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

CIVIL APPEAL NO. ABU0021 OF 2004S
(High Court Civil Action No. HBC 318 of 1998S)

BETWEEN:

ATTORNEY-GENERAL OF FIJI

Appellant

AND:

METUISELA CAMA
APAKUKI TUISUE
TIMOCI TULELE

Respondents

Coram: Ward, President
Barker, JA
Tompkins, JA

Hearing: Tuesday, 23 November 2004, Suva

Counsel: Mr. S. Banuve for the Appellant
Mr. R. Singh for the Respondents

Date of Judgment: Friday, 26 November 2004

JUDGMENT OF THE COURT

Introduction

[1] The respondents, formerly known as the Eagle Ocean Harvest Club, now known as the Eagle Ocean Harvest Fishing Group (Eagle) brought proceedings against the appellant on behalf of the Ministry of Agriculture and Fisheries (the Ministry) claiming damages arising out of the loss or vandalising of articles belonging to Eagle. The cause of action relied on is not apparent from the statement of claim, but we assume it to have been conversion, trespass to goods or negligence.

[2] The Ministry counterclaimed against Eagle for goods it claimed were owned by it in the possession of Eagle but not returned.

[3] Part way through the hearing in the High Court, the Ministry conceded that it was liable to Eagle and withdrew its counterclaim. The subsequent hearing was for the purpose of assessing damages.

[4] In a judgment delivered on 24 February 2004, Scott J assessed the damages at $50,000 inclusive of interest. Judgment was entered accordingly. The Ministry has appealed against that assessment of damages on the grounds that the damages awarded were excessive. Eagle has cross-appealed on the grounds that the damages awarded were inadequate.

Background

[5] Eagle was registered with the Ministry of Youth, Employment Opportunities and Sport in April 1994. It had started as a fishing group of young men but, over the following years, diversified into boat building, engine and automotive repairs and panelbeating. Its operations were based in a large building situated at the Ministry's compound at Lami.

[6] On 10 September 1996, the Ministry wrote to Eagle advising that the Ministry wished to resume occupation of the building for its own purposes. Eagle was asked to vacate the building by the end of 1996. Eagle was unable to relocate. Relations between the Ministry and Eagle deteriorated to the point where Eagle was forcefully, and in the presence of Police, evicted from the building on 3 January 1998.

[7] It was claimed on behalf of Eagle that when it was evicted from the building by the Ministry, tools of trade, stock of spare parts, machinery and other personal possessions were left in the building. There were also two vessels. When they were evicted, they were only allowed to take their clothes. They were not allowed to take their tools, stock, etc nor the boats. On 13 March 1998 a witness of behalf of Eagle was allowed to return to the building. Prior to that, he said he had not been allowed to enter the building. He found that all their possessions had disappeared or been vandalised. Eagle's claim against the Ministry was for damages resulting from the loss of all these items.

[8] In support of its claim for damages, a witness on behalf of Eagle produced a schedule of the stolen or lost items and a schedule of the items that had been vandalised. The former consisted of 236 items. In each case, the schedule stated the quantity, the unit price and the total price. The total was $58,640.79. The schedule of items vandalised showed 17 items

and the estimated cost of each, totalling $35,769.65. The schedules had been produced from a ledger the witness had kept. The judge observed that there was no reason to doubt their authenticity or accuracy.

[9] Eagle's claim was for $94,410, being the total of the items in the schedules, $20,000 for loss of income, exemplary damages of an unspecified amount, interest and costs

The judgment in the High Court

[10] In his judgment, Scott J set out the background to the claim and summarised the evidence that had been given in support and in opposition. He found that the evidence placed before him fell short of satisfactorily explaining the precise extent of Eagle's loss. Although he was told what the purchase price of the items had been, he was not told who had paid for them. Some of the items were on loan from a government agency.

[11] He considered that the loss of income claim paid no regard to the fact that Eagle could have moved elsewhere if it wanted to continue its fishing business. Since the vessels which they were operating appear to have been built with Ministry equipment and funds or to have been donated by another agency, he did not consider that Eagle should be compensated for their loss following repossession for failing to keep up with loan repayments.

[12] He held that the business losses claimed by Eagle flowed, not from the Ministry's actions, but from its failure to find suitable alternative premises. Eagle cannot recover for the loss of the vessels which he thought, on the balance of probability, it did not own. There were no grounds for awarding exemplary damages: it was Eagle's persistent failure to comply with the request to vacate that drove the Ministry forcefully to evict them.

[13] He found that, in the absence of better particulars as to the precise ownership and value of the chattels lost, it was not easy to arrive at a figure which would fairly compensate Eagle for its undoubted loss. Doing the best he could, he awarded Eagle a global figure of $50,000 inclusive of interest. The claim for loss of profits and the claim for exemplary damages were dismissed.

