

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: 351 OF 2001

BETWEEN: **RAJESH PRAKASH SHARMA** son of Vishwa Nand Sharma
of 215 Rewa Street, Suva, Fiji, Bank Officer

PLAINTIFF

A N D: **THE REGISTRAR OF TITLES**

FIRST DEFENDANT

A N D: **NAVUA DRAINAGE BOARD** a board duly constituted under
the Drainage Act

SECOND DEFENDANT

A N D: **THE ATTORNEY GENERAL OF THE REPUBLIC OF FIJI**

THIRD DEFENDANT

A N D: **SHIU NARAYAN** f/n Ram Govind and **AGRAWALA**
DEVELOPMENT LIMITED

THIRD PARTIES

Counsels: **Mr. V. Mishra** for Plaintiff
 Ms M. Rakuita for First and Third Defendants
 Mr. E. Veretawatini for Second Defendant

Date of Hearing: **21st January 2008**

Date of Submissions: **6th February 2008**

Date of Judgment: **29th February 2008**

JUDGMENT

Background:

- [1] In January 1998 the plaintiff purchased a piece of freehold land comprised in Certificate of Title 13177. The land is located in Navua. He checked the title before purchase. The title showed it was one continuous piece of land with meandering Waikalou Creek forming the border on one side. After purchase he engaged a surveyor for subdivisional purposes. Soon after the surveyor began the survey, he realized that the course of the Waikalou Creek had shifted. It was later learnt that the Waikalou Creek had been re-aligned at the request of the Navua Drainage Board by the Ministry of Agriculture. The re-aligned creek cuts across the land splitting it into two parts. The result of this re-alignment was that a piece of land about one and a half acres was separated from the rest by the new creek channel.
- [2] The re-alignment of the creek was done sometime in 1981. The position of the new creek, that is the re-alignment, is not shown on the title or in any way endorsed on the title.
- [3] The plaintiff's case is that he relied on the title to buy the land. He says that the defendants were negligent in failing to have the re-alignment endorsed on the title and that they breached their statutory duties. Such conduct he claims has caused him damages. All the statement of claim says is that there was breach of statutory duties.
- [4] The pleadings do not say what sections of which statute were breached, a woeful omission from the pleadings. The failure to provide sections of relevant statute or statutes is unforgiveable. It makes it extremely difficult for the opposing party to prepare its case. In future those who rely on provisions of statutes must provide section numbers and name the statute relied upon or risk having the particular clause of pleading being struck

out. They must also provide a brief explanation as to why such section has been breached.

WAS THE PLAINTIFF AWARE OF RE-ALIGNMENT?

- [5] The first issue for me to decide is whether the plaintiff prior to purchase knew that the re-aligned creek cut through the land he wanted to buy. If I conclude that he did, then he would have to suffer the consequences and bear the losses.
- [6] The plaintiff in cross examination admitted that he lived on the land in question with his father up till 1998. In 1981 he was 17 years old.
- [7] His father did not own the land but only lived there. I find that the plaintiff knew that the Waikalou Creek had been re-aligned. A major work like that with machinery would not have escaped his attention in 1981. However in 1981 he was a young boy and he would not have given a thought to buying this property. There would be no reason for him to find through whose land the re-aligned creek cut through. To a lay person it is difficult to match what is on the ground with what is shown on the title or a plan. I believe the plaintiff that he only realized that the re-aligned creek cut through the land after he had bought it and after the surveyor brought this fact to his attention.

Was the Registrar of Titles negligent in any way?

- [8] The powers and duties of the Registrar of titles are spelt out in Section 129 to 138 of the Land Transfer Act. No doubt it is a position of great responsibility. His basic duty is to attend to registration of documents which comply with the requirements of the Act. His duties are not investigatory. He is not required to go onto the lands covered by titles to see if plans are accurate. It is for the proprietors of the land to notify the registrar in the proper documentary form if there are any changes to the title. In the present case there is no evidence before the court that anyone brought the re-alignment of the channel to the Registrar's attention and

the Registrar refused or neglected to register it. The Registrar therefore cannot be held responsible for something of which he was not aware.

Breaches of Statutory Duties:

[9] The conduct of the defendants which allegedly amounted to negligence or willful misrepresentation to the public and breach of statutory duty is set out in paragraph 8 of the statement of claim I set these out verbatim from that paragraph –

“The conduct of the defendants and/or their servants and/or their agents was negligent and/or careless and/or reckless. Particulars of negligence of the defendants are as follows :-

- (a) allowing the area of land in Certificate of Title to be changed without making the necessary registration(s) against Certificate of Title No. 13177 of an appropriate caveat and/or charge which would have given adequate warning to the plaintiff or other purchasers of the re-alignment of the Waikalou Creek and its consequences.*
- (b) allowing and permitting the re-alignment of Waikalou Creek to proceed when it left part of Certificate of Title No. 13177 on the other side of Waikalou Creek without road access.*
- (c) not obtaining the access to the part Certificate of Title No. 13177 which fell on the other side of the Creek after re-alignment.*
- (d) allowing a re-alignment of Waikalou Creek without submitting the necessary requests and plans to the*

Department of Lands and Survey and the Registrar of Titles.”

