

IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL APPEAL NO: CBV 3 of 2014
[Court of Appeal No: ABU 19 of 2012]

BETWEEN : AMBARAM NARSEY PROPERTIES LIMITED

Petitioner

AND : LAUTOKA CITY COUNCIL

1st Respondent

MOHAMMED YAKUB KHAN
MOHAMMED NASIR KHAN
MOHAMMED SABIR KHAN
MOHAMMED IQBAL KHAN
MOHAMMED MUKTAR KHAN
MOHAMMED AZAD KHAN

2nd Respondents

Coram : Hon. Justice S. Marsoof, Justice of the Supreme Court
Hon. Justice S. Chandra, Justice of the Supreme Court
Hon. Justice B. Mutunayagam, Justice of the Supreme Court

Counsel : Mr. B C Patel & Mr. C B Young for the petitioner
Mr. V Mishra & Mr. R Charan for the 1st Respondent
Ms. N. Khan & Ms. A. Ali for the 2nd Respondents

Date of Hearing : 29 October 2014

Date of Judgment : 14 November 2014

JUDGMENT

Justice Marsoof

1. I have carefully considered the judgment of my brother Justice Chandra in draft. I respectfully agree with his reasoning and conclusions.

Justice Chandra

2. The Petitioner instituted action against the 1st and 2nd Respondent in the High Court at Lautoka claiming damages consequent upon damages caused to its building as a result of building constructions being carried on next to their building by the 2nd Respondent. The Petitioner claimed such damages on the basis of the construction of the building works carried on by the 2nd Respondent and against the 1st Respondent for approving the building plans and failing to supervise and for uplifting a stop order it had initially imposed on the building activities of the 2nd Respondent.
3. The High Court held that the 1st and 2nd Respondent liable for the cracking, partial collapse and damage to the Petitioner's building in the proportion of twenty percent (20%) of the damage to the 1st Respondent and 80% to the 2nd Respondent.
4. The 1st Respondent appealed against the said judgment to the Court of Appeal and the Court of Appeal by its judgment dated 5th March 2014 dismissed the appeal but varied the High Court judgment by disallowing the Petitioner the costs of experts reports and photocopies amounting to a sum of \$61,439.93.
5. The Petitioner by petition dated 1st April 2014 has sought leave to appeal against that part of the judgment of the Court of Appeal disallowing the sum of \$61,439/93 setting out the following grounds:

(a) The Court of Appeal was wrong to disallow the costs of the experts' reports and photocopies because those costs were claimed and proved as special damages.

(b) Those costs arose out of the damage to the building and were not pure economic loss but consequential upon the damage.

(c) The Court of Appeal breached the principles of natural justice and rule 5 of the Court of Appeal Rules by failing to give the Appellant an opportunity to address the issue before varying the judgment.

6. The petitioner further set out in its petition that the appeal raises a matter that is otherwise of substantial general interest to the administration of civil justice: s.7(3)(c) of the Supreme Court Act 1998, in particular:

(a) It is an important public and administrative issue that the Court of Appeal should not have varied the High Court judgment and disallowed part of the award of damages without giving the party affected an opportunity to address the Court on it when there was no ground of appeal filed in respect of it and when no submission was made to support the disallowance.

(b) The Court of Appeal acted in breach of rule 5 of the Court of Appeal Rules. The rule states that the "Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground.

(c) There is miscarriage of justice, in that, the decision of the Court of Appeal to disallow the costs is of "sufficient apparent error of such a substantial character that it would be repugnant to justice to allow it to go uncorrected": Junior Farms Ltd v. Hampton Securities Ltd (in Liq) (2006) NZSC 368 at 369.

Petitioner's Arguments

7. The main thrust of the argument of the Petitioner is that the Court of Appeal had not addressed the issue relating to the disallowance of that part of the damages to the Petitioner in the course of the hearing of the appeal before them and further that it was not a matter addressed to by the 1st Respondent in their notice of appeal and thereby there was a contravention of Rule 5 of the Court of Appeal Rules.
8. The Petitioner further contends that the error created by disallowing the costs is of a substantial character and that it ought to be corrected.

1st Respondent's Arguments

9. As against the argument of the Petitioner, the 1st Respondent argued that the Court of Appeal does have jurisdiction to make variations to a High Court judgment as an appeal to the Court of Appeal is by way of rehearing in terms of Section 15 of the Court of Appeal Act, that under section 22(3) the Court of Appeal has power to draw inferences of fact to make any judgment or give any order which ought to have been given or made, and to make such further or other order as the case may require. That, Section 22(4) gives the Court of Appeal power to exercise such discretion even if no notice of Appeal is given and make any order to ensure the determination on the merits of the real question in controversy between the parties.
10. The 1st Respondent argued further that the Court of Appeal was correct in deciding that the amount disallowed was not covered under the head of special damages though claimed by the Petitioner as such.
11. The 1st Respondent stated on the basis of their arguments that the Petitioner's appeal does not come within the threshold that is required in terms of Section 7(3) of the Supreme Court Act of 1998.

