IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV 0022 of 2019
Court of Appeal No. ABU 61 of 2017

BETWEEN: (1) **THE TRUSTEES OF VANUA LEVU MUSLIM LEAGUE**
(2) **BASHIR KHAN**

Petitioners

AND: (1) **VCORP LIMITED**
(2) **LABASA TOWN COUNCIL**

Respondents

Counsel: Mr. V. Filipe for the Petitioners
Mr. A. Sen and Mr. G. O'Driscoll for the Respondents

CIVIL PETITION NO: CBV 0011 of 2020
Court of Appeal No. ABU 61 of 2017

BETWEEN: (1) **VCORP LIMITED**
(2) **LABASA TOWN COUNCIL**

Petitioners

(1) **THE TRUSTEES OF VANUA LEVU MUSLIM LEAGUE**
(2) **BASHIR KHAN**

Respondents

Counsel: Mr. A. Sen and Mr. G. O'Driscoll for the Petitioners
Mr. V. Filipe for the Respondents

Coram : The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr. Justice Madan Lokur, Judge of the Supreme Court

Date of Hearing: 11 April, 2023

Date of Judgment: 28 April, 2023

JUDGMENT

***Gates J*:**

1. I have had the advantage of reading Keith J's judgment in draft. I agree with it, and with its reasons and orders.

***Keith J*:**

Introduction

2. This case relates to a long-running dispute over land in Vanua Levu. The lessees of the land wanted to develop it. The lessees of adjoining land were unhappy about that. They tried in various ways to bring the proposed development to a halt. An understanding of the underlying facts is important, and I trust that I will be forgiven for going into them in some detail. I take them from the findings of the trial judge, Wati J, and the various exhibits.

The facts

3. *The land*. The land to which the dispute relates was originally part of lot 1 on Plan M2458. This was a large plot, consisting of 9 acres in all, on the bank of the Labasa River.[1] The lot was then Crown land. It was leased to Labasa Town Council ("the Council"), then known as Labasa Township Board, under a Crown lease (no 6068) with effect from 1 January 1969 for a term of 25 years.[2] The lease provided that the land was to be used only as a "recreation ground or ornamental park or open space for the general convenience and enjoyment of the public", but Wati J found[3] that the Council had not maintained the land properly. It had become something of an eyesore. It had been misused by members of the public who had gone there to drink and by courting couples. They used to throw away their rubbish there.

4. The Council's lease of the land expired on 31 December 1993. Wati J said[4] that there was no evidence that the lease had ever been renewed, and the land would then have reverted to the Crown.

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[1] Plan M2458 is at pages 222 and 223 of vol 1 of the Record of the High Court.
[2] The lease us at pages 220-225 of vol 1 of the Record of the High Court.
[3] Para 9 of the judgment.
[4] Para 88 of the judgment.

5. *The proposed development of the land.* Vinesh Dayal is a local businessman. He thought that the land had potential for development. He wanted to build a tourist hotel on the land with conference facilities and a shopping centre. He was the managing director of VCORP Ltd ("VCORP"), and VCORP was the vehicle through which the development of the land was ultimately to proceed. By then the part of the land in which Mr Dayal was interested had been redesignated as lots 1 and 2 on Plan M2605.[5] The schedule of lots shown on the plan recorded that Lot 1 was Crown land and lot 2 was iTaukei land. Lot 1 was therefore under the auspices of the Ministry of Lands and Natural Resources ("the Ministry"), and lot 2 was under the auspices of the iTaukei Land Trust Board ("the Board").

6. Both the Ministry and the Board were content with the proposed development. Three steps were taken to enable VCORP to acquire and develop the land. First, the land had previously been zoned as "civil open space". It was re-zoned as "special use (tourism)". Secondly, the Ministry allowed lot 1 to revert to being iTaukei land. That decision had been effected by the Ministry by 7 June 2012 which was when the Ministry formally approved the re-zoning of the land. That approval referred to the fact that the land was now leased through the Board, and Wati J read that approval as showing that the Ministry had indeed approved the transfer of the land to the Board for leasing.[6] On that topic, Mr Sen for VCORP drew our attention to an application for judicial review of the Board's decision to lease the land to Hotel Northpole Ltd, a sister company of VCORP.[7] The application was dismissed by Brito Mutunayagam J on 1 June 2017, and an appeal against the dismissal of the application was dismissed by the Court of Appeal on 30 April 2021.[8] The Court of Appeal held that section 88 of the Local Government Act 1972 gave the Board the legal power to act as it did. The judgments show that it was never contended that the Ministry had acted unlawfully when it had allowed lot 1 to revert to iTaukei land in the first place. Thirdly, it looks as if the the land was never leased to Hotel Northpole Ltd, because the Board in fact leased the two lots to Centrepoint Hotel Management Ltd (by which VCORP was then known) by an iTaukei lease (no 30080). The lease was registered on 9 October 2012, and was for a term of 99 years with effect from 1 July 2011.[9] I should add that there had for many years been a children's play centre on the site. Presumably the Council had granted a licence for it to be there. The proposed development would have resulted in its demolition.