- [10] The re-alignment was done in 1981. The evidence regarding the manner in which Drainage Boards operate was given by Baram Deo who is the Secretary of Central Division Drainage Board which now incorporates Navua Drainage Board. He stated that the functions of the Drainage Boards are to provide and maintain drains. The purpose of this is to improve agricultural land. The farmers seek assistance of the Board. The Board does ground work and obtains the necessary consents from the farmers to carry out the works.
- [11] The Board lacks the resources so it seeks assistance from the Ministry of Agriculture to carry out the actual work which is done by the Ministry of Agriculture. The work is only carried out after obtaining the consent of farmers whose lands are affected. His evidence is confirmed by the evidence of Satya Narayan Swami who is now retired. Prior to his retirement he was the Director of Land, Water and Resource Management with the Ministry of Agriculture. He had served in the Department for 31 years so he had a good knowledge of the drainage matters.
- [12] Both these persons were firm in their evidence that no work is done without the prior consent of the farmers. Neither of them was aware of any case where the State had acquired land compulsorily to carry out drainage works.
- [13] Baram Deo in fact named Shiu Narayan as the farmer who had given consent to re-alignment. The title to the property shows that Shiu Narayan was the registered proprietor of CT 13177 up to 1987 so he was the owner of the land at the time of re-alignment.
- [14] These two witnesses were independent witnesses. They had nothing to gain. They both testified in a forthright and impressive manner. I find that Shiu Narayan had consented to the re-alignment and the State had not

trespassed onto the property and re-aligned the channel. There was no need for any compulsory acquisition. Shiu Narayan did not complain for six years while he remained as registered proprietor nor did his successor Agarwala Development Limited lodge any complaints.

Section 150 of the Land Transfer Act:

[15] There is no provision in the Drainage Act which imposes a duty on the Drainage Board to register the existence of drains against the title. In his submissions Mr. Mishra submitted that if the re-alignment was done by consent, then the Minister should have invoked Section 150 of the Land Transfer Act and ask the Registrar to require the proprietor to deposit a plan certified by the surveyor. Section 150 of the Land Transfer Act provides :

“The Registrar may require the proprietor of any land subject to the provisions of this Act, or any estate or interest therein, desiring to transfer or otherwise to deal with the same or any part thereof to deposit with the Registrar a plan of such land on such scale and with such measurements thereon as may be prescribed and with such further information as the Registrar may require, and every such plan shall be certified by a surveyor registered under the provision of the Surveyors Act.”

The important words are may require. It is not mandatory. It gives the Registrar a discretion. So even if the Minister had asked, the Registrar was not in any way bound to ask Shiu Narayan to lodge a plan. The plaintiff says that the omission of the defendants make them liable.

Section 140 of the Land Transfer Act:

[17] The plaintiff in his submissions relies on Section 140 of the Land Transfer Act. This section permits someone affected by the acts or omissions of the Registrar of Titles or clerks in his office to bring an action for damages. Section 140 of the Land Transfer Act provides :

“Any person who either before or after the commencement of this Act –

- (a) sustains loss or damages through any omission, mistake or misfeasance of the Registrar or of any of his officers or clerks in the execution of their respective duties; or***
- (b) is deprived of any land subject to the provisions of this Act, or of any estate or interest therein, by the registration of any other person as proprietor of such land, estate or interest, or by any error, omission or misdescription in any instrument of title, or in any entry or memorial on the instrument of title, or has sustained any loss or damage by the wrongful inclusion of land in any instrument as aforesaid, and who by this Act is barred from bringing an action for possession or other action for the recovery of such land, estate or interest,***

may bring an action against the registrar as nominal defendant for the recovery of damages.”

Is plaintiff entitled to damages under Section 140?

[18] This right to compensation is a statutory right and unless the loss or damages can be brought within the requirements of the statutory provisions, damages are not payable. However in applying these provisions the overall purpose of the Land transfer Act must not be lost sight of. That purpose was described in Attorney General v. Vijay Kumar & Everett Riley – ABU 71 of 1981 so as ***“to establish certainty of title based upon registration, which can be taken as notice to the world of the identity and extent of interest of the person who is certified to be***

the owner". Innocent persons may suffer through error or other causes but they take second place to the merit of certainty leaving injured parties to be compensated.