2nd Respondent's Arguments

12. The 2nd Respondent argued that the petitioner does not give rise to any question of general or public importance, and there being no miscarriage of justice, that the petitioner has not made out a case for leave under Section 7(3) (c) of the Supreme Court Act 1998.

The Judgment of the Court of Appeal

13. The Court of Appeal in its judgment in respect of the appeal of the 1st Respondent in relation to the disallowing of the experts' reports cost and cost of photocopies stated:

"Costs of Expert Reports and Photocopies

- [190] *The trial judge has awarded a sum of \$60,919.68 as cost of expert reports and a sum of \$520.25 as cost of photocopies.*
- [191] *Was the cost of procuring expert reports in proving its case against the Appellant and the 2nd Respondent recoverable? If so, under which head of special damages?*
- [192] *The causal link between damage to property and consequential loss within the four corners of the general principle was expounded earlier. That does not seem to be present here. The criteria used by the learned trial judge themselves such as diminution of value of the property and reinstatement value do not in our view encompass expenses incurred in procuring expert evidence and reports in proving a case. The 'loss' if it is to be called so would if at all fall into the category of 'pure economic loss'.*
- [193] *The same would apply to cost of photocopies.*
- [194] *They were expenses and are subsumed in the award described by the learned trial judge under the head costs and were in the nature of incurred costs in the action.*
- [195] *Although Appellant's Counsel did not address on this aspect as a specific ground of appeal, given the fact that his contention was that the Appellant was neither negligent nor therefore was liable to meet any monetary claim based on a duty of care, statutory or flowing under the common law, it is an aspect that encompasses the award.*
- [196] *Accordingly, we strike off that part of the award made by the trial judge.*
- [197] *Subject to that variation we dismiss this appeal and affirm the judgment of the trial judge."*

Consideration of the Appeal

14. The Petitioner is seeking leave from the Supreme Court pursuant to Section 98(4) of the Constitution of Fiji and Section 7(3) (c) of the Supreme Act 1998.

15. The criteria set out in Section 7(3) have been examined and applied in several decisions of the Supreme Court of Fiji such as *Bulu v. Housing Authority* [2005] FJSC 1 CBV0011 of 2004S (8 April 2005), *Ganesh Chand v. Fiji Times Ltd* CBV0005 of 2009 (8th April March 2011), *Praveena's BP Service Station Ltd v. Fiji Gas Ltd* CBV 0018 of 2008 (8th March 2011), *Suva City Council v. R.B.Patel Group Limited* CBV 0006 of 2012 (17 April 2014) and it is clear from these decisions that special leave (in the 2013 Constitution referred to as "leave") is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public, interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so, special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.
16. It is the contention of the Petitioner that there was a breach of the principles of natural justice and a contravention of Rule 5 of the Court of Appeal Rules. Rule 5 states:

"The Appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of objection not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated:

Provided that the Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground."

17. It would be relevant to consider the provisions of Rules 22(4) of the Court of Appeal Act also. Rule 22(4) states:

"The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in varying the decision of that

Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

18. A consideration of the above Rules would show that if there is no notice of appeal or there is no such ground specified in the notice of appeal which the Court has considered, the Court of Appeal may deal with such matter in order to determine the real merits of the case. However, as stated in Rule 5 the Respondent has to be alerted by the Court regarding such matter.
19. In the present case it is quite apparent on a perusal of the manner in which the Court of Appeal dealt with the question of Experts Costs and photocopying costs, that the Respondent was not alerted on that question by the Court of Appeal. Therefore there is a lapse on the part of Court of Appeal in not complying with Rule 5.
20. The question then arises is whether that lapse is sufficient for the Petitioner to meet the threshold of Section 7(3) (c) of the Supreme Court Act.
21. The question that the Court of Appeal considered in disallowing a part of the award was the amount that was claimed by the Petitioner as Experts' Costs and photocopying charges, which amount was claimed in the High Court as special damages.
22. The loss claimed by the Petitioner in the High Court was in respect of the damages caused to the building as a result of the actions of Respondents. The claim included the damages caused to the building, the loss of rentals, etc. Included in the claim were the expenses incurred in respect of the Experts costs and photocopying charges which the Petitioner asserted were unchallenged and proved in the High Court.
23. The purpose of including a claim under special damages is to avoid the element of surprise on the other party as has been stated in decisions such as *British Transport Commission v. Gourley* (1956) All ER 796, *Perestrello v. United Paint Co. Ltd* [1969] 3 All ER 479. The Petitioner by claiming the said amount had brought it to the notice of the

