IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 142 OF 1978

000014

Between:

TEKOTI ROTAN — PLAINTIFF

- and -

UAIETA ERI & ORS. AND RABI HOLDINGS LIMITED (In Liquidation) — DEFENDANTS

Mr. D.C. Maharaj for the Plaintiff.
Messrs. P.I. Knight & E.D. Powell for the Defendants.

J U D G M E N T

The plaintiff's claim against the defendants is for special and general damages arising out of the termination of his position as managing director of Rabi Holdings Limited, the sixth defendant. The first four defendants were at all relevant times directors of the defendant company and the fifth defendant was its secretary.

Both counsel for the plaintiff and the 6th defendant had overlooked the fact that the company was in liquidation before the action came on for hearing. Whether a liquidator had been appointed before the action was instituted is not known. However, applications were made to the Court after the hearing commenced under sections 176 and 190(1)(a) of the Companies Ordinance for leave to proceed with the action and for the liquidator to defend the action on behalf of the company. Leave was granted.

When the plaintiff's claim is examined it is apparent that the greater part of his claim is for what he alleges is owing to him by the company for accumulated

leave and passage allowances under his contract of employment. A sum of $18,200 is also claimed for salary and allowances for 12 months in lieu of 12 months notice of termination of his employment.

While the amended statement of claim is a lengthy one and the defence an even lengthier answer to the claim the pleadings are far from clear. There is a lengthy recital of the facts leading up to the termination of the plaintiff's employment, challenging the legality of meetings and resolutions passed thereat leading one to expect that the plaintiff challenged the legality of his dismissal and seeking damages for wrongful dismissal.

However, paragraph 22 and 23 of his statement of claim complain about the alleged fact that no reasonable notice of termination of his employment or payment in lieu of notice was given to him before his dismissal and he claims that he was entitled to reasonable notice which he says should be 12 months.

Mr. Maharaj however, during cross-examination of the second defendant stated that the plaintiff was asked to step down and was given one month's notice which he accepted but that before the notice expired he was thrown out of his office. He does not now dispute that he was legally dismissed on the 15th May, 1978, when the members of the defendant company in general meeting dismissed him.

The plaintiff goes on to complain that the comp. ıy has persistently refused to pay him for all leave passage and other allowances due to him and has refused to pay a reasonable amount in lieu of proper notice.

The defendants in their original defence denied liability for special and general damages but indicated a willingness to offer the sum of $6,179.58 made up of salary, allowances, leave pay and passage grant. In their amended defence however, they have omitted that offer.

Yet it is not in dispute that the company does owe the plaintiff money for salary, etc. which has not been quantified or specified by the defendants. However, the company counter-claims against the plaintiff for two sums, $44,334.65 alleged to be moneys borrowed or appropriated by the plaintiff and the sum of $14,749.88 alleged to have been paid by the compan to the plaintiff as the purchase price for the plaintiff's property at 262 Fletcher Road, Vatuwaqa which the plaintiff failed to transfer to the company. Alternatively the company claims the sum of $28,000 being the sale price of the plaintiff's property received by him.

In his defence to the counterclaim the plaintiff admits owing the company $19,159.88 after deducting sums totalling $12,480 for alleged housing allowance and house rent alleged to be owing to him by the company but contends that the balance money is not yet due and payable. Although he claimed to set off the sum of $12,480 the two sums which total $12,480 form no part of his claim against the company.

The plaintiff pleaded that no written contract between the plaintiff and the sixth defendant was signed but that it was agreed that he should receive the same starting salar, as he was receiving in the civil service and that he would receive all leave and all passage and other allowances which he was receiving in the Public Service at the time he left.

The evidence discloses that there was never a written contract of employment notwithstanding that the plaintiff was at all relevant times managing director of the company and in a position to have such contract prepared and executed by the Company's Board.

I think I am safe in assuming that when employed by the company it was intended that the plaintiff would be employed for more than 6 months and that his contract would contain conditions of employment which would appear to differ materially from those pertaining to a managing director of a commercial company.

If I am correct in my assumption, section 32 of the Employment Ordinance requires such a contract to be in writing and it is unenforceable if it is not in writing.