- [19] The policy behind the State Compensation under the Torrens System was considered in Registrar General of Land v. Marshall - (1995) 2 NZLR 189. Justice Hammond expressed the view that the policy has two rationales: The first is that in introducing the Torrens System, the State creates a risk and therefore it is a classic case of state providing an insurance against loss from that risk. The second is that in the interests of efficiency in public administration, it is better for state officials to make a few mistakes and pay for those mistakes than to spend more money in trying to prevent those mistakes.
- [20] In Marshall, Hammond J. expressed the view that Section 172 of the New Zealand statute (equivalent of Section 140 of Fiji Act) covered two different kinds of losses - the first was deprivation of estate or interest in land which was the original concern of the Torrens System when land was brought under the Torrens System. It also covers loss arising from acts or omissions occurring in the Titles Office. In Fiji the loss of land is covered by Section 140(b) while other losses are covered by Section 140(a). He preferred to give a wide or more expansive approach to compensation. Section 142(a) in our jurisdiction would therefore cover a wide range of damages.
- [21] Before Section 140(a) applies, the plaintiff must show that the loss was sustained as a result of omission, mistake or misfeasance of the Registrar or one of his clerks in the execution of their duties. Omissions of anyone else beside the persons named will not permit a claim under the section. This section requires the plaintiff to show that –
- 1) he suffered loss or damage
 - 2) through
 - 3) the omission mistake or misfeasance of the Registrar or his clerk.

4) In the execution of their duties.

[22] Justice Hammond in Marshall expressed the view that the word **“through”** is a major limitation on the subsection. It does not cover all losses: He stated that

“the word “through” is surely a major limitation on the subsection. It immediately separates the Registrar-General from the position of a guarantor of the system in respect of all actions of him or his officers. The word comprehends that there must be a causal nexus between the loss or damage sustained and the actions complained of. The mere fact that something “went wrong” does not trigger a right to compensation. There has to be a relationship between the Registrar’s wrong and the result. The public purse is thereby protected in the sense that if is only the wrongful consequences of acts by public officials that redound in a public debit.”

[23] As I said earlier, there was no omission by the Registrar. Prior to 1981 the Title correctly showed the boundaries and the river channel. If the registered proprietor goes behind the back of the Registrar and then re-aligns the channel, one can hardly expect the Registrar to know that unless he is made aware of it. Accordingly, I am of the view that Section 140 does not assist the plaintiff.

Drainage Act:

[24] Ms Rakuita further submitted that there is no provision in the Drainage Act which requires the Drainage Board to register the re-alignment. There was no acquisition by the defendants. The land remained the property of the registered proprietor. The Drainage Board was only doing the registered proprietor a favour.

- [25] I agree with the views expressed by Ms Rakuita. In cases of compulsory acquisition by the Crown, there is a corresponding decrease in the area of land of the registered proprietor. At the time when the re-alignment was done in 1981, the acquiring authority could only acquire land if it was needed for public purpose. In the present case I have no evidence to suggest that the land was acquired for public purpose. The only evidence is that the farmers wanted re-alignment. It was a few farmers including the registered proprietor of CT 13177 who triggered the alignment for their own benefit and not for public benefit.
- [26] The plaintiff also relied on Section 161 of the Land Transfer Act. This is a section which applies when the Minister of Lands acts under the provisions of the Crown Acquisition of Land Act to acquire land for public purposes. In such cases a mandatory duty is imposed on the Director of Lands to file a notice of intention to acquire together with a plan of area to be acquired with the Registrar of Titles. There is no such obligation imposed on the Drainage Board when it acts under the Drainage Act and where farmers consent to a proposed course of action.
- [27] Ms Rakuita further submitted that a purchaser who has suffered at the hands of the vendor should first pursue his claims against the vendor for redress. She relied on Parker v. Registrar General - (1977) 1 NSWLR 22 to support her proposition.
- [28] Parker does not support the above proposition and nor does Registrar General v. Behn - 1980 1 NSWLR 589 the other case the defendants relied upon. In fact these cases advance the proposition that the statutory cause of action is not necessarily congruent with a cause of action under the common law against the wrongdoer. There is no need for an aggrieved person to first sue the wrongdoer.

Conclusion/Orders:

- [29] I do not consider that there has been breach of any statutory duty by the Registrar of Titles which caused the plaintiff loss. The plaintiffs remedies

lies against the predecessor in title from whom he bought the land. It was the previous owner or owners who allowed the re-alignment of creek and did not inform the Registrar of Titles. Accordingly, I dismiss the plaintiff's action with costs summarily fixed in the sum of \$3,000.00 to be paid in fourteen (14) days.



[Jiten Singh]

JUDGE

At Suva

29th February 2008