IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 55 OF 1991
(High Court Civil Action No. 586 of 1986)

BETWEEN:

ABHAY KUMAR SHANKAR
ARUN LATA — APPELLANTS

-and-

HOUSING AUTHORITY
LAUTOKA RURAL LOCAL AUTHORITY — RESPONDENTS

Mr. A. K. Narayan for the Appellants
Mr. Anu Patel for the 1st Respondent
Mr. Moses Gago for the 2nd Respondent

Date of Hearing : 23rd August, 1993
Date of Delivery of Judgment : 26th November, 1993

JUDGMENT OF THE COURT

On 19th September 1986 the appellants commenced an action for damages based on negligence against the Housing Authority and the Lautoka Rural Local Authority. The appellants had become the lessees from the Housing Authority of certain land, namely lot 17 in DP 5558, one of the lots in a subdivision undertaken by it. They built a house on the lot and obtained prior approval from the appropriate authority, the Rural Authority, to do so. They employed Messrs Maheed Razaak & Associates, who call themselves "Latest Designer of Modern Homes...." to add a second story to it, and again obtained approval. However, as the building work went upwards, it was noticed that it came perilously close to some high tension power lines carrying 33000 volts, and work

stopped. The power lines ran along a 30 links reserve or easement across the plaintiff's land. Their house had been built wholly or partly on the reserve or easement and underneath the power lines. Being unable to rid themselves of the land, or rather the lease, they sued the two authorities, whom they alleged were responsible for this predicament.

The particulars of negligence alleged in respect of the Housing Authority were (i) that it had not informed the appellants of the existence of the reserve affecting this lot (ii) that it gave the plaintiffs a set of plans which did not show the reserve (iii) that it did not check or inquire whether the plans were correct (iv) that it knew or ought to have known that the plaintiffs' building was being built on a reserve and it failed to inform them (v) that it encouraged and assisted them to build on the reserve. The statement of claim did not allege that the Authority knew of the existence of the reserve or when it became aware of it, nor when or by what means it ought to have known of its existence. We suppose it is therefore understandable that the Authority did not deny that it knew or that it ought to have known about it. The evidence would seem to make it clear that it was aware of the reserve as early as 1981, perhaps 1980.

The negligence alleged on the part of the Rural Authority, which was the authority charged with the responsibility of giving approval to any developments on the land in question, was (i) that it was negligent in approving the building plans (ii) that

it knew or ought to have known that the proposed building was situated on a reserve, and hence ought not to have approved the plans (iii) that from its inspection of the construction of the building it knew or ought to have known that the building was on a reserve but failed to inform the appellants. The evidence was that someone from the Rural Authority visited the site on 4th September 1984 after the building work had commenced and when the building area had already been marked out (record p.64). The plaintiffs did not assert how or when the Rural Authority knew or ought to have known that there was a reserve or easement and that the building was sited on it, so we suppose that it, in its defence, did not deal with this either.

It can be noted that, naturally enough, the appellants did not deny that they knew of the presence of the power lines; the first appellant saw them on his initial inspection of the land. He says he thought they were ordinary power lines. Although they were not insulated, meaning that they comprised uncovered wire, he thought they would be insulated, presumably by the Housing Authority. His evidence was that he approached the Housing Authority to do this "so that I could put the roof", but apparently because of the high voltage they could not be insulated. It was not till he had found out at a later stage that the lines were high tension lines that he went to the Housing Authority to seek their insulation. This was in July 1985 (record p.67).

The Housing Authority in its defence claimed that the plaintiffs' problem arose wholly as a result of their own negligence (i) because a site plan which it claimed was supplied to the appellants, clearly showed the easement reserve, and (ii) building under the high tension lines.

The Judge dismissed the action of the appellants.

The following sequence of events may be helpful; the page references in the record and supplementary record, comprising 343 pages, plus 15 plans, are not always given; we believe that we have correctly made references. There are two record books; the second we refer to as sup. record.

The appellants made their first inquiry from the Housing Authority in July 1980. In December 1980 there was a survey of an area for subdivision, and a plan of subdivision showing the power line easement was lodged by the Housing Authority for registration on 18th March 1981. It can be noted that it was not registered until 15th March 1985 (last plan in sup. record).

Whether the July 1980 inquiry was treated by the Housing Authority as an application to it of some sort by the appellants we are not aware, but by letter dated 30th July 1981 it offered a sub-lease over lot 17 subject to conditions, and required the appellants to confirm the "purchase". The deposited plan number is written in ink in the otherwise completely typed letter; it is clear that this number was added later (sup record pp. 8, 194),

but, of course, the plan showing the easement had, by this time been lodged for registration. One of the conditions that would form part of the lease when executed was that the appellants be required to erect a dwelling house and complete it within two years of the commencement of the sub-lease, plans and specifications of which were to have the consent of the appropriate local authorities. The sub-lease was eventually executed on 25th April 1985 and was for a term of 92 years and 3 months commencing on 30th July 1981.