Respondents and it had not been challenged. However, the question for consideration is as to whether such claim should be allowed. Petitioner's Counsel cited the decision in *Krishna Brothers v. Post and Telecommunications Limited* ABU0028.2004S (29 July 2005) where it was stated that the "Court is entitled to consider a claim for damages when presented as special and unchallenged". However, my view is that though the Court is entitled to consider such a claim, Court is not bound to accept and grant same as special damages. Court has to consider whether such a claim comes within the realm of special damages and it is left to the Court to consider whether such a claim can be granted as special damages.

24. In assessing damages caused to a building it may be necessary to seek the assistance of experts in that field and obtain their opinions and they would charge fees for giving such opinions. Although the Petitioner has classed such expenses as special damages, do they really constitute special damage? It is a cost incurred by the Petitioner, which is litigation costs and as observed by the Court of Appeal may be subsumed in the costs of the action. In Halsbury's Laws of England (4th Edition) Volume 12(1) at paragraph 807 on '**Damages as distinguished from costs**' sets out:

"Costs are distinct from damages".

And at footnote 13 states:

"Thus in a personal injuries case, the cost of medical treatment is part of the damages, but the cost of a medical examination for the purpose of litigation forms part of the costs."

25. Drawing an analogy from the above statement in Halsbury's Laws of England, cost of a medical examination for the purpose of litigation would be similar to the cost of Experts Reports in the present case and therefore would not come within special damages and would form part of the costs of the action.

26. *Bolton v. Mahadeva* [1972] 1 WLR, 1009 was a case which involved a defendant's claim in respect of fees for a report which he had obtained from his expert. That was in a case in which a heating engineer was suing for work done in installing a heating and domestic hot water system. There Cairns LJ, giving the first judgment of the court, said:

"So far as the defendant's claim in respect of fees for the report which he obtained from his expert is concerned, it seems to me quite clear that that report was obtained in view of a dispute which had arisen and with a view to being used in evidence if proceedings did become necessary, and in the hope that it would assist in the settlement of the dispute without proceedings being started. In those circumstances, I think that the judge was right in reaching the conclusion that the report was something the fees for which if recoverable at all, would be recoverable only under an order for costs."

27. This decision has been cited in *Hutchinson v. Harris* Court of Appeal (Civil Division) 10 Build LR 19 where it was stated that all the costs of litigation which arise out of a breach of contract or a breach of duty are, in a sense, the result of that breach, but not all such costs are recoverable as damages. Therefore the decision of the Court of Appeal disallowing the costs of Experts Reports and photocopy charges cannot be faulted.
28. The Petitioner cited the decision in *New Zealand Pacific Training Centre Ltd v. Training & Productivity Authority of Fiji* (2011) FJSC 3 which involved a case of awarding costs against the Petitioner higher than normal costs without hearing the Petitioner on it and where the Court had granted leave. The Court was of the view that in a matter of granting exorbitant costs, the Court of Appeal should have heard the Petitioner before granting it as it was an important, public and administrative issue.
29. The present case can be distinguished from that case in that what was involved in that case was granting of costs of the action which when considered to be exorbitant gave rise to a situation which involved a matter of public importance, whereas in the present case it was a matter which was between the parties regarding the question of the claim for damages in respect of expenses incurred in getting experts reports and photocopying charges which as dealt above would not fall into the category of special damages. The

question before Court was a matter of construction or interpretation in relation to the claim of the Petitioner as special damages. It is the view of this Court as stated in *Albrights v. Hydro Electric Power Commission* [1923] AC 167 that, it is a matter of construction of the claim of the Petitioner which related to the claim for damages which the Court considered as not and hence a matter between the parties and not a matter of public importance.

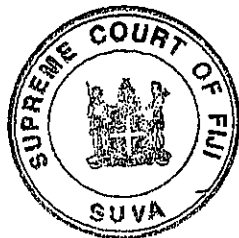
30. As the Petitioner has failed to meet the threshold of Section 7(3)(c) of the Supreme Court Act of 1998, special leave is refused and the petition is dismissed.

Justice Mutunayagam

31. I also agree with the conclusions and reasons of His Lordship Justice Chandra.

Orders of Court:

1. The Petition of the Petitioner is refused.
2. The Petitioner shall pay costs in a sum of \$4000 to the 1st and 2nd Respondents to be shared equally.



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Hon. Justice S. Marsoof
Justice of Appeal

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Hon. Justice S. Chandra
Justice of Appeal

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Hon. Justice B. Mutunayagam
Justice of Appeal