IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

000004

Civil Jurisdiction

Action No. 189 of 1977

BETWEEN: BODH MATI SHARMA d/o Chatter Pal Singh — Plaintiff

A N D : NATIVE LAND TRUST BOARD — Defendant

Mr. M. V. Pillai — Counsel for the Plaintiff
Mr. A. Qetaki — Counsel for the Defendant

JUDGMENT

In April 1972 the plaintiff became the lessee of a piece of Native Land Trust Board agricultural land at Vuda Point. The Native Land Trust Board gave its approval on 11th April, 1972, and the rent was fixed at $100 per annum.

By a letter dated 3rd July, 1972 the plaintiff asked the defendant for permission to convert 3 acres of the land to commercial premises on which she wished to establish a grocery and drapery store with a liquor department, and later a guest house.

In reply the defendant by letter dated 5th July, 1972 said

> "I am to advise that it is in order for you to operate a store for the sale of groceries and drapery within your lease but the Board objects to the selling of liquor or the operation of a guesthouse on the demised land. The approval is subject to your agreeing to pay an additional rental of $100 per annum for the privilege granted to you by the Board." (sic)

It will be noted that the defendant did not deal with the question of the conversion of three acres of the land to commercial premises. Presumably the defendant was prepared to leave the whole of the land as an agricultural lease, but to allow part of it to be used for commercial purposes for which it wished to increase the rental to $200 per annum. It is difficult to see how this could be reconciled with regulation 19 of the Native Land (Leases and Licences) Regulations which sets out precisely the classes of leases that may be issued. Although the plaintiff's letter did not specifically state that the store was still to be erected, it is a fair inference from the wording of her letter that this was the position.

Plaintiff's solicitors wrote to the defendant on 27th April, 1973 referring to the Board's letter of 5th July, 1972 and asking for the Approval Notice dated 11th April, 1972 to be cancelled and two separate Approval Notices to be issued reflecting the division of the land into commercial and agricultural

leases. There is no record of any reply being sent to this letter.

The plaintiff herself then sent a letter dated 24th January, 1974 again asking for separate leases for the two portions of land, and also making it quite clear that the erection of the store was being held up because she didn't have a lease. Presumably she was referring to the fact that not only did she not have a lease specifically permitting commercial usage, but that she had no lease at all even though she had paid the required $130 survey fee in April 1972.

To this the secretary to the Board replied -

> "Further to what I have written I would like to state that on no occasion had the Board made any indication that the area presently under lease was to be stripped (sic) into a commercial as well as an agricultural lot. Nowhere did we also give you permission to erect a special building for use as a store".

If the Secretary had written anything further as stated, this was not produced to the Court, and in view of the previous correspondence to which I have already referred the attitude taken by the Secretary is rather difficult to understand. The plaintiff had asked for an area of the land to be converted to commercial use upon which she wished to "establish" a store, and the approval subject to the payment of additional rental would appear to be tacit approval of the plan to separate an area for commercial purposes, and there is nothing in the Board's letter of approval to indicate that such approval was only in respect of an existing building on the land. Either the erection of a new building or the conversion or extension of an existing building must have been contemplated. On 5th July, 1974 the plaintiff sent the Board the plans for her store and presumably there were further representations by the plaintiff to the Board, either in person or by phone - because there does not appear to be any further correspondence till 12th February, 1975, when the Board sent the following letter -

> "I refer to your request to build a store on your above quoted lease and inform you herewith that it has been approved subject to our receipt of your written agreement to pay an additional rental of $250.00 over and above the current figure, effective from 1st January, 1974. Your rental commitment would therefore be $350.00.
>
> May we please have your written agreement to pay the enhanced rental of $250.00 as above stated."

It will be noted first that this purports to backdate the increased additional rental to the previous year even though it must have been obvious that there was no store operating, and secondly that the exact amount of rent due annually is far from clear. It would appear that even Mr. Kini the person who wrote the Native Land Trust Board letter is not clear what the total rent is or was meant to be. He was of the opinion that it was $350, but the

plaintiff who paid the additional rental of $200 for 1973 was told when she went to pay the rent for 1975 that the total rent was $450 per annum back-dated to 1st January, 1974 which rent she has paid until 1979. And demand notes from Native Land Trust Board thereafter clearly indicate that the Native Land Trust Board authorities in Suva also consider that her total rent per annum is $450.

Mr. Kini wrote a further letter dated 25th October, 1976 which is significant -

> "Further to my letter to you of 12th February, 1975 please be expressly informed that the conditions on which you were given approval to operate a store on your holding was payment of enhanced rental by you to $350 per annum effective from 1st January, 1974.
>
> Apart from this fact, please be expressly informed that this Board has never, at any time agreed for the excision of any part of this holding for commercial purposes and therefore you are not obliged to claim compensation upon the expiry of this lease and reversion of the holding to the Native Owners.
>
> To all intents and purposes therefore, yours is still an agricultural lease."

This makes it quite clear that so far as the Board was concerned this was always and remained an agricultural lease, and was never a commercial lease so that its rental should have been calculated as for an agricultural lease. If the land was to attract a commercial rent it should have been converted to a commercial lease as the plaintiff requested. The letter also makes clear that the increased rental, even if it could be justified for an agricultural lease under the Act or the Regulations, was in respect of the operation of a store on the premises. It is common ground that there is not and never has been a store operating on the premises.

So far as the plaintiff was concerned the whole exercise was for the purpose of erecting and operating a store on a portion of the land which was to be converted to a commercial lease. She was frustrated in her efforts by the Board's refusal to give her a commercial lease together with her failure to get planning permission from the Local Authority to build the store. Whether she would eventually have got planning permission is impossible to say at this stage but the first obstacle was the fact that before it would consider giving permission the Local Authority wanted a site plan which could only be supplied by the Board, or if the Board was prepared to issue a proper commercial lease for the land. This the Board was unwilling or unable to do, and so the plaintiff has suffered damage and claims as follows:-

Special damages -

(a) repayment of excess rent, i.e.	$1,600;
(b) cost of building plan specifications;	$40
(c) loss of income from 1st January, 1975 at the rate of per annum;	$5,000

And general damages.

The plaintiff is certainly entitled to have the excess rent repaid. It was improperly increased in the circumstances, and since the increased rental was conditional upon the operation of a store it would only have been payable, if at all, when the store was erected and commenced operations. The fact that the store was never erected and could never operate was due to the inability or unwillingness of the Board to issue a commercial lease - or even an approval notice for a commercial lease - or a site plan even though the plaintiff had paid the survey fee.

The plaintiff will also be given the cost of the building plan specifications, i.e. $40. This expense was incurred by the plaintiff in the reasonable belief that the Board was giving her, or would give her a commercial lease.

With regard to the claim for loss of income from 1st January, 1975 at the rate of $5,000 per annum, I presume that this means loss of estimated profit if the store had been able to operate. However there was no evidence that the plaintiff would have got planning permission from the Local Authority even if the Board had been prepared to give her a commercial lease. And the evidence as to likely profit was much too vague. The only evidence was by a storekeeper operating a store some miles away from Vuda. He was far from precise and it is really impossible to draw any sort of comparison, there are far too many imponderables.

In the event therefore judgment will be given for the plaintiff for special damages only in the total sum of $1,640, and costs to be taxed if not agreed.

(sgd.)
G. O. L. Dyke
JUDGE

LAUTOKA,
4th November, 1980