RAM CHANDRA NAIDU (f/n BALRAM NAIDU) v DIRECTOR OF LANDS AND MINERAL RESOURCES and Anor

HIGH COURT — CIVIL JURISDICTION

SCOTT J

27 October 2003

[2003] FJHC 24

Damages — exemplary — mitigated — wrongful acquisition of land — 1990 Constitution s 9(1) — Land Transfer Act (Cap 131) s 161 — State Acquisition of Land Act (Cap 135).

Plaintiff sought damages, way above its true value, as a result of the incursion onto and the de facto acquisition of part of his land and the crops previously standing thereon. The value of the loss was put at $15,000. Defendant did not follow the procedure for the acquisition of land needed to promote the public benefit set out in the State Acquisition of Land Act (Cap 135) and s 161 of the Land Transfer Act (Cap 131).

Held — The 1st Defendant acted unconscionably and unconstitutionally in taking the Plaintiff's land without following the proper provisions of the law. But that does not mean that a party so affected is entitled to inflate the damage caused. The award must be mitigated by the Plaintiff's own unmeritorious approach to his loss.

Award mitigated.

No case cited.

S. Chandra for the Plaintiff.

Z. Sahu Khan and *R. Green* for the Defendants.

Scott J. During 1997 the Fiji Government continued with the upgrading of the Naravuka to Dreketi section of the Nabouwalu Road. The construction of the new wider and straighter road involved the acquisition of privately owned land abutting the old road including certain land belonging to the Plaintiff.

For reasons which were barely and not at all satisfactorily explained the perfectly straightforward procedure for the acquisition of land needed to promote the public benefit set out in the State Acquisition of Land Act (Cap 135) and s 161 of the Land Transfer Act (Cap 131) were not followed. Instead the contractors, with the knowledge of the 1st Defendant, simply entered onto the Plaintiff's land with bulldozers and other earth moving equipment after "every effort was made to contact one Raj Kapur Naidu before commencement of the works and unfortunately to no avail": see Document No 7 in the Plaintiff's agreed bundle of documents.

This was a clear and wholly inexcusable case of trespass as well as a clear breach of s 9(1) of the 1990 Constitution. Despite this however the Defendants did not see fit to concede liability until just under 6 years after the writ was issued and after the action had been transferred from Labasa to Suva for trial.

At the pre-trial conference held in May 2002 the Defendants admitted that the Plaintiff had suffered some loss and damage as a result of the incursion onto and the de facto acquisition of part of his land and the crops previously standing thereon. The value of the loss was put at $15,000.

The Plaintiff calculated his loss very differently. As first indicated in his previous solicitors' letter of 24 November 1997 (Document 6 in the Plaintiff's bundle) the Plaintiff claimed that the "total damages both general and specific

amounted to approximately $500,000". In the event the amended statement of claim sought "specific" damages of $461,910 plus general damages of $100,000 and interest at the rate of 13.5% until judgment.

On 8 September 2003 I heard the Plaintiff, a former employee of his Tulsi Ram and a valuer in private practise at Labasa, Silio Toronibau. On 9 September the Defendants called another valuer Paula Raqeukai. On 10 September counsel presented their final submissions, the Plaintiffs being helpfully reduced to writing. By consent, and after discussing the matter with counsel it was also arranged to have the central lawn area outside government buildings (where a statue of Sir Lala Sukuna is to be found together with a lily pond) precisely measured for comparison purposes: it measures 2067m² or 0.51 acre.

The Plaintiff told me that he and his valuer visited his land shortly after the road widening had begun. A number of photographs were taken when the site was visited. They are included at pp 21–26 of the Plaintiff's bundle of documents. The Plaintiff told his valuer what had been lost and asked him to prepare a report on the basis of notes taken. Although the valuer did not charge for the report it was agreed that he would receive 2½% of the amount eventually recovered by the Plaintiff.

So far as the Plaintiff could recall, he lost 400 pine trees, 3 acres of cassava, 5000 pineapples, 2000 ginger plants, 50 coconut palms, 200 sultana trees, six drumstick plants and 200 bananas. There were also losses of pumpkins and rourou. Approximately 3000 pine trees were damaged.