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[5] Plan M2605 is at page 252 of vol 1 of the Record of the High Court.
[6] Paras 93-94 of the judgment.
[7] High Court Case No HBJ 006 of 2012.
[8] Civil Appeal No ABU 068 of 2017. Lecamwasam JA gave the leading judgment, and Guneratne and Basnayake JJA agreed with it.
[9] The lease is at pages 245-253 of vol 1 of the Record of the High Court.

7. *The adjoining land.* The land adjoining the land to be developed consisted of two lots: lots 13 and 13A on Plan M1644. There is a large three storey building on this land, which houses, among other things, a mosque. The land was leased by a State lease (no 17786) to the Trustees of the Vanualevu Muslim League ("the Trustees") with effect from 1 January 2006 expiring on 31 May 2039. The President of the League and Administrator of the Trustees is another local businessman, Bashir Khan.[10]

8. *The objection to the proposed redevelopment.* The Trustees were opposed to the proposed development. It is plain from the judgment of Wati J that they were unhappy about the adjoining land being developed at all.[11] They looked for ways in which to stop the development going ahead. Accordingly, they claimed that there was a drain which ran from the building on the Trustees' land to the river. It crossed the land on which the proposed development was to take place. The Trustees were concerned that the proposed development would block the drain, and thereby prevent rainwater which gathered on the roof of the building on the Trustees' land flowing from the building's gutters into the drain and from there into the river. They were also concerned that the blocking of the drain could result in water from the river seeping into the building and the mosque when the river flooded. The Trustees therefore objected to the re-zoning of the land on which the development was to take place. However, following a public consultation exercise and a public hearing, the land was re-zoned. Wati J said[12] that there had been uncontradicted evidence that all proper procedures had been followed before the re-zoning of the site was approved.

9. *The drainage easement.* There was another route by which the Trustees sought to preserve the drain which they said was on VCORP's land. They contended that on 27 February 2012 the Ministry, acting through the Director of Lands, had "issued" VCORP with an easement over the drainage on the land[13]. This easement had subsequently been "withdrawn"[14], and the Trustees claimed that without the protection of the easement, the blocking of the drain – which the development of the land would necessarily involve – would result in irreparable damage to the building on their land.

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[10] The lease is at pages 232-239 of vol 1 of the Record of the High Court. It replaced a previous lease which had granted Mr Khan himself a lease of the two lots with effect from 1 January 1993. This lease is at pages 191-193 of the supplementary record provided to the Court of Appeal.

[11] See para 106 of the judgment.

[12] Para 14 of the judgment.

[13] Para 30 of the Amended Statement of Claim at page 55 of vol 1 of the Record of the High Court

[14] Ibid.

10. The facts relating to the "issue" of the drainage easement were these. On 18 October 2011 the Trustees applied to the Ministry for a "drainage reserve".[15] In other words, the Trustees were asking that a part of VCORP's land should be set aside for drainage to perform the same function as the drain on the land had previously performed. The Ministry responded to the application by a letter to Mr Khan dated 27 February 2012[16]. It informed him that approval for a drainage reserve had been granted, and that it would immediately seek the approval of the Director of Town and Country Planning. However, that approval was withdrawn a few weeks later, before the Director of Town and Country Planning could have given his approval for the drainage reserve. That was because the Ministry had become aware of the dispute between Mr Khan and Mr Dayal. Mr Khan was informed of that by the Ministry by letter dated 15 March 2012[17].

The proceedings

11. *The first action*. The Trustees and Mr Khan commenced the current proceedings (Civil Action No HBC 032 of 2011). No separate cause of action was pleaded in favour of Mr Khan. The defendants to the proceedings included VCORP, the Council, the Board and the Ministry. The Ministry of Local Government, Urban Development, Housing and Environment and the Attorney-General of Fiji were also named as defendants, but since no relief was sought against them, it is unnecessary to refer to them again.

12. The relief sought by the Trustees took two forms. First, the Trustees (or their lawyers) were under the impression that Crown lease no 6068 had still been in existence when the development of the land was being considered, and it was thought that the Council had surrendered the lot to which that lease related. They sought declarations that the Council's surrender of the lease of that lot, ie lot 1 on Plan M2458, and the Board's grant of a lease of the two new lots, ie lots 1 and 2 on Plan M2605, to VCORP, as well as VCORP's acceptance of the new lease, were unlawful. The Trustees' case was that the surrender of the old lease and the grant of the new one had required the approval and consent of the Ministry, and that had not been obtained. Secondly, the Trustees sought an injunction restraining VCORP from demolishing the drain on the basis that to do so would amount to a breach of the easement "issued" by the Ministry.