While Mr. Knight did refer to sections 22 to 24 of the Employment Ordinance he did not refer to section 32.

The contract of employment was treated by the parties as an oral one and for the purpose of this action I will treat it as such.

Without at this stage setting out the facts but treating the contract as an oral one, the plaintiff's claim for salary and allowances for 12 months in lieu of reasonable notice of termination cannot be entertained.

While there is evidence that the plaintiff was engaged at a salary stated to be an annual figure he was paid bi-monthly.

Section 22(1) of the Employment Ordinance provides that in the absence of proof to the contrary an oral contract shall be deemed to be a contract for the period by which wages are calculated but in any case shall not extend for a period longer than the month from the making of the contract.

Under Section 24 of the Ordinance one month's oral or written notice can be given terminating a monthly contract.

A claim to reasonable notice might have been considered if the plaintiff had had a written contract engaging him for a number of years. That may have been the original intention of the parties but, as I have pointed out, non compliance with section 32 of the Act would render the contract in this instance unenforceable.

I have not so far set out the facts which I now proceed to do.

Until the end of 1970 the plaintiff was a

Senior Assistant Registrar of Co-operatives. He is a Banaban and one of the very few Banabans who ~~are~~ is educated. The Rabi Council Leaders, seeking ways and means to utilise the Council's funds received from the mining of phosphate on Ocean Island, sought to set up a company staffed by Banabans. Members of the Council approached the plaintiff and asked him to set up a company and to take over the position of managing director when it was incorporated.

A special meeting of the Rabi Council of Leaders was held on Friday the 23rd January, 1979, at which the plaintiff was present where it was resolved (inter alia) that the Council desired the plaintiff to work for the Council and he was given six months to work out his departure from Government Service.

The plaintiff said in evidence that at the meeting with the Councillors there was a discussion that he would receive the same salary and benefits as he was getting in Government. He said he told them he was applying for housing and would lose an opportunity to purchase a house.

Except for a resolution that the Council could purchase land and a house, none of what the plaintiff now alleges is reflected in the Council's minutes. There is a reference that the Council would confirm his appointment in writing. If they did write to the plaintiff he has not produced the letter.

The preliminary discussions and agreement reached with the Council do not assist the plaintiff. His contract was with the company which he himself later set up and incorporated. He was under the articles of association of the company one of the first directors. The company was incorporated in September, 1970, according to the plaintiff.

I pass from that date to the 10th April, 1978, when the company's board held a meeting in the plaintiff's office. The intervening years was a period of rapid growth of the company and the setting up of several subsidiary

companies but all was not well with the company. It is clear the company had grown far too big for the plaintiff to manage but that does not excuse his failure to ensure that proper accounts and records were kept. His negligence and lack of experience resulted in the company incurring very heavy losses and being placed in liquidation and has seriously handicapped the liquidator in defending this action due to accounts and records, which should exist, not being available to him.

The Banabans' dissatisfaction came to a head on 10th April, 1978, when the Company's Board of Directors made it clear to the plaintiff that the Banaban shareholders were unhappy with the state of affairs and the directors agreed that the plaintiff should be 'dismissed' and that he be given one month's notice effective from the 11th April, 1978.

The plaintiff queried the translation of the minutes of the meeting of the 10th April, 1978, which are attached to the English translation of Exhibit A. The Gilbertese word "Musirawa" has been translated as 'dismissed'. It appears the proper meaning should be 'retire' or 'step down'. The plaintiff's evidence about this meeting discloses that he made it clear to the directors that he was prepared to stand down as managing director. He said he was given a month's notice to hand over and step down but before he could retire he was locked out of his office.

At this meeting there was mention of passage grants which I will be referring to later.

There was a further meeting of the Board on the 20th April, 1978, which the plaintiff did not attend. He had sent the Board a telegram claiming the meeting was not properly called. The Board decided (inter alia) that the plaintiff should be 'dismissed' as soon as possible and a telegram was sent to him to appear before the Board at noon the following day. He did not appear at this meeting.

At the meeting on the 21st April, 1978, the Board agreed (inter alia) that the plaintiff's leave and passage grant be stopped and that he be 'dismissed' with effect from the 21st April, 1978.

