

**CONCAVE INVESTMENTS LTD v HIRALAL DHARAMSI and 3 Ors
(HBC0352 of 1997L)**

HIGH COURT — CIVIL JURISDICTION

5 CONNORS J

15, 26 March, 13 April 2004

10 **Real property — easements — creation — whether installation of sewer system
trespass — whether there was implied grant of drainage easement — Constitution of
the Republic of Fiji 1970 ss 8, 9, 40 — Constitution of the Republic of Fiji 1997 s 40
— Land Transfer Act (Cap 131) ss 37, 49, 159 — Sewerage Act ss 3A, 7.**

15 **Tort — trespass to land — installation of sewerage pipes — continued use of pipes
through land.**

The Defendants were the owners of a lot (Lot 18) and the Plaintiff the registered proprietor of another lot (Lot 11). In 1997, when the Director of the Plaintiff visited Lot 11, workmen were digging and laying pipes in Lot 11 which was allegedly for the benefit of Lot 18. It turned out that the Public Works Department had laid the sewerage connection from Lot 18 through Lot 11.

20 The Plaintiff argued they did not give approval nor did the Public Works obtain any right to the digging up or to the installation of the sewerage system on Lot 11. The Plaintiff further argued that the installation was illegal and amounted to trespass. Thus, the Plaintiff sought declarations, orders and damages with respect to the alleged trespass.

25 The Defendant counterclaimed that an easement of necessity existed in favour of Lot 18 over Lot 11, or alternatively, that there was an implied grant of a drainage easement in favour of Lot 18 over Lot 11.

30 **Held** — (1) The Sewerage Act, subject to the provisions of ss 8 and 9 of the Constitution of the Republic of Fiji, gives power to the government in certain circumstances to use land for the construction of a sewerage system. Section 9 of the Constitution requires notice to be given and compensation to be paid for any land acquired by the government. However, the evidence of the Plaintiff showed that no land was acquired pursuant to these provisions. There was no evidence of any right created in favour of the Public Works Department by operation of the Sewerage Act.

35 (2) Further, s 159 of the Land Transfer Act (Cap 131) (the Act) is the statutory regime for the creation of an easement on registration of a plan of subdivision. Unless an easement in gross or an easement of access for light or air was created, a certificate of easement was required to create the easement in addition to the plan of subdivision. Likewise, s 49 of the Act provides for the creation of easements by way of grant and transfer where the consent of the dominant and servient tenements are required. However, there was no evidence of certificate of easement in accordance with s 159 creating an easement over Lot 11 for the benefit of Lot 18 for the purpose of sewerage or drainage. Likewise, there was no evidence of an easement created by transfer and grant. The only evidence given was a notation on DP 7612 of an easement 3 metres wide for sanitary sewerage and drainage. Further, there was no evidence that Lot 18 had no other means of connecting to the sewerage system. As there was no easement, the installation of the sewerage system amounted to trespass and that since there was no evidence of loss, no award of damages in favour of the Plaintiff could be made.

45 Application granted.

Cases referred to

50 *Assets Co Ltd v Mere Roihi* [1905] AC 176; (1905) NZPCC 275; [1904–7] All ER Rep 1599; *Boyd v Mayor, Etc, of Wellington* [1924] NZLR 1174; *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37; *Dabbs v Seaman* (1925)

36 CLR 538; 31 ALR 402; *Public Transport Commission (NSW) v Perry* (1977) 137 CLR 107; 14 ALR 273; *Sutton v O’Kane* [1973] 2 NZLR 304, cited.
Ba Town Council v Becharbhai Holdings Ltd (unreported, FCA 112/1985);
5 *Frazer v Walker* [1967] 1 AC 569; [1967] NZLR 1069; [1967] 1 All ER 649;
Permanent Trustee Co of New South Wales Ltd v Campbelltown Municipal Council
(1960) 105 CLR 401; [1961] ALR 164, considered.

A. *Patel* for the Plaintiff

D. S. *Naidu* for the Defendants

10 Connors J.

The application

The Plaintiff by way of writ of summons filed on 15 October 1997 seeks declarations, orders and damages with respect to the alleged trespass by the
15 Defendant onto the Plaintiff’s land.

The alleged trespass is the installation of sewerage pipes and the continued use of those pipes to convey sewerage through the land of the Plaintiff.