The Plaintiff told me that at the time the damage occurred he was not seeking medical treatment. Although he owned the land at the time the damage took place he seemed rather uncertain as to its present status. After some questioning he agreed that the land had been sold in 2000 and that he now no longer owns it. This fact is not disclosed in the Certificates of Titles exhibited.

The second witness did not really advance the matter very far. He told me that he had previously worked for the Plaintiff and had planted 1000 pine trees for him on the land as well as 200 coconut palms, 5000 pineapples, 3 acres of cassava and 2 acres of ginger. Unfortunately he was not present when the Plaintiff's farm was damaged and had no personal knowledge of the damage caused.

The Plaintiff's last witness, Silio Toronibau, produced the report which was included at pp 1–8A of the bundle of documents prepared by the Plaintiff's solicitors. Mr Sahu Khan objected to the production of the report in view of the remarks contained on p 4:

> … this summary report should be read in conjunction with the complete valuation report. Reliance on this report should only be taken upon the sighting of the signed original document.

After Mr Toronibau confirmed that the report was the only report still in existence and that all his other papers had been destroyed in Cyclone Ami I agreed to allow the report to be produced. It is not however best practice for disputed documents to be included in a bundle for the use of the court.

Mr Toronibau told me that he had prepared the report on the basis of information given to him by the Plaintiff on the day of the inspection and on what he himself had seen at the site. Page 8A of the report is a summary of the losses said to have been incurred. Inspection of this summary reveals that it can conveniently be divided into four parts.

The first part, amounting to $79,870, principally consists of lost crops. The second part amounting to $321,940 is made up of lost topsoil and lost "rotten rocks, clay and rocks". The third part is a claim for $100,000 for damages for trespass. The fourth and final claim is $300,000 for "injuries affection (medical)".

5 I do not think that the information contained in the first part of p 8A really added anything to what the Plaintiff had already told me since Mr Toronibau simply recorded what the Plaintiff had told him both in terms of the amount of crops lost and their values. No attempt was made to justify the $100,000 for trespass and neither the claim for "injuries affection (medical)" which did not 10 appear in the amended statement of claim not the claim for the loss of the use of the land were proceeded with. As will be seen from the Plaintiff's closing written submissions, however, the issue of the $321,940 for loss of soil, rocks and clay was very much in contention.

15 In my opinion there were a number of significant difficulties in the way in which the loss of these materials was calculated. In the first place, Mr Toronibau conceded that he did not actually measure the surface area of the Plaintiff's land lost to the new road. In the second place there were no calculations at all to show how the estimated volume of top soil and rocks and clay was arrived at. Third, 20 the value placed by the Plaintiff on the top soil, rocks and clay removed was, I was told by Mr Chandra, based on the figures set out in the Native Land Trust (Gravel) Regulations 1999 (L/N 9/1998). The figures contained in these regulations however are the amount of *royalty* which is to be paid by native owners to the Native Land Trust Board when sand, gravel, topsoil, rock and clay 25 are excavated from Native Land. These figures do not, as it seems to me, bear any relation at all to the actual value to the Plaintiff of the soil, clay and rocks lost. Both the Plaintiff and Mr Toronibau appear to have completely overlooked the extraction and delivery costs associated with the mining and sale of the topsoil, rock and clay which were undoubtedly lost.

30 The final witness was Paula Raqeukai, presently the housing officer with the USP and a highly qualified registered valuer who principally produced his report prepared in December 1998 (Ex D 1). This report speaks for itself and only its principal conclusions need to be referred to.

According to the report, two pieces of land owned by the Plaintiff were 35 affected by the road works. These were parts of Lot 2 and 5 on DP 6757. Lot 2 originally had a total area of 8.4829 hectares (20.95 acres). Of this area 1.18%, equivalent to approximately 1000 square metres was lost to the road. Lot 5 originally amounted to 5.6396 hectares (13.93 acres). Of this, 3.55% was lost to the road or approximately 2000 square metres. The total area acquired for the 40 road from the Plaintiff therefore amounted to approximately 3000 square metres or roughly three quarters of an acre.