The defendants pleaded that the plaintiff was dismissed on the 10th April, and or the 21st April, 1978.

As pleaded by the plaintiff, on the 15th May, 1978, the members of the company at a special general meeting terminated the office of the plaintiff both as a director and as managing director. The defendants now accept that the plaintiff was dismissed at that meeting and that he is entitled to salary and allowances up to the 15th May, 1978.

The Board of Directors of the Company were not empowered by the Articles of Association of the company to dismiss a managing director. Paragraph 82 of the Articles provides that he must vacate his office if he ceases to be a director or if the company in general meeting terminates it.

The purported dismissal of the plaintiff as managing director by the Board whether on the 10th April or the 21st April, 1978, was void and of no legal effect. The plaintiff is accordingly entitled to salary and allowances (if any) up to the 15th May, 1978, when the services of the plaintiff were lawfully terminated by the members of the company in general meeting.

I turn now to consider what allowances the plaintiff was entitled to at the time of his dismissal. One of the problems I face is that the plaintiff left the affairs of the company in such a mess that the liquidator has been unable to locate many of the records of the company and has been unable to trace payments. As managing director the plaintiff gave orders to his subordinates to make payments to him and dictated what the records should show.

An example of this is Exhibit E - a receipt for $4,340, one of the disputed sums paid to the plaintiff. Attached to the receipt is a note in the plaintiff's handwriting which reads :

"KATAAKE
Pl. prepare voucher $4,340
Bal. of refund on 262 Fletcher Rd."

Then follows his initials and date '30/8'. The plaintiff in his Defence to the Counterclaim contends this was a refund of salary and housing allowance deductions made in error which the directors agreed at a meeting to refund. No minutes of that meeting were produced. I do not believe him.

The plaintiff pleaded that he was asked to join the company as its manager on the same terms and conditions as to salary, leave passage and other allowances as were enjoyed by him at the time he resigned from Government. The defendants deny this and plead that there is no written contract evidencing such conditions of service. While it would simplify a decision in this case to disallow any claim for allowances the fact remains that the plaintiff was in receipt of certain allowances. I consider that even on a monthly oral contract there is no reason why leave and passage grants could not be agreed which would be conditionally payable if the employee served long enough to qualify for such grants. However, I am not prepared to accept what the plaintiff tells me. He did not impress me at all and left me with a very strong feeling that his stewardship of the company took second place to his personal interests. The position today is that it is quite impossible to discover just what funds of the company were used by him and for what purposes some moneys were paid to him. He pleaded he was employed on civil service conditions and it is those conditions which will be considered not the many later agreements he alleges he entered into with the company relating to his employment.

Exhibit AAA discloses what were the conditions of service of the plaintiff when he resigned from Government on 5th February, 1971.

The plaintiff when he left the civil service was serving under the 1957 leave conditions. He was entitled to 4 days leave for each completed month of service. At the end of his tour of 3 years, had he completed it on 6th January, 1972, he would have been entitled to up to 3 adult passages to the United Kingdom. He was also entitled to 10 working days leave a year but could not accumulate it. He was entitled to an U.K. passage grant but only one in addition to a grant for New Zealand or Australia at the end of other tours.

Amongst the exhibits, Exhibit Z records annual leave due to the plaintiff and also records leave sold by him. Judging by this record the plaintiff claimed more leave than he would have been entitled to in the civil service. He is shown as being entitled to 52 days a year from 1stJune, 1970.

On 5th July, 1974, the record shows he had accumulated 152 days leave. He sold 107 days for $2,930.85.

The next month on 2nd August he received $4,853.40 being passage for 3 adultsto London and return.

On 29th July, 1975, he sold 61 days leave for $2,815.15. This payment appears to be for all accumulated leave up to the date of payment and as at 31st December, 1975, 21 days were due to him. Record does not show what leave was taken by the plaintiff after the 12th November, 1976, when he took one day's leave.

