IN THE HIGH COURT OF FIJI AT LAUTOKA

APPELLATE JURISDICTION

Civil Appeal No. HBA 13 of 2015

BETWEEN : **MANOA SEFANAIA** of Wailoaloa, Nadi, a Businessman trading under the name and style of **MANA BAY LAGOON BACKPACKERS**

PLAINTIFF/APPELLANT

AND : **VISHNU DEO** of Australia, a Businessman

DEFENDANT/RESPONDENT

Counsel	:	Mrs J. Naidu
		Ms Barbra Doton
Date of Hearing	:	23.06.2016
Date of Oral Judgment	:	19.08.2016
Date of Written Reasons:		01.09.2016

J U D G M E N T

[Written Reasons]

Introduction

01. On 19 August 2016 I orally pronounced judgment dismissing the appeal and ordered written reasons will be delivered on a later date. These are my written reasons for dismissing the appeal.

02. This is a timely appeal from a judgment of the Magistrate Court sitting at Nadi, pronounced on 30 September 2015.

03. Both parties orally argued the appeal. They sought time to file their written submission. The court accordingly granted 21 days for both parties to file their respective submission. However, neither party filed submission.

The Facts

04. Manoa Sefanaia, the original plaintiff (*'the appellant'*) filed statement of clam in the Magistrate Court and sought injunctive relief against Vishnu Deo, the original defendant (*'the respondent'*) that:

(a) Preventing the defendant (respondent) from interfering with the peaceful possession of the plaintiff (appellant) of the premises and

(b) Preventing the defendant from evicting the plaintiff from the said premises.

05. The respondent filed statement of defence and denied all the claim of the appellant and made a counterclaim of $8,500.00 as arrears of rents, $18,200.00 as special damages and further sum of $20,000.00 as general damages. The appellant did not file reply to statement of defence to counterclaim. It appears that Learned Magistrate had given sufficient time to do so. Finally, the Learned Magistrate ordered the appellant to file his statement of defence and defence to counterclaim on or before 30 July 2014 subject to costs of $250.00. However, the appellant failed to comply with the peremptory orders of the court. On 30 July 2014, the appellant appeared in person and applied for further time. The Learned Magistrate refused as the respondent objected to and moved for formal proof of the counterclaim. The respondent did not make any application to strike out the statement of claim, but conceded that the appellant may proceed with the statement of claim if he wished to do so. The matter was fixed for formal proof on 22 October 2014. At formal proof, the respondent gave evidence and produced some

documents to prove his counterclaim. After analysing evidence adduced by the respondent, the Learned Magistrate delivered the judgment in respect of the counterclaim on 30 September 2015 and ordered that:

(a) Judgment in favour of the plaintiff in sum of $7,005.00, (distress of rent),
(b) Special damages in sum of $4,720.00
(c) Mesne profit in sum of $8,000.00 and
(d) Summarily assessed cost of $500.00.

The appellant appeals the judgment to this court.

The Grounds Appeal

06. The appellant has taken the following grounds for appealing the judgment:-

1. **THAT** the Magistrate erred in law and in fact in failing to take judicial notice that the tenancy agreement entered sometime July, 2012 between the Appellant and the Respondent was without the consent from Director of Lands in relation to the said tenancy.

2. **THAT** the Magistrate erred in law and in fact by failing to consider that there was no consent of Director of Lands obtained by the Respondent to levy Notice of Distress of Rent on the Appellant.

3. **THAT** the Magistrate erred in law and in fact by failing to consider and take judicial notice that there was no consent of Director of Lands obtained by the Respondent to proceed with this counterclaim in this matter.

4. **THAT** the Magistrate erred in law and in fact in awarding damages for:
   a) A sum of $7005 as distress of rent

b) Special damages in sum of $4720.00

c) A sum of $8000 mesne profit

The Issue at Appeal

07. The primary issue at appeal was that whether the learned Magistrate erred in law and in fact in failing to take judicial notice that the tenancy agreement entered in July 2012 between the appellant and the respondent was without the consent of Director of Lands in relation to the tenancy agreement.

The Submission

Appellant

08. Counsel appearing for the appellant, Mrs Naidu, argues that the tenancy agreement was entered into between the parties in respect of state land and the Learned Magistrate has failed to take judicial notice in this regard. She further contends that the Learned Magistrate erred in law and in fact when awarding damages for distress of rent, and special and mesne profit.