The Defendants counterclaim and seek declarations that there exists on Certificate of Title No 10581 a drainage easement arising out of necessity in
20 favour of the Defendants’ land or alternatively an order granting a drainage easement over the land in Certificate of Title No 10581 in favour of the Defendants’ land.

The background

The Defendants or the owners of Lot 18 in DP 2290 being the land in CT 9911
25 [Lot 18]. On that land is erected commercial premises which were serviced by a septic tank prior to August/September 1997 and are now connected to the sewerage system via a connection in or near Lot 11 DP 7612 [Lot 11].

The Plaintiff is the registered proprietor of the land in Certificate of Title No 10581, which it caused to be subdivided by registration of inter alia DP 7612
30 on 6 October 1995.

Registration of DP 7612 created inter alia Lot 11 being the land in Certificate of Title No 29454.

The land in Certificate of Title No 10581 was Lot 24 in DP 2290. On 4
35 September 1958, Certificate of Title No 9911 issued for Lot 18 and on 27 March 1961, Certificate of Title No 10581 issued for Lot 24 in DP 2290 which is the land the subject of inter alia DP 7612.

It is apparent from Certificate of Title No 9911 that a drainage reserve 10 links (about 2 m) wide was created or in existence as at 4 September 1958. Certificate
40 of Title No 9911 also bears reference to Certificate of Title No 7134 with respect to the land to the south of Lot 18.

Nothing has been put before the court with respect to this notation to enable any finding that such a reserve exists or ever existed, its terms or, what land had the benefit of it if it did in fact exist.

Mr Vijay Kumar, a director of the Plaintiff, visited Lot 11 on a Saturday in
45 August/September 1997 and witnessed workmen digging and laying pipes in Lot 11, apparently for the benefit of Lot 18.

When spoken to the workmen indicated that they worked for the Public Works Department during the week and told him “to take a running jump”.

It appears that the sewer connection to Lot 18 was made on or about 27 August
50 1997 (Ex D-2) and that since that time the sewerage from Lot 18 has been reticulated through Lot 11 and the reticulation system through DP 7612.

No approval was given by the Plaintiff for the digging up of Lot 11 or for the connection of the sewerage from Lot 18 into Lot 11. No condition was imposed on the subdivision approval requiring the Plaintiff to grant or create any easement to drain sewerage for the benefit of Lot 18.

5 Similarly, the Public Works Department did not seek to obtain any right from the Plaintiff to dig up Lot 11 for the purpose of installing sewer pipes or for the drainage of sewerage from Lot 18 through Lot 11.

As part of the subdivision approval process the Plaintiff was required to install the sewerage reticulation system as shown in Ex P-6 to drain sewerage from all
10 Lots in DP 7612 and to connect that system to the pre-existing sewerage system.

The system once installed was to be maintained by the developer, the Plaintiff, for a period of 12 months and thereafter it became the property and responsibility of the Public Works Department.

The Public Works Department sewerage supervisor, Mr Seruisarou gave
15 evidence that the Public Works Department laid the sewerage pipeline through Lot 11 and installed the Y-junction to service Lot 18. The junction going about 1 m into Lot 18.

This work was done by the Public Works Department for the Public Works Department and not on behalf of any particular persons. Y-junctions were
20 installed for all the commercial Lots adjacent to Lot 18. The installation was carried out "*within the easement allotted to us*".

He certified the connection of Lot 18 to the sewer system. The work being carried out by a licensed plumber.

The sewer system in Nadi Town was initially under the control of Nadi Town
25 Council but was taken over by the Public Works Department in 1985.

No approval was sought by Public Works Department from the Plaintiff to enter and carry out the works or any works and no compensation was paid to the Plaintiff by the Public Works Department.

The connection of the sewer pipes within Lot 18 to the sewer system was
30 undertaken by Mr Mohammed, a licensed plumber, of behalf on the Defendants. The connection was made over a 3 m high-retaining wall to an inspection plate in a 190 mm pipe, about 300 mm above the ground and about 50 mm from the retaining wall on the Lot 11 side of the retaining wall. The work was carried out
35 by use of a ladder in a V-drain on the Lot 11 side of the retaining wall and by affixing the 100 mm pipe to that retaining wall on the Lot 11 side of the wall.

The installation carried out by the Public Works Department within Lot 11 should have a life in access of 50 years.

