of the Constitution of the United States.

In the present case there was no acquisition by the State of Fiji of property belonging to the respondent.

It follows that his Lordship's declaration that the respondent was entitled to seek compensation pursuant to s.40 of the Constitution, his order that the proceedings be adjourned for assessment of compensation in accordance with s.40 of the Constitution and his order that the appellants pay the costs of the proceedings before him must be set aside.

There has been no appeal from his Lordship's orders that the application for summary judgment and the application for an interlocutory injunction be dismissed. Those orders will stand.

Counsel for the respondent has relied upon a notice of contention seeking to uphold his Lordship's order on the following ground:

*"It is wrong in any event to deprive the Respondent of his property without compensation and the Respondent is entitled to compensation under Common Law and/or rules of equity, which have established that no person is to be deprived of his property without compensation."*

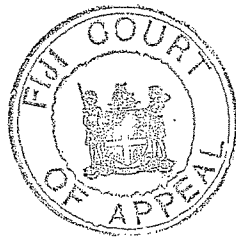
However, that notice cannot be dealt with in this Court. There has been no trial of the action and no consideration of that issue. Indeed, the statement of claim may need amendment to raise all the issues which counsel for the respondent wishes to litigate.

The proceedings must be remitted to the High Court to continue the ordinary processes of preparation for trial and trial.

No submission was made that his Lordship's order was not a final order. However, it did not finally dispose of the respondent's action. Entitlement to compensation was found but the proceedings were adjourned for the assessment of compensation. As there are differing view as to whether a decision on liability alone without an assessment of damages or compensation is final or interlocutory, the Court will grant leave to appeal so as to ensure that the appeal is validly instituted. Leave has already been granted extending the time for appeal.

The orders of this Court are:

1. Leave to appeal granted and appeal allowed.
2. The Court sets aside his Lordship's declaration that Ved Prakash was entitled to seek compensation for his property pursuant to s.40 of the Constitution, his order that the proceedings be adjourned for assessment of compensation in accordance with s.40 of the Constitution and his order that The Native Land Trust Board and Filipe Kubuyawa pay the costs of Mr Prakash assessed at \$500.
3. In lieu thereof it is ordered that Mr Prakash pay to the Native Land Trust Board and Filipe Kubuyawa costs of the proceedings below which are fixed at \$500.
4. The respondent shall pay the appellants' costs of the appeal which are fixed at \$750.
5. The proceedings are remitted to the High Court of Fiji at Lautoka to continue the ordinary processes of preparation for trial and trial.



*Robert Smellie*  
Smellie, JA

*J. Daryl Davies*  
Davies, JA

*J. Penlington*  
Penlington, JA

Solicitors:

Howards, Suva for the Appellant  
Messrs. G.P. Shankar and Company, Ba for the Respondent