In his report Mr Raqeukai made it clear that his valuation did not include a valuation of the standing crops or trees damaged or lost during the construction of the road or any allowance for re-fencing: see p 7 of the report. Mr Raqeukai 45 told me that it was unnecessary for him to address these aspects of the Plaintiff's loss since he knew that the Public Works Department had already considered that question and had recorded its findings and calculated the Plaintiff's loss at $5075.99 in a document entitled "Appendix B — List of Crops in respect of which compensation will be paid" which is document 13 at p 27 of the Plaintiff's 50 list of documents. For some unexplained reason this very important document does not appear in the Defendants list of documents dated 1 June 1999, although

it may be a document dated 12 December 1997 which appears in the Plaintiff's list. Although not formally produced, the document was placed before me by consent.

As explained by Mr Raqeukai, his approach to the valuation of the plaintiff's loss essentially followed those considerations set out in s 12 of the State Acquisition of Land Act. Proceeding on that basis he arrived at a figure of $20,000 to which must be added the $5075.99 from "Appendix B".

During the course of Mr Raqeukai's evidence it became apparent that the Plaintiff's claim involved not only the difficulties associated with the removal of top soil, clay and rocks already referred to but also the difficulty of reconciling both the very large amount of crops said to have been lost as set out on p 8A of Mr Toronibau's report with the very smaller amount set out in "Appendix B" but also, and to my mind crucially, the difficulty of reconciling the very large amount of crops said to have been lost with the comparatively small amount of land which it was not disputed was taken by to the road. When it is appreciated that the amount of land taken was only half as much again as the size of the High Court lawn in front of Government Buildings (with the statue and the lily pond) already referred to then the difficulty of fitting all the crops said to have been lost according to p 8A into that comparatively small area immediately becomes apparent. In the words of Mr Raqeukai: "they would have been very crowded".

On 10 September Mr Chandra made a submission which I found quite surprising. He suggested that the Plaintiff's claim was not merely that the Plaintiff had suffered as the result of the loss of that portion of his land which had been taken for the road but that the rest of his land had also been extensively damaged. With respect, I cannot accept that proposition.

In the first place, the pleadings and the minutes of the pre-trial conference seem quite clearly to me to show that the issue between the parties was the value to be attributed to the damage sustained by the Plaintiff owing to the wrongful acquisition of his land. Second, no mention at all of "associated loss" was made either by the Plaintiff in his evidence of by Mr Toronibau. Third, Mr Toronibau told me that the Plaintiff had only taken him to Lot 5 and not even to Lot 2. If there was damage all over both lots then I would have expected some evidence of that damage to be presented. Fourth, the photographs suggest that the Plaintiffs land was cleanly cut and that the land not required for the road was not affected at all. It is notable that there are no pictures of damaged or crumpled crops at all, no squashed cassava, pineapples or ginger. Not even a flattened coconut palm. The pine trees next to the cut seem to be healthy and undamaged. The claim that apparently wanton destruction of areas of his farm quite unconnected with the road widening occurred seems to me to be unsupported either by the pleadings or the evidence.

As made clear at the outset, the Department of Lands and Mineral Resources acted unconscionably and unconstitutionally in taking the Plaintiff's land without following the proper provisions of the law. But that does not mean that a party so affected is entitled to inflate the damage caused.

In my opinion the amount of crops lost by the Plaintiff was far smaller than the amount claimed. The theoretical value of the soil, rocks and clay were they ever to be excavated thereby sacrificing the value of the crops standing on the land and rendering the land henceforth uncultiviable also does not seem to me to be a proper head of damage at all. The Plaintiff was a farmer (and apparently a night club owner) not a quarryman.

I accept Mr Raqeukai's assessment of the value of the land lost by the Plaintiff. I also find that an additional $5100 should be awarded in respect of the crops and trees lost. As already explained I find that the 1st Defendant's failure to comply with the requirements of the law governing the compulsory acquisition of land to be quite inexcusable. This is a suitable case for an award of exemplary damages for trespass however the award must be mitigated by the Plaintiff's own unmeritorious approach to his loss. I award $5000 under this head.

In summary my award is as follows:

(1) Loss of land: $20,000.

(2) Loss of crops: $5100.

(3) Damages for trespass: $5000.

I will hear counsel as to cost and interest.

Award mitigated.