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[15] That application is at page 155 of the larger of the two Supplementary Records of the High Court, and the plan for the propped drainage reserve is at page 157.

[16] Page 206 of vol 1 of the Record of the High Court.

[17] Page 208 of vol 1 of the Record of the High Court.

13. For its part, VCORP counterclaimed against the Trustees and Mr Khan. That counterclaim was based on the fact that on 9 September 2011, the Trustees and Mr Khan had obtained an *ex parte* injunction from Calanchini J which had had the effect of halting the development of the land for the time being. VCORP claimed that the injunction had been obtained fraudulently. It contended that Mr Khan had submitted survey plans to the court which had been falsified to show that the Trustees had an easement over VCORP's land, and that he had made statements in the affidavit which he had sworn in support of the application for the injunction, knowing that those statements were false. Those statements included statements that the Trustees had an easement over VCORP's land, and that VCORP had not been entitled to develop the land. Properly analysed, this was a claim in tort for deceit.

14. The counterclaim raised two other causes of action. First, VCORP claimed that the Trustees had "encroached" onto its land, and had unlawfully erected on it water chambers and a shed over them and were unlawfully discharging storm and waste water onto VCORP's land. This was a claim in tort for trespass to land. Secondly, VCORP claimed that Mr Khan had (a) persuaded the police to arrest Mr Dayal, and to detain him at Labasa Police Station for several hours, and (b) threatened VCORP's directors and employees with the result that VCORP's employees refused to work on the land. This was a claim in tort for intimidation and false arrest.

15. The relief sought by VCORP on its counterclaim was an injunction requiring the Trustees to cause the structures to be removed, and an injunction restraining them from (a) trespassing on VCORP's land, (b) discharging any storm or waste water onto VCORP's land, and (c) interfering with VCORP's development of the land. It also claimed damages: general damages, special damages, and what was described as "exemplary, punitive and aggravated damages". Punitive and aggravated damages are other terms for exemplary damages. From now on, I shall refer to VCORP's claim for such damages as exemplary damages.

16. *The second action*. Another set of proceedings were issued a few months later (Civil Action No HBC 22 of 2012) ("the second action"). It was issued by the play centre and the Vanualevu Muslim League ("the League"). These proceedings were not issued by the solicitors who were acting for the Trustees and Mr Khan in the first action, and it looks as if they may have been prepared in something of a hurry. The League was said in the Statement of Claim to have been one of the "owners" of Crown lease no 17768, whereas in the first action it had been correctly stated that it was the Trustees of the League who had been granted the lease. Moreover, the

play centre was said in the Statement of Claim to have been one of the "owners" of Crown lease no 6068, whereas even a casual glance at the lease shows that only the Council were the lessees.

17. The second action named the same defendants as had been named as defendants in the first action, save that VCORP was not named as a defendant. In its place were Hotel Northpole Ltd and another sister company of VCORP. The two actions were consolidated, but it is unnecessary for me to say anything more about the second action as (apart from some references to the play centre) it does not feature anywhere in Wati J's judgment, and no-one has suggested that she should have dealt with it. It was either discontinued, or the parties agreed that there was no need for the Court to consider it, or it was simply overlooked. Whatever happened, I say no more about it.

The judgment of Wati J

18. In a careful and lucid judgment handed down on 11 May 2017, Wati J dismissed the Trustees' claim. She rejected the contention that the surrender by the Council of Crown lease no 6068 had required the Ministry's approval: there had been no Crown lease to be surrendered as the lease had lapsed on its expiry without having been renewed.[18] She found that the Ministry had approved the transfer of lots 1 and 2 on Plan M2605 to the Board.[19] She found that no drainage easement had been created over VCORP's land in favour of the Trustees' land[20]: no such easement had ever been granted, and to the extent that the Trustees were really saying that there was to be a drainage reserve, the approval of such a reserve by the Ministry had been withdrawn before the Director of Town and Country Planning could have approved it. Indeed, as I read her judgment, she found that there had never been a drain over VCORP's land. Such a drain as she had seen when she visited the site on a view had, in her opinion, been freshly dug. What there was on VCORP's land was not a drain, but a waterway which had been created naturally as a result of the discharge of storm and waste water from the building on the Trustees' land and the disposal of rubbish.[21]

19. Wati J then addressed VCORP's counterclaim. She found that the injunction had been obtained fraudulently by Mr Khan, who had deposed in his affidavit in support of the *ex parte* application for the injunction that the Trustees had a drainage easement over VCORP's land which he knew

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[18] Para 88 of the judgment.
[19] Paras 93-95 of the judgment.
[20] Para 54 of the judgment.
[21] Paras 67 and 68 of the judgment.