09. Ms Barbra, appearing for the respondent advances argument that appeal is not proper as it is a formal proof judgment or counterclaim for damages to the property. She goes on to argue that mesne profit was claimed on the basis of trespasser. Therefore, grounds of appeal have no merits.

The Decision

10. The appellant appeals the judgment of the Magistrate Court delivered on 30 September 2015. By that judgment the Learned Magistrate granted the counterclaim made by the respondent. The judgment on the counterclaim was made after considering oral and documentary evidence adduced by the respondent at the trial in the presence of the

appellant's solicitor. However, the hearing on counterclaim had proceeded without the appellant's defence to counterclaim. As I said the appellant failed to file his defence to counterclaim. Consequentially, the counterclaim was proved at the formal proof hearing.

11. On the day when the formal proof hearing was taken counsel who appeared for the appellant made an abortive application to vacate the formal proof hearing. She did not make any other application on behalf of the appellant.

12. It will be noted the appellant initiated proceedings in the Magistrate's Court against the respondent and obtained certain restraining injunctive orders. There were no any other substantive claims in the statement of claim filed by the appellant except for injunction. The appellant, it seems, obtained injunctive orders without seeking any substantive remedy.

13. The appellant was a tenant of the respondent under a lease agreement in respect of the state land. His application for injunction emerged when the respondent issued a quit notice. The injunctive orders sought by the appellants were in respect of the state land. Therefore, in my view, he should have obtained consent of the Director of lands.

14. Ms Doton, counsel for the respondent advanced argument that the counterclaim was brought on the basis that the appellant was a trespasser after the termination of the rent agreement and therefore no consent of the Director of lands was necessary.

Judicial Notice

15. Firstly, let me deal with the issue of judicial notice. The appellant at the appeal stage argues that the learned Magistrate has failed to take

judicial notice that there was no consent of the Director of lands to initiate proceedings action against the appellant. The appellant's submission on the judicial notice point is of little assistance. He did not cite any provision of the law under which the learned Magistrate was obliged to take judicial notice of the issue of consent or any case authority to support his submission.

16. Fiji Court of Appeal in ***Handyhard Marketing (Fiji) Ltd v Chand*** *[2015] FJCA 76; ABU71.2014 (28 May 2015)* set out the principle relating to judicial notice. The Court of Appeal at para 71 citing Mullen's case states:

> "[71] ***Archbold*** *in Criminal Pleading, Evidence and Practice*, 2011. (Sweet & Maxwell) cites with approval the principle relating to **judicial notice** as stated in **Mullen v. Hackney L.B.C**.[1997] 1 WLR 1103, CA (Civ. Div.) thus:
>
> *"Courts may take **judicial notice** of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence in unnecessary; and local courts are not merely permitted to use their local knowledge, but are to be regarded as fulfilling a constitutional function if they do so."'*
>
> (Archbold, at p.1365 (*supra*)"

17. In ***Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd*** [2002] FJHC 213; HBC0205d.2001s (7 May 2002) the High Court cited a New Zealand Court of Appeal decision on judicial notice and stated that:

> 'On this aspect the following extract from the case of **R v Wood** [1988] 2 NZLR 233 at 235 NZ Ct. of Appeal is also pertinent bearing in mind the affidavit evidence before the Court:

A Judicial notice is the cognisance taken by the Court of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary - Phipson on Evidence (12th ed, 1976) paras. 10, 46. Judicial notice is available to both Judges and juries, Phipson, para 47. There are at least two reasons for the taking of it. First, it expedites the hearing of many cases by dispensing with the proof of matters which, if they had to be the subject of evidence, might be costly to prove. Secondly, it tends to produce uniformity of decision on matters of fact where a diversity of findings might otherwise result. But this very matter requires that before judicial notice is taken of any fact it must be so well-known as to give rise to the presumption that all persons are aware of it - Cross, p 160; Holland v Jones [1917] HCA 26; (1917) 23 CLR 149, 153; Auckland City Council v Hapimana [1976] 1 NZLR 731. Before a Court Anotices @ a fact it must be fully satisfied of its existence and it must be cautious to see that there is no reasonable doubt as to its existence - Holland v Jones at 153, per Issacs J. The fact in question must be so notorious that it cannot be the subject of serious dispute.'