Upon registration of DP 7612, it was sought by the plan to create an easement
40 3 m wide within Lot 11 and adjacent to Lot 18 for a sanitary sewerage and drainage reserve. There is no easement certificate with respect to this easement.

The statutory provisions

The Land Transfer Act (Cap 131) provides in s 37 that: —

45 No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the
50 instrument.

Section 49 of that same Act provides: —

5 Whenever any easement or profit à prendre is created over any land, the grantor may execute a grant of easement in the prescribed form or a profit à prendre in such form as may be approved by the Registrar and the Registrar shall enter a memorial of the instrument creating such easement or profit à prendre upon the folium of the register constituted by the existing grant, certificate of title or lease of the grantor, and, except where an easement or profit à prendre is in gross, the Registrar shall also enter a memorial upon the folium of the register constituted by the existing grant, certificate of title or lease of land to which the easement is annexed or with which it is used and enjoyed.

10 The section provides for the creation of easements by way of transfer and grant, that is, with the consent of the dominant and servient tenements.

15 Section 159 of the Act is the statutory regime for the creation of an easement on registration of a plan of subdivision. Unless an easement in gross or an easement of access for light or air is being created, a certificate of easement, is required to create the easement in addition to the plan of subdivision. The certificate of easement must set out the terms of the easement and shall describe the land the subject of the easement and the land to which it is intended the easement to be appurtenant.

20 There is no evidence of the creation of an easement over Lot 11 for the benefit of Lot 18 having been created by transfer and grant. Further there is no evidence of there being a certificate of easement in accordance with s 159 creating an easement over Lot 11 for the benefit of Lot 18 for the purpose of sewerage or drainage.

25 The only evidence is a notation on DP 7612 of an easement 3 m wide for sanitary sewerage and drainage.

The Sewerage Act gives power to the government in certain circumstances to use land for the construction of a sewerage system.

Section 3A states: —

30 The Government shall, subject to the provisions of section 8 and 9 of the Constitution, have full powers —

- (a) to construct a sewerage system or sewerage works and to maintain any such sewerage system or sewerage works;
- 35 (b) to make connecting sewers from the main and branch sewers or any of them up to the limit of any premises existing or proposed to be placed in connection with the same; and
- (c) for any and every such purpose to enter upon, take and use any land required to be taken or used for such purpose:

40 Provided that the Government shall do as little damage as may be in the execution of the several powers herein contained.

The Constitution referred to in that section was the 1970 Constitution of the Sovereign Democratic Republic of Fiji. Section 9 of that Constitution requires notice to be given and compensation to be paid for any land acquired by the government. A similar provision is contained in s 40 of the 1997 Constitution.

45 The evidence of the Plaintiff is that no land was acquired pursuant to these provisions.

Section 7 of the Sewerage Act also requires compensation to be paid if land is used for the purposes of the Act.

50 There is no evidence of any right having been created in favour of the Public Works Department by operation of the Sewerage Act. This Act has not been used to enable the laying of pipes by the Public Works Department through Lot 11.

SP 7612 (Exhibit P-8)

To the north of Lot 11 and adjacent to Lot 18 is the notation on this plan “3.0 wide san.sew.and drnge res”.

5 There is also a dotted line parallel to the boundary and by scale about 3 m to the south of it.

Is the notation alone sufficient to create an easement notwithstanding the provisions of the Land Transfer Act?

10 In *Ba Town Council v Becharbhai Holdings Ltd* (unreported, FCA 112/1985) in upholding the contractual right of the respondent company to use a strip of land shown on a plan as a rear lane to its lot despite it not being registered as an easement on the servient tenement said:

15 In Fiji, as in New Zealand an easement over land under the Land Transfer Act can only be created by easements certificate procedure under section 159 or by way of formal memorandum of transfer. However a registered proprietor can create an equitable easement in favour of another or others as was demonstrated in *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37 and *Sutton v O’Kane* (1973) 2 NZLR 304.

20 In this case the Ba Town Council in offering for lease a number of lots by relation to a plan describing Lot 21 as rear lane adjoining all but two of those lots rendered it inequitable and unconscionable that it should be permitted to prevent or any way obstruct the rights of those lessees.