to be false, and by exhibiting to the affidavit a copy of Plan M1644 which had been forged to show that the Trustees' land had the benefit of a drainage easement over VCORP's land. She found that the Trustees had trespassed onto VCORP's land interfering with some of the work on the development of the site. She rejected VCORP's counterclaim for damages for intimidation and false arrest. As damages for the causes of action which she found established, she ordered the Trustees and Mr Khan to pay VCORP $50,000 as general damages and $50,000 as exemplary damages, but dismissed VCORP's claim for special damages. She ordered the Trustees and Mr Khan to remove the structures which had been erected on VCORP's land. She declared that VCORP was at liberty to proceed with the development of the land. She restrained the Trustees and Mr Khan from interfering with the development of the land and from discharging storm or waste water onto the land. She noted that the re-zoning of the land had been subject to a condition requiring VCORP to form a drainage easement along the boundaries of the land, and she required VCORP to comply with that condition. Finally, she ordered that until VCORP was able to comply with that condition, the Trustees and Mr Khan were only to discharge storm or waste water in a common drain which had been provided by the Council.

The appeals

20. The Trustees and Mr Khan appealed against Wati J's judgment to the Court of Appeal (Civil Appeal No ABU 0061 of 2017). For its part, VCORP cross-appealed against some aspects of her judgment. The Court handed down its judgment on 29 November 2019. The leading judgment on the appeal was given by Lecamwasam JA. The other two judges – Basnayake and Dayaratne JJA – agreed with his judgment. VCORP's cross-appeal was dismissed, but the Trustees' and Mr Khan's appeal was allowed, albeit to a limited extent. On that appeal, the Court of Appeal set aside two findings of fact which Wati J had made: her finding that the document exhibited to Mr Khan's affidavit in support of the *ex parte* application for the injunction had been forged, and her finding that the grant of the injunction had hindered the development of the site both in the period during which the injunction was in place and thereafter. In part as a consequence of these findings, the Court of Appeal reduced VCORP's general damages to $20,000 and VCORP's exemplary damages to $30,000.

The applications for leave to appeal to the Supreme Court

21. The Trustees and Mr Khan applied for leave to appeal to the Supreme Court by a petition filed on 11 December 2019 (Civil Petition No CBV 0022 of 2019). VCORP also applied for leave

to appeal to the Supreme Court by a petition filed on 11 March 2021 (Civil Petition No CBV 0011 of 2020). That would have been well out of time, but the Court allowed VCORP's application for its time for filing its petition to be extended, as the Trustees and Mr Khan had consented to that so as to enable the Court to address the real controversy between the parties. I propose to address first the Trustees' and Mr Khan's application for leave to appeal. Five grounds of appeal were originally advanced in the petition (grounds (a)-(e)), but a sixth was raised by a proposed amendment to the petition. That new ground alleged bias on the part of Wati J, and I propose to address it first.

The Trustees' and Mr Khan's petition

22. *Bias*. Wati J took a dim view of Mr Khan. She expressed her view about him in colourful language. She said that his main aim had been to stop the development of the land at all costs, and that he had decided to use his concerns about the effect of the development on drainage from his land to prevent the development going ahead. Indeed, she went further. She characterised Mr Khan's use of the drain on VCORP's land to discharge storm and waste water into the river as illegal. She described what she found to be his attempt to mislead the court as "outrageous". She called Mr Khan a "tycoon" and described him as "financially powerful". She said that he was maliciously trying to stifle legitimate competition from Mr Dayal who she described as a "young businessman".[22]

23. It is important to understand the context in which Wati J made these remarks. She was addressing VCORP's counterclaim for "exemplary, punitive and aggravated damages". In other words, she was explaining why she thought that this was a case for exemplary damages – why, in other words, this was a case for punishment.

24. One of the Trustees' and Mr Khan's grounds of appeal was that exemplary damages should not have been awarded at all. One of VCORP's grounds of cross-appeal was that the award of $50,000 as exemplary damages was insufficient. As I have said, the Court of Appeal took a view which was different from the claims of all parties, and reduced the exemplary damages, but only to $30,000. However, in doing so, Lecamwasam JA said at para 21 of his judgment, after quoting paras 113 and 114 of Wati J's judgment:

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[22] Paras 106-114 of the judgment.

> *"The above paragraphs suggest that the learned Judge was guided by her personal knowledge of the locale rather than by the evidence before court. The fact that no evidence was led to this effect was pointed out by the Counsel at the time of argument before this court as well. Therefore I find that her personal biases have propelled her to don the role of a witness in order to impose heavy damages against the [Trustees and Mr Khan]. A Judge should not be motivated by extraneous factors such as wealth of a person unless in the context of a tax or revenue application."*

These observations were made in the context of determining what the proper sum to be awarded to VCORP as exemplary damages should be. They resulted in the Trustees and Mr Khan now saying that they amounted to a finding of bias on the part of Wati J, whatever the proper test of bias may be. They argue that this bias infected her judgment on liability as well as on damages, and they contend that the whole of her judgment should be set aside for that reason.