The appeal by the Ministry

[14] The essence of the submissions on behalf of the Ministry was that Eagle had failed to discharge the burden of proving damages. It was submitted that the measure of damages to which Eagle was entitled was the market value of the goods together with any special loss which flowed naturally and directly from the wrong. Market value means the value for which the goods can be sold, not what they cost. The Ministry submitted that the schedule of items lost was unreliable as no invoices to support the values were produced. The Ministry challenged Scott J's finding that there was no reason to doubt the authenticity or accuracy of the schedules.

[15] The Ministry submitted that in the absence of better evidence of the value of the chattels, the award should have been for a nominal amount.

[16] We accept that the evidence called by Eagle did not establish, in precise dollar terms, the value of the chattels and therefore the extent of its loss. We also note the Judge's findings that at least some of the items had been lent to Eagle and that there was some doubt of the ownership of items such as the boats. But we do not accept that in these circumstances, the damages should have been nominal.

[17] In *Newbrook v Marshall* [2002] 2 NZLR 606, the Court of Appeal in New Zealand considered the proper approach where damages, in that case for loss of profits, could not be accurately assessed. Richardson P, delivering the judgment of the Court said at 614:

> "Where there are variables involved, as usually occurs in assessments of business profits or losses, if precise figures had to be proved few plaintiffs could succeed. Where, as here, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the Courts. It is not a matter of whether an expert could give a reasoned assessment and could defend the number he or she came up with. As Lord Mustill said in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at p 269 "The assessment of damages often involves so many unquantifiable contingencies and unverifiable assumptions that in many cases realism demands a rough and ready approach to the facts"

[18] Richardson P referred to an earlier decision of the Court of Appeal in *Walsh v Kerr* [1989] 1 NZLR. It concerned the value of a guarantee, where its actual value had not been

established. It was held that the Court should do its best to arrive at a figure, if satisfied there had been some real damage. Cooke P, delivering the judgment of the Court said at 494:

> "There are cases where, although the assessment can only be largely speculative and the evidence is exiguous, the Court will do the best it can to arrive at a figure if satisfied that there has been some real damage. Cases on the value of a chance are well known. But perhaps the most instructive precedent is the Privy Council decision cited by Tipping J himself, *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, where, having held that the true measure of damages was one to which neither the evidence nor the judgments in the Courts below had been directed, their Lordships came to "the conclusion that the ends of justice would be best served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is". See the judgment delivered by Lord Keith of Kinkel at p 106."

[19] This is the situation in the present case. There can be no doubt that Eagle has suffered some real and substantial damage resulting from the loss of or damage to the items in the schedules. Because of uncertainty concerning the value of those items and the accepted fact that some, but not many, of the items may not have been owned by Eagle, the loss cannot be precisely proved. In those circumstances, the Judge was entitled to take a robust view and to make a broad brush assessment of loss. That was the course adopted by Scott J. He was justified in doing so.

[20] The Ministry's appeal against the assessment of damages is dismissed.

The cross appeal

[21] Eagle's cross-appeal set out two grounds, first that the Judge erred in not awarding a higher amount for special damages, and secondly, that he erred in failing to award any general damages. As part of its first ground, Eagle also submitted that the Judge should not have included interest in the damages awarded, rather it should have been assessed separately. The second ground was intended to include its claim for exemplary damages and for loss of income, although the latter is more correctly described as special damages.

[22] We deal first with the submission concerning interest. The power of the Court to award interest on damages is conferred by s 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap. 27). The award of interest so conferred is discretionary. The

Court may, if it thinks fit, "order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages . . ."

[23] The nature of an award of interest was considered by Bingham J in the *Swiss Bank Corporation v Brink's-Mat Ltd and others* [1986] All ER 188 at 189:

> "Approaching an application for interest in circumstances such as this, I, like any English judge, start off with an inclination to award interest. That is, after all, the order that ordinarily follows where a plaintiff succeeds in establishing a breach of contract, in the absence of fairly compelling reasons why interest should not be awarded. *The award of interest is not, of course, made as part of the damages* but as interest on damages, and is paid not by way of any penalty against the defendant but as compensation to the plaintiff for having being kept out of his money for whatever period is deemed to be appropriate. The award of interest is, furthermore, seen as having a public policy purpose in that it tends to deprive a recalcitrant defendant of any advantage which he might otherwise have from protracting the proceedings." (Emphasis added)

[24] Although Bingham J refers to breach of contract, his comments are equally applicable to the award of damages on other causes of action.