Accepting these figures in the absence of any other up to date records, leave due to the plaintiff on the 15th May 1978 for each completed month of service would be 132 days made up as follows :

Leave 1/1/76	..	21
1/1/76 to 30/4/78 (28 months)	..	112
		133
Less taken 12/11/76	..	1
		132

As to passage grants, the plaintiff would have been entitled to a once only passage to the United Kingdom for which he was paid in 1974. He could only have been entitled to one more passage grant for up to 3 adults to New Zealand before he was dismissed in May 1978.

At a meeting of the Board on 10th April, 1978, a resolution was passed that the managing director be given passage grants for 2 tours. No amount is recorded in the minutes. There is however, a mention of the sum of $12,000 in Exhibit C the minutes of the company when it was resolved that payment of that sum to the plaintiff be stopped. He had been given a cheque for this amount.

On the evidence before me the plaintiff was not entitled to be paid that sum and a resolution by the Board that he be paid it, which the Board later cancelled, does not entitle the plaintiff to the payment.

There remains the claim for house allowance. The plaintiff being resident in Suva was not entitled to any housing allowance. It is apparent that he was paid housing allowance until 1st October, 1972, and this must have been because the plaintiff informed the company that he was entitled to it. With effect from 1st October, 1972, however his salary was increased to $7,500 per annum and his housing allowance was cancelled.

I hold that the plaintiff was employed on a monthly oral contract and that his services were lawfully terminated by the company on the 15th May, 1978, up to which date he is entitled to salary. His claim for general damages is dismissed. He is further entitled to be paid for 3 adult passages to New Zealand and for 132 days accumulated leave.

He is not entitled to any housing allowance. Counsel agreed that entitlement for leave passage to New Zealand should be $1,000 for 3 adult passages. He is entitled to this sum.

In his amended claim for relief the plaintiff claims :

Salary to 10/4/78	$583. 34
Salary to 15/5/78	$1166. 68
Leave pay 174 days at 38.35 per diem	$2838. 35
	$4588. 37

Mr. Knight in agreeing to the amendment did not challenge the figures.

I am unable to reconcile Mr. Maharaj's figures. At $38.35 per diem, I make 174 days the sum of $6672.90 and not $2838.35 as claimed by the plaintiff. It may be that I misheard Mr. Maharaj in his closing address when he sought the amendment.

The plaintiff as I have held is entitled to 132 days accumulated leave which at $38.35 per diem comes to $5062.20.

I allow the plaintiff the following sums :

Salary to 10/4/78 as claimed ..	$583. 34
Salary to 15/5/78 as claimed ..	$1166. 68
132 days leave	$5062. 20
3 adult passages to N.Z. and return	$1000. 00
	$7812. 22

There will be judgment for the plaintiff on his claim of $7812.22 against the defendant company with costs of the claim.

I have now to consider the counterclaim. Six sums totalling $31,639.88 are admitted as having been received

by the plaintiff as part of an approved loan of $40,000 to $50,000 by the company to the plaintiff. The terms of that loan have not been established. I do not accept the plaintiff's contention that it is not now due and payable.

The company also claims $14,000 alleged to have been borrowed by the plaintiff from the company in 1975/76.

The basis for this claim is that a voucher (Exhibit H) attached to cheque No. 001635 for $6,000 paid to Munro, Leys, Kermode & Co. on the 6th July, 1976 has the following particulars :

> "Dr. to Tekoti Rotan
> Being payment to Munro Leys & Co. for his house loan $6,000.
> (Total paid to date $20,000).

The liquidator has to admit that while Exhibit H indicates $14,000 was paid from the same source as the $6,000 he was unable to determine where the $14,000 actually came from. The plaintiff contended the $14,000 was paid by him from his own funds. I do not believe him but I have to hold that the defendant company has not established that it lent the plaintiff $14,000 in 1976/77 or that he used that much of the company's money. I do not allow this sum.

The company also claims the sum of $558 the debit balance in the Debtor Ledger in the name of the plaintiff.

The plaintiff admitted under cross-examination that the entries on Exhibit DD showing debit balance of $558 were correct. I allow this sum.