25. I disagree. Wati J was required to form a view about the honesty of Mr Khan. That was inevitable in the light of the allegation of fraud on his part. Expressing a clear view of him was unavoidable. The fact that she did so in strong terms does not begin to mean that she was biased against him, whatever test of bias is adopted. As it is, the test of bias in Fiji was explained by the Supreme Court in *Chief Registrar v Khan* [2016] FJSC 14[23]. In short, the question is whether a fair-minded and informed observer would conclude that there was a real possibility that the judge was biased. In the context of this case, had Wati J spoken about Mr Khan in such outspoken terms as to throw doubt on her ability to approach the issues which the case raised with an open mind? In my opinion, the answer which the fair-minded and informed observer would give to that question would be No. Unquestionably, she used strong language. She did so to get across what she truly thought about Mr Khan. But to go on to say that the language she used made her ability to address the issues which the case raised questionable is, in my opinion, a leap which no fair-minded and informed observer could reasonably make.

26. I should add that I disagree with Lecamwasam JA's view that there was something inappropriate about Wati J bringing "her personal knowledge of the locale" to the case. As Lokur J pointed out in the course of argument, she had had a view of the site, and to the extent that this view informed her judgment, she was entitled to take what she saw into account. I

[23] The judgment of Keith J at paras 39-42.

also disagree with Lecamwasam JA's statement about the absence of any evidence about the kind of man Mr Khan was. The evidence was what Wati J found him to have done, from which she inferred the kind of man she was. With great respect, I do not see how any of that could be evidence of bias on her part.

27. *Ground (a): Exemplary damages*. In para 102 of her judgment, Wati J said that Mr Khan had exhibited a copy of Plan M1644 to his affidavit in support of his *ex parte* application for an injunction. It can be found at page 12 of the smaller of the two Supplementary Records of the High Court as exhibit "BK1" to the affidavit of Mr Khan sworn on 9 September 2011. Wati J added that this document was marked in such a way as to show that the Trustees' land had the benefit of an easement over VCORP's land.[24] Those markings consisted of the word "easement" being added in pencil and the direction of the easement being drawn. She said that this document was not "a proper and valid document", by which she meant that it was not in the form in which it had been when originally created. She found that the markings on the document referring to the easement had been forged, by which she meant that the copy of the plan had been falsified to show an existing easement when no such easement existed. As I have said, the Court of Appeal set aside the finding of forgery. Ground (a) is that, having set aside that finding, there was no basis for the Court of Appeal to have awarded any exemplary damages at all.

28. I disagree. The Court of Appeal got the wrong end of the stick. It thought that Wati J's finding of forgery related, not to the document on page 12 of the shorter of the two Supplementary Records of the High Court, but to the document which appears at page 157 of the longer of the two Supplementary Records of the High Court. That document was not the copy of Plan M1644 on which the "easement" had been added. It was the plan for the proposed drainage reserve which the Trustees were asking the Ministry to approve. The Court of Appeal rightly found that this document had not been represented by the Trustees and Mr Khan as an approved plan, but that was not what had been suggested. The Court of Appeal unfortunately misunderstood to which document Wati J's finding related. The basis on which it is claimed that no award for exemplary damages should have been made falls away.

29. *Ground (b): The general damages*. The general damages which Wati J awarded to VCORP on its counterclaim were damages for trespass. That trespass consisted of the erection of water

[24] Para 102 of the judgment.

chambers and a shed over them on VCORP's land, and the discharge of storm and waste water onto it. The Trustees' and Mr Khan's ground of appeal is that the evidence had been that the shed had been there since 1993, and that since then storm and waste water had been discharged into the river across VCORP's land. The argument is that in those circumstances VCORP should have given the Trustees notice that it required the shed to be removed and the discharge of the storm and waste water onto its land to be discontinued. If VCORP had done that, no loss would have been incurred by them as the trespass would have been abated.

30. This does not appear to have been an argument advanced to Wati J. It certainly was not a ground of appeal to the Court of Appeal. That is not surprising. It assumes that if VCORP had required the Trustees to remove the water chambers and the shed and discontinue discharging storm and waste water onto its land, the Trustees would have agreed to do so. There was no evidence that they would have done that. Indeed, looking at Wati J's findings as a whole, it is overwhelmingly likely that she would have found that they would not have agreed to do so.

31. _Ground (c): State foreshore land._ Section 21(1) of the State Lands Act 1945 provides, so far as is material:

> *"No lease of any State foreshore land ... shall be made without the express approval of the Minister [of Lands and Mineral Resources] and such approval shall not be granted unless the Minister declares that such lease does not create substantial infringement of public rights."*

The Trustees and Mr Khan argued before Wati J that VCORP's land was State foreshore land, that it could therefore not have been leased to VCORP without the express approval of the Minister, and that such approval had not been obtained. The consequence of that, so the Trustees and Mr Khan argued, was that the land should revert to the State, and that would enable the Trustees to ask the Minister to "process" their claim for a drainage easement over the land.