[25] In the present case, we do not think it appropriate for the Judge to have included interest as part of his global assessment of damages. Rather, the proper course was to make the global assessment of damages, and then, if the discretion should be exercised in favour of an award of interest, provide for interest on the amount of the damages to be included in the judgment. In the circumstances of the present case, we consider that interest should be awarded to compensate Eagle for being kept out of the amount to which it was entitled, and that interest should run from the date of the issue of the writ, 17 June 1998, to the date of the issue of this judgment, at the rate of 5% per annum.

[26] We come now to the assessment of damages. An appellate court is reluctant to interfere with the assessment of damages made by the trial judge, particularly where, as here, the assessment is made on a global basis having regard to the whole of the evidence. But we are satisfied that, in this case, the award of damages is inadequate. We reach that conclusion for these reasons:

[27] First, as we have mentioned above, the Judge found that there was no reason to doubt the authenticity or the accuracy of the schedule of items lost and damaged. The witness for

Eagle explained that the invoices relating to these items had also been lost during the period that the items were in the possession of the Ministry. The witness said that in case of some of the items, the present cost price was in fact greater that the price shown in the schedule. No attempt was made by counsel for the Ministry to challenge the accuracy of the schedules, and in particular the prices shown.

[28] Secondly there was no market for the sort of items included in the schedules. So it was not possible to assess the loss on the basis of market value. *J. & E. Hall Ltd v Barclay* [1937] 3 All ER 620 is authority for the proposition that a plaintiff is entitled to the value of the items converted, which was ordinarily the price of similar articles in the market, but if there be no market in the articles concerned, the measure of damage is the cost of replacement. Again the Ministry made no attempt to suggest that there was a market and that the value of any individual items in the list was less that the value shown.

[29] Thirdly, the judge found that some of the items were on loan from one government agency or another. It is correct that a witness for Eagle said that some items had been lent by the Ministry or some other government agency. No attempt was made by the Ministry to identify which item in the schedules came within that category. In any event, even if some items were lent, it does not follow that Eagle is not entitled to recover. Counsel for Eagle referred to the following passage in the 9th edition of *Fleming, the Law of Torts*, at page 78:.

> "A possessor or a person with a right to possession whose chattel has been converted by a stranger is entitled to recover its full value, even though he is not the owner. Modern law has retained the medieval axiom that possession is title against a wrongdoer: damages are merely a substitute for such possession and must therefore be equivalent to the chattels and amount to its full value"

[30] However, the axiom applies against all but the true owner. To the extent, therefore, that some (unidentified) items lent were owned by the Ministry, Eagle is not entitled to recover.

[31] Fourthly, the Judge relied on evidence indicating that some of the items had been donated to Eagle by the Ministry or some other government agency. He considered that Eagle could not claim for those items. We do not consider that to be the case. If an item had been donated to Eagle, Eagle acquired the legal and equitable title in that item. It was therefore entitled to be compensated for the full value of that item. We observe that no attempt was

made by the Ministry to identify which particular items had been donated by the Ministry to Eagle.

[32] Where, for whatever reason, damages cannot be assessed accurately, and the Court is required to take a broad global approach to the assessment of damages, that approach should be conservative. The claimant should not receive the benefit of any doubt if it is unable to prove its loss precisely. For this reason, and taking into account the other matters to which we have referred, we are satisfied that there should be a reduction from the total figures show in the schedules. Making the best estimate we can, we assess Eagle's loss at $75,000.

[33] Counsel for Eagle submitted that there should have been an award of exemplary damages. We do not accept that submission. No possible basis was made out to justify such an award. The Judge was right to dismiss that claim.

[34] On the claim for loss of income, the Judge held that these losses flowed, not from the Ministry's actions, but from Eagle's failure to find suitable alternative premises. The notice by the Ministry to Eagle to vacate was given on 10 September 1996. The Ministry evicted Eagle on 3 January 1998, one year and four months later. During the whole of that period Eagle knew that it was going to have to find alternative premises. We agree with the Judge that, to the extent that there may have been some income lost following the eviction, it was primarily due to Eagle's failure to relocate during the lengthy time that was available for it to do so. The appeal on this ground cannot exceed.

Result

[a] The appeal is dismissed

[b] The cross-appeal is allowed.

[c] The judgment in the High Court is set aside.

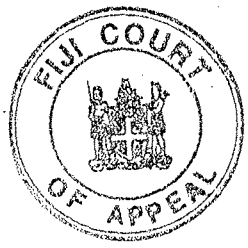
[d] Eagle is entitled to damages against the Ministry of $75,000.

[e] Eagle is entitled to interest on that sum at 5% per annum from 17 June 1998 to 26 November 2004, being the date of delivery of this judgment.

[f] Eagle is entitled to costs on this appeal against the Ministry which we fix at $1,000 plus disbursements.

[g] There will judgment accordingly.

Ward, President



Barker, JA

Tompkins, JA

Solicitors:

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