In *Frazer v Walker* [1967] 1 AC 569 at 584; [1967] NZLR 1069 at 1078; [1967] 1 All ER 649 at 654: —

25 Before leaving this part of the present appeal their Lordships think it desirable, in relation to the concept of “indefeasibility of title” as their Lordships have applied it to the facts before them, to make two further observations.

30 First, in following and approving in this respect the two decisions in *Boyd v Mayor, Etc, of Wellington* [1924] NZLR 1174, their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In do so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia.

40 In *Permanent Trustee Co of New South Wales Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401; [1961] ALR 164 where a strip of lease was shown as a road on a plan of subdivision which was deposited with the Registrar-General at p 422 Windeyer J said:

45 But Saywell’s lodging of his plan of subdivision with the Registrar-General had two results. Firstly, it gave those who purchased and took transfers of lots by reference to the plan, and their successors in title, a right to use as a way of access any road shown on the plan on which their lots abutted. St. George’s Parade thus became available for use as a private or occupation road for the benefit of at least the owners of the allotment in the subdivision also.

50 Similarly, in *Dabbs v Seaman* (1925) 36 CLR 538; 31 ALR 402, the High Court of Australia held that equitable rights in personam may be created without compliance with the legislative regime but no rights in rem can be so created.

There was no contractual relationship between the Defendant and the Plaintiff. There is nothing to suggest that the Defendant relied on the notation on DP 7612 and accordingly there can be no contractual or in personam right acquired by the Defendant to use the Plaintiff's land for the conveyance of sewerage.

5 **Trespass**

Trespass to the land consists of any unjustifiable intrusion by one person upon land in the possession of another.

It is a trespass to place anything on or in land in the possession of another.

10 Every continuance of a trespass is a fresh trespass, in respect to which a new cause of action arises from day-to-day as long as the trespass continues.

It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. If the entry is quite involuntary, no liability is incurred. Thus the High Court of Australia has held that falling onto railway tracks in an epileptic fit is no trespass — *Public Transport Commission v Perry* (1977) 137 CLR 107; 14 ALR 273.

The Plaintiff's claim

20 Any installation carried out or authorized by the Public Works Department within Lot 11 is without legislative support. It is illegal and amounts to a trespass by the Public Works Department onto the lands of the Plaintiff. The Defendant in entering Lot 11 for the purposes of connecting to the sewer system within that lot or more importantly by reticulating sewerage from Lot 18 through Lot 11 is trespassing on Lot 11, the land of the Plaintiff. The trespass is continuing.

25 **The counterclaim**

The Defendant seeks to claim that an easement of necessity exists in favour of Lot 18 over Lot 11 or alternatively that there ought to be an implied grant of a drainage easement in favour of Lot 18 over Lot 11.

30 A way of necessity arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case the parts so left in accessible is entitled, as of necessity, to a way over the other part. The principle no doubt applies where both parts are disposed of simultaneously, either by grant inter vivos, or by will.

35 It is not essential at the inaccessibility of the land granted (or retained) be due to the fact that it is surrounded by land of the grantor (or grantee) and no other persons; but speaking generally it does appear to be essential that the land is absolutely inaccessible or useless. If, however, a particular part of the property cannot, without the right claimed, be used for its designed purpose, then it is probably true to say that a right of access for that purpose will arise as of necessity" — *Gale — Easements 14th ed pp*
40 *117/118*.

There is no evidence before me to show that Lot 18 had or has no other means of connecting to the sewerage system.

The counterclaim must therefore be dismissed.

45 **Conclusion**

As there is no easement in favour of Lot 18 over Lot 11 to drain sewerage or for any other purpose and as any installation by the Public Works Department has been effected otherwise than in accordance with the legislative provisions the use of the connection and line of pipes within Lot 11 by Lot 18 is a trespass. The
50 Defendant is using the Plaintiff's land without the authority of the Plaintiff and without any other authority or right to do so.

The Plaintiff is therefore entitled to relief. There is, however, no evidence of loss and no award of damages can be made.

Orders

- 5 (1) Declare that the Defendants have trespassed on the land of the plaintiff;
 (2) The Defendant are restrained at the expiration of 28 days from the date
 hereof from continuing to use the Plaintiff's land for the conveyance of
 sewerage;
 (3) The Defendants are to remove all sewerage connections from Lot 11 DP
10 71612 within 28 days;
 (4) The Defendants' counterclaim is dismissed;
 (5) The Defendants to pay the Plaintiff's costs.

Application granted.

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