32. This was an entirely new point. It had not been pleaded or identified as one of the issues in the case at the pre-trial conference. Wati J concluded that it was not open to the Trustees and Mr Khan to rely on this new point, but in case it was later held that she had been wrong about that, she considered the point on its merits. She rejected the argument for three reasons. First, the land, though originally State land, had become iTaukei land by the time it was leased to

VCORP. Section 21 did not therefore apply to it, as it only applied to State land. Secondly, Wati J thought that the Trustees and Mr Khan did not have the *locus standi*, ie a sufficient interest in the land, for them to invoke section 21. Thirdly, even if section 21 applied to VCORP's lease, and the Trustees and Mr Khan had been entitled to invoke it, the public consultation process and the public hearing on the question whether the land should be re-zoned addressed the very question which the Minister would have had to address under section 21. The Court of Appeal agreed with all of that.

33. I agree with Wati J that this point should have been pleaded, and that it should certainly have been highlighted as an issue in the pre-trial conference. But as far as I can tell, the determination of the issue which the Trustees' reliance on section 21 raised would not have required any further evidence to have been given, subject to one point to which I shall come in a moment. Provided that VCORP's legal team had been given such time as they needed to consider the point once it had been raised, I do not see how they could have been prejudiced by this point having been sprung on them. It would have been preferable for the Trustees to have applied for leave to amend their Statement of Claim at that stage to plead their reliance on section 21, but the fact that they did not do so did not in the event prevent the court from considering the issue on its merits.

34. Nor am I persuaded that Wati J was right to conclude that the Trustees were prevented from raising this issue on the basis that they had insufficient standing to raise it. The need to have sufficient standing is, of course, required to bring an application for judicial review, but not for an action of this kind. In any event, if sufficient standing was required for the Trustees to bring this action, their interest in preserving a route by which storm and waste water could be drained from their land over VCORP's land gave them a sufficient interest to seek a declaration that the grant of the lease to VCORP contravened section 21, and rendered the lease unlawful.

35. Although the route by which lot 1 became iTaukei land was initially unclear, the lack of clarity was eliminated when Mr Sen drew our attention to the previous application for judicial review. The fact that the whole of VCORP's land had become iTaukei land by the time the Board leased the land to VCORP under what was expressly referred to as an iTaukei lease is undeniable. It is equally undeniable that iTaukei land is not State land: whereas State land is governed by the State Lands Act 1945, iTaukei land is governed by the iTaukei Lands Act 1905. Wati J was therefore right to conclude that section 21 of the State Lands Act did not

apply to VCORP's land once it had become iTaukei land. I have looked at the iTaukei Lands Act to see if there is any provision in it equivalent to section 21 of the State Lands Act. There is not. It follows that VCORP's lease was not rendered unlawful by the fact that it had not been expressly approved by the Minister. In the circumstances, it is unnecessary for me to consider the final reason Wati J gave for rejecting the argument based on section 21 – namely that the process by which the land was re-zoned addressed the very question which the Minister would have had to address under section 21 had it applied to VCORP's lease. To do that, it would have been necessary for the court to be provided with the documents relating to the re-zoning process to see precisely what issues were raised and considered in that process.

36. I should add one thing to all this. The Trustees' argument assumes that VCORP's land was foreshore land. What constitutes "foreshore land" is not defined in the State Lands Act, and we therefore have to go to the common law to find out what foreshore land is. Under the common law, the foreshore is "the seashore up to the point of high water of medium tides, between spring and neap tides": *Stroud's Judicial Dictionary*, 6th ed, p 980. It is a matter of complete conjecture whether VCORP's land comes within that definition, but looking at a map of the area, my guess is that it would not. However, it is not possible to reach a definitive conclusion on the topic without evidence, and save for one thing, there was no evidence on this topic before the judge. My one reservation relates to a letter dated 1 September 2011 from the Northern Divisional Surveyor to Mr Khan in which he refers to VCORP's land as foreshore land.[25] Plainly, he was under the impression that the land was foreshore land, but we cannot rely on that as we do not know on what he based his view, or whether his expertise was such as to render his opinion expert evidence on which the court could rely. In the absence of any evidence that this was foreshore land, the relevance of section 21 falls away.

37. *Ground (d): The use of the common drain*. Wati J referred to evidence from one of the Council's employees that storm and waste water from the building on the Trustees' land could have been discharged into a common drain which went past a building known as Savila House. This drain was only 30 metres from the Trustees' land, and the Trustees could have laid pipes from the building on their land connecting it with this drain.[26] This ground of appeal criticizes Wati J's reference to that evidence. It is contended that on the evidence Wati J should have held that it had not been possible to divert storm and waste water to that drain.

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[25] Page 213 of vol 1 of the Record of the High Court.
[26] Para 64 of the judgment.