The company also claims the sum of $4546.65 for allege expenses paid for repairs,etc. on the Vatuwaqa property during 1970/71. The plaintiff while not denying the company had done repairs without his authority did not admit this sum. Exhibit WW a cash book has on the first page an account in the plaintiff's name showing a debit balance of $21,546.65. If the $16,000 house loan is deducted and the $1,000 at bottom of the page transferred from some other account which the

liquidator cannot identify the balance remaining is $4546.65 being mainly for moneys expended on the plaintiff's property. The last entry in the cash book is dated June 22, 1971, and there is an entry showing that the account has been transferred somewhere else.

There is no evidence as to what was owing on 15th May, 1978, seven years later. The claim for this sum is not allowed.

The balance of the company's claim is for two sums of $4,000 and $4,340 alleged to have been paid by the company on account of the purchase price of the plaintiff's Fletcher Road property. This part of the claim also includes the sum of $6,409.88 to pay off the mortgage on the property. This is one of the six sums referred to earlier which the defendant admits receiving but as part of his loan.

Alternatively they claim $28,000 being the purchase price received by the plaintiff when he sold Fletcher Road property.

The plaintiff did receive payment of the two sums of $4,000 and $4,340. Attached to Exhibits E and F are the cheques and notes in the handwriting of the plaintiff as regards Exhibit E. The writing on Exhibit F appears to be the writing of the plaintiff and the particulars on the voucher are as follows :

> "A/C 262 Fletcher Road Property.
> Refunds on instalments due to property being taken over by Company (part payment) $4,000".

Exhibit E which has a note which the plaintiff admits is in his handwriting shows that the $4,340 was balance of refund on 262 Fletcher Road.

There is other evidence that indicates the company had apparently taken over the Fletcher Road property.

The photocopy of the Suva City Council's Demand for 1976 rates has attached to it a photocopy of a note which the plaintiff admits is in his handwriting. It reads :

> "C/S
> This house now belong to Company I will provide details in order to adjust same in financial accounts."
>
> Then follows his initials and date '13/10'.

The plaintiff does not deny that there were negotiations with the company for the company to purchase his house but he states that the transaction fell through because the company failed to appoint a valuer to value the property. I do not believe him. However, the liquidator has been unable to produce any records to substantiate that the company paid the full purchase price and what amount was paid.

The sums of $4,000 and $4,340, which on the documentary evidence were refunds payable due to the property being taken over by the company as exhibits E and F disclose, must be repaid to the company on the negotiations for the purchase not being completed as pleaded by the plaintiff. The plaintiff cannot be permitted to keep not only the proceeds of the sale of the property but also refunds that became payable to him on the company taking over the property. He admitted in his defence to the counterclaim receiving these sums but alleged they were "refund of salary and housing allowance deductions made in error" by the company and agreed to be refunded.

On the counterclaim the company has satisfied me the plaintiff owes it the following sums :

Admitted received by plaintiff	$31,639.88
Admitted by plaintiff	558.00
Refunds to be repaid	8,340.00
	$40,537.88

The plaintiff sought to set off two sums against the amounts claimed by the company namely $6,000 he claims is due to him for housing from October 1976 to May 1978 at $300 a month and $6480 "house rent in Fletcher Road Vatuwaqa property owned by the plaintiff assigned to and received by the 6th defendant of May 1975 to April 1978 inclusive at $180 a month".

The plaintiff's own evidence discloses that the Rabi Island Council lent him $16,000 to purchase the Fletcher Road property. Assignment of his rent was for repayment of this loan as he admitted in evidence. This explains why he did not claim a refund from 6th May, 1975, to April, 1978, in his statement of claim.

The plaintiff in his claims does not claim either the $6,000 or the $6480.

The plaintiff was entitled to little credence. As managing director he should have ensured that records and accounts of the company were properly kept. I do not accept his evidence of alleged agreements reached with the company. Records do not now exist which would enable the liquidator to check on the legality of all the payments to the plaintiff. In giving judgment to the plaintiff on his claim I may well have given the plaintiff more than he is actually entitled to. However, the other directors must have been aware for some years that all was not well with the company and they must accept some blame for the plaintiff's gross inefficiency and the pitiful state of the company's records.

There will be judgment for the 6th defendant on the counterclaim for $40,537.88 and costs of the counter claim.

R G Kermode

(R.G. KERMODE)

J U D G E

SUVA,

1st ~~August~~ September, 1981.