18. Hon. Justice Gates (as he then was) in ***Prasad v Republic of Fiji*** [2000] FJHC 121; Hbc 0217.2000l (15 November 2000) cited a judgment of Haynes P in ***Mitchell & Others v. Director of Public Prosecutions & Another [1986] LRC (Const.) 35,*** which said about judicial notice that:

> "It is insufficient for a court to have to rely solely in deciding such an issue on the taking of **judicial notice** of notorious facts. Haynes P concluded at 73g:

"I do not think this Court can properly act on a bare statement of fact or opinion of popular support, however credible and knowledgeable the source is and whatever is the basis of it. Proof of the fact by judicial notice may be admissible. But the weight to be given to it is another matter. I would hold that what is needed here is proof of particular facts or circumstances from which the court itself can infer popular support. In my view the proof here was insufficient."

19. States Land Act, section 13 provides that:

> *'**13**.-(1) Whenever in any lease under this Act there has been inserted the following clause:-*
>
> *"This lease is **a protected lease** under the provisions of the **Crown Lands** Act (States Lands Act)"*
>
> *(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, **nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law**, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*
>
> *Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.'*

20. Section 13 applies to a protected lease. Such a lease should not be dealt with by any court of law or under the process of any court of law without the written consent of the Director of Lands first had and

obtained. Certain conditions must be met before section 13 becomes applicable. The conditions are that: (i) it must be a protected lease; (ii) It must be a Sates Land and (iii) the action must deal with such a land. These conditions must be established through affirmative evidence. These conditions are not so notorious or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary.

21. Whether or not the consent under section 13 was necessary in relation to the tenancy agreement or to the action (counterclaim) brought by the respondent is matter of fact and of law, which must be proved by evidence. The court could not take judicial notice thereof. Therefore, the ground of appeal that the learned Magistrate failed to take judicial notice of consent issue has no merit and accordingly fails.

Award of special and mesne profit

22. I now turn to the respondent's argument that the Learned Magistrate erred in law and in fact when awarding damages for distress of rent, and special and mesne profit.

23. The appellant counterclaimed against the appellant for special damages in the sum of $18,200.00 for carrying out substantial renovation on the property to repair the damage and tear down the illegal structures built of the property by the appellant; general damages limited to the sum of $20,000.00; and a further sum of $8,500.00 on account of arrears of rent.

24. The learned Magistrate after carefully considering the unchallenged evidence, oral and documentary, adduced by the respondent in respect of the counterclaim gave judgment in favour of the respondent. He ordered that: (i) the sum of $7,005.00 in respect of distress of rent; (ii)

special damages in the sum of $4,720.00; (iii) mesne profit in the sum of $8,000.00; and summarily assessed cost of $500.00.

25. Upon analysing evidence, the learned Magistrate concludes:

> *"When analyzing all the evidence before this court on counterclaim made by the defendant, this court is of the view that, it is proved to satisfaction of the court the defendant is only entitled to the amount mentioned below;*
>
> *i. A sum of $7,005 as distress of rent after deducting a sum of $1,595.00 (the amount recovered after the auction) from the sum of $8,600.00 (the amount mentioned in Exhibit 5),*
>
> *ii. A sum of $3,340.00 being the amount paid to the contractors,*
>
> *iii. A sum of $1,380.00 being 'mesne profit' (this is after deducting $2000.00-the bond money- from the total amount of $10,000.00 claimed by the defendant."*

26. When ordering mesne profit the learned Magistrate correctly identified the principle relating to mesne profit and he found that the landlord may recover in an action for mesne profit in respect of the (tenant's) continued occupation after the expiry of his legal right to occupy the premises.

27. The appellant continued occupation of the property despite the expiry of his tenancy agreement. Therefore the learned Magistrate rightfully awarded mesne profit to the respondent.

28. The learned Magistrate had the delivered judgment based on evidence that was available in court. His judgment is strongly supported with evidence. An appeal court will not upset a judgment of the lower court that is supported with sufficient evidence. Therefore the second appeal ground the Learned Magistrate erred in law and in fact when awarding

damages for distress of rent, and special and mesne profit has no merit and accordingly fails.

29. For the foregoing reasons, I would dismiss the appeal with costs of $600.00, which is summarily assessed.

The Result

1. Appeal dismissed.
2. Appellant will pay $600.00 as costs to the respondent.

.....1/9/16.....

M H Mohamed Ajmeer

JUDGE

At Lautoka

01st September 2016