38. This ground of appeal had been advanced to the Court of Appeal, together with the contention that the drain was more than 30 metres from the building on the Trustees' land. The Court of Appeal referred to Wati J's finding that the re-zoning of the land had been subject to a condition requiring VCORP to form a drainage easement along the boundaries of the land. The Court of Appeal took the view that Wati J's reference to this alternative mechanism for draining water from the Trustees' land showed that she had tried to make an order "acceptable" to all parties. On that basis, this ground of appeal failed.

39. I do not think that this answers the point. The issue which the ground of appeal raises is whether Wati J made a finding of fact about the feasibility of a particular option which it was not open to her to make. The fact that there was another option which was feasible is beside the point. My view about this ground of appeal is that Wati J's reference to this evidence did not in the event affect any of the orders she made. She was simply recording her narrative of events. Whether the evidence was right or wrong did not affect the outcome of the case.

40. *Ground (e): The service lane*. The Trustees' and Mr Khan's petition asserted that there was a service lane behind the building on their land which had been built on its boundary with the Council's consent. This ground of appeal is that the Court of Appeal erred by failing to find that the Council should have ensured that this service lane remained in place. I have not understood at all what the service lane, if there was one, had to do with the case. There was, as far as I can tell, no evidence about it, and no reference to it was made in Wati J's judgment. Indeed, it did not form the basis of any ground of appeal to the Court of Appeal. When these concerns were put to Mr Filipe for the Trustees and Mr Khan in the course of argument, he said that this ground of appeal would not be pursued. I say no more about it.

VCORP's petition

41. VCORP's petition seeks to resurrect the two awards of damages made by Wati J before they were reduced by the Court of Appeal. I deal with each award separately.

42. *Exemplary damages*. The $50,000 which Wati J awarded VCORP as exemplary damages was based on her view of Mr Khan's conduct in the litigation – particularly his successful attempt to mislead the court into granting an injunction which had the effect of halting the development for the time being by exhibiting to his affidavit a plan which had been falsified to suggest that there was a drainage easement over VCORP's land. Indeed, she found that it

was not only the court which Mr Khan had tried to mislead. She found that he had also misled the Ministry when, on learning that VCORP's land was no longer held under the Crown lease, he had requested the Ministry to grant the Trustees a lease of part of the land for a number of reasons, one of which was that it had an easement over the land.[27] In her view, Mr Khan had been determined to stop VCORP's development of the land, and was prepared to do whatever it took to achieve that end. The Court of Appeal reduced the award to $30,000 to reflect, as I said in para 24 above, their view that the judge had been motivated by "extraneous factors".

43. By reducing the award to $30,000 rather than setting the award aside in its entirety, the Court of Appeal must have concluded that there had nevertheless been something in Mr Khan's conduct which called for censure. It did not state what that was, but the important point is that it thought that exemplary damages were still appropriate despite the judge's supposed errors in taking "extraneous factors" into account, and in concluding that Mr Khan had misled the court by falsifying the copy of Plan M1644. For the reasons I have given, I do not think that the Court of Appeal was right to treat Wati J as having erred in these respects, and it follows that the basis on which the Court of Appeal reduced the award of damages for exemplary damages cannot stand. I would restore the award of $50,000 for exemplary damages. Mr Sen confirmed that VCORP would not be arguing that the award for exemplary damages should have been higher than that.

44. *General damages.* Although general damages were sought by VCORP under its causes of action for deceit, for trespass and for intimidation and wrongful arrest, Wati J awarded it damages for trespass and intimidation only. Although the Trustees had only been trespassing on a part of VCORP's land, that had resulted in VCORP not being able to use other parts of its land. Some of the development work could be done like land filling, but other things could not. For example, the work on the river bank could not. The consequence of the intimidation of VCORP's workforce was that the construction team were reluctant to come to work with the result that the development was delayed, and the grass could not be cut because the members of the workforce who would otherwise have done that were too scared to do so as a result of the harassment from Mr Khan.

45. Wati J arrived at her sum of $50,000 for general damages in two ways. First, VCORP had to pay the Council $330 a month to cut the grass for it. That lasted for six years, and the total

[27] See Mr Khan's letter to the Department of Lands and Mineral Resources dated 7 September 2011 at pages 217 and 219 of vol 1 of the Record of the High Court.

sum they had to pay the Council for that therefore came to $23,760. Secondly, for the six years during which the development could not be completed, VCORP still had to pay rent to the Board totalling $15,000 and rates to the Council totalling $12,000. These three sums came to $50,760, which Wati J rounded down to $50,000. At first blush, Wati J's methodology of calculating part of the loss by the sums VCORP had to pay for rent and rates appears unsound: VCORP would have had to pay for rent and rates even without the trespass and the intimidation. However, Wati J justified her approach on the basis that but for the trespass and the intimidation, VCORP would have started to generate income from the development, and it would have used that income to pay the rent and rates.

46. In VCORP's cross-appeal to the Court of Appeal, it argued two things. First, VCORP contended that Wati J should have awarded it general damages under its other causes of action. The Court of Appeal disagreed but it did not say why. I did not understand VCORP to be advancing that contention in the Supreme Court. Secondly, VCORP argued that the damages which Wati J awarded for trespass were too low. The Court of Appeal disagreed. Again, Mr Sen confirmed that VCORP would not be arguing that VCORP's general damages should have been higher than $50,000.

47. As I have said, the Court of Appeal thought that the award for general damages for trespass was too high. It reduced the award to $20,000. It said that it did so "for the same reasons" as it reduced the award for exemplary damages to $30,000. This approach was flawed. General damages are awarded to compensate a party for its loss as a result of a violation of or interference with its rights. This reason which the Court of Appeal gave for reducing the award for general damages had nothing to do with that at all. It treated the award of general damages as if it had been exemplary damages which could be reduced if the trial judge has ascribed too much blame to a party who nevertheless deserved some censure. That was completely irrelevant to the claim for general damages.

48. There is one other point. Wati J recorded in her judgment[28] that Mr Dayal had accepted that "before the injunction was obtained, and even after it was obtained, VCORP continued the development work on the land". If the development had not been delayed, what was the basis for awarding damages for the six years during which the development could not be completed? The answer Wati J gave was that even after the injunction had been discharged on 2 April

[28] Para 125 of the judgment.

2013, VCORP could not get the building plans approved while the current proceedings were pending. Rather than challenging the stance being taken by the planning authorities, VCORP decided to await the outcome of the current proceedings. Wati J regarded that stance as "justified".[29] There was no challenge by the Trustees and Mr Khan to that finding.

49. One of the orders which the Court of Appeal made was that VCORP's counterclaim be dismissed. If that was a reference to its counterclaim in the action, the order was wrong. It had succeeded on its counterclaim for exemplary and general damages, even though the Court of Appeal had reduced those damages. So by saying that the counterclaim be dismissed, the Court must have meant that VCORP's cross-appeal was being dismissed.

Conclusion

50. For these reasons, I would refuse the Trustees' and Mr Khan's application for leave to appeal. As for VCORP's application for leave to appeal, I would give VCORP leave to appeal on the basis that its application raised a far-reaching question of law, namely whether a litigant can be denied general damages for proved tortious conduct on the same basis as a litigant can be denied exemplary damages. In accordance with the Supreme Court's usual practice, I would treat the hearing of VCORP's application for leave to appeal as the hearing of the appeal. I would allow the appeal, I would set aside the orders of the Court of Appeal dismissing VCORP's cross-appeal and reducing its exemplary and general damages, and I would restore the judgment of Wati J that the Trustees should pay VCORP exemplary damages of $50,000 and general damages of $50,000.

51. Finally, there is the question of costs. The Court of Appeal ordered all parties to bear their own costs. It did not say why. In particular, it did not say why it was departing from the usual order that the losing party should pay the winning party's costs. In view of this judgment, I would set aside the Court of Appeal's order for costs, and I would order the Trustees and Mr Khan to pay VCORP's costs both in the Court of Appeal and in the Supreme Court. I would summarily assess those costs at $7,500 for each of the appeals.

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29 See paras 126 and 127 of the judgment.

Lokur J:

52. I have read the draft judgment prepared by my learned brother Justice Keith and agree with the reasons and conclusions arrived at by him.

Orders:

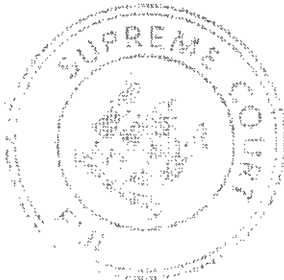
(1) Civil Petition No CBV 0022 of 2019:

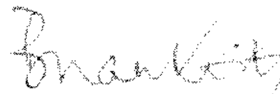
(i) Application for leave to appeal refused.
(ii) The Trustees and Mr Khan must pay to VCORP its legal costs of Civil Appeal No ABU 0061 of 2017 and Civil Petition No CBV 0022 of 2019 summarily assessed at $7,500 in all.

(2) Civil Petition No CBV 0011 of 2020:

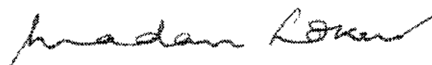
(i) Application for leave to appeal granted.
(ii) Appeal allowed.
(iii) Orders of the Court of Appeal dismissing VCORP's cross-appeal and reducing VCORP's exemplary and general damages set aside.
(iv) Orders of Wati J that the Trustees pay to VCORP exemplary damages of $50,000 and general damages of $50,000 restored.
(v) The Trustees and Mr Khan must pay to VCORP its legal costs of its cross-appeal in Civil Appeal No ABU 0061 of 2017 and Civil Petition No CBV 0011 of 2020 summarily assessed at $7,500 in all.

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court





The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court



The Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court