The first appellant was given a site plan by an officer of the Housing Authority, which he gave to Mr Razaak (sup. record p.186). It did not show any easement. It appears that plans for the erection of the house were approved by the Rural Authority. The evidence is that the original plans were approved by the Rural Authority on 20th March 1984, and building work commenced on 25th August 1984. The site was inspected by an officer of the Rural Authority on 4th September 1984. The Housing Authority had visited the side on 29th August 1984 and prepared a progress report. So both authorities were fully aware of what was going on. The Housing Authority commenced to make advances to enable the building to be erected. The appellants had been granted finance by the Housing Authority to "purchase" the land and erect the building. By 21st November 1984 an application for approval of proposed alterations and additions to the house, which related to an upper story, was made to the Rural Authority, and certification of approval of Mr Razaak's plans for such additions was dated 28th January 1985; they may have been approved on 16th

January - it does not matter. On 14th March 1985 the Housing Authority approved a loan to the appellants, and although it appears from the documents that the plan of such sub-division was not registered until 15th March 1985, the DP lot number appears on the documents.

On 25th April 1985 the sub-lease from the Housing Authority to the plaintiffs was executed, and on 28th April 1985 a mortgage of that lease to the Housing Authority was executed.

By July 1985 it was realised that there was a problem relating to the power lines, and work stopped. The roof, if constructed, would have come within about 4 or 5 feet of the power lines. The first appellant went to the Housing Authority; he wanted the lines to be insulated. He was told that nothing could be done; he was still not informed of any reserve. He was told to see the Fiji Electricity Authority. He did so. He was referred by it to the Housing Authority (sup. record p.236). So on 24th July 1985 he wrote to the Housing Authority as follows:-

> *"Dear Sir*
>
> *LOT 17 DP5558*
>
> *I wish to complain about FEA's main power line carrying 33000 volts crossing the above-mentioned Lot just overhead. As I have already started the second stage of my building and do estimate that once it reaches the roof height, not much clearance will be left. Definitely, this I reckon would be extremely dangerous.*
>
> *I did speak to the FEA's District Supervisor who referred me to you.*
>
> *I do hope you would take positive steps to curtail the oncoming problems."*

It is clear that he was aware of the DP lot number. On 8th or 18th August 1985 an officer within the Housing Authority asked its surveyor to confirm "if the building is being erected (? constructed) within the power reserve!" The first appellant did not receive any reply to his letter.

On 18th July 1985 the first appellant had made some kind of inquiry to the Rural Authority, probably seeking consent to occupy the ground floor; by letter dated 6th August 1985 he was given temporary permission and was required to complete the first floor "as per approved plan" and to obtain a "Certificate of inspection and permission to occupy once the entire work is completed ..." (sup record p.235). It will be remembered that Mr Razaak's plans for this story had been approved by the Rural Authority back in January 1985.

The first appellant wrote to the Electricity Authority on 12th February 1986. He received a reply dated 23th July 1986 (sic). The copy of the letter in evidence (sup. record p.240) can almost be deciphered to show that the Electricity Authority told him of the reserve or easement. He says that this was the first time he came to know of the registered easement.

The appellants commenced the proceedings on 19th September 1986.

The appellants' house has never been completed; the first floor is virtually a shell with no roof; the appellants complain of water penetration to the ground floor and other matters.

Whilst the proposed plans of subdivision prepared by or for the Housing Authority in 1978 show no easement, those that were submitted by it for registration in 1981 do. As mentioned earlier it appears they were registered in March 1985. There is no evidence that before August 1985 anyone ever consulted them. Of course the Housing Authority must be deemed to have had knowledge of the existence of the easement shown on its own plans at least from March 1981, probably December 1980. There does not seem to be any evidence that the Rural Authority was aware of the existence of the easement at any material time, or, if it was, when it became aware. The Subdivision of Land Act Cap 140, seems to require any person who wishes to subdivide land such as this to make an application for approval to the Director of Town and Country Planning; such an application must be accompanied by a proposed plan or diagram (ss. 4, 5). Section 5 requires various matters to be shown on the plan documents, and these do not include easements. However, the regulations made under that Act require various additional matters to be shown, which include (reg. 5(h)):-

> .....
>
> (h) the position of all existing or proposed easements correctly labelled;
>
> .....

The Act also requires a copy of the application and of the plan documents to be sent to the relevant local authority, here the Rural Authority (s.6).

There is no evidence before the Court to show that this requirement was observed, or, if it was, what the proposed plan showed. Indeed the evidence (record p.69) is that it was the scheme plan, i.e. the one prepared in 1978 and not showing the easement, that was submitted by the Housing Authority to the Director of Town and Country Planning for approval. If he forwarded any plan to the Rural Authority, it would have been that one. But then there is no evidence that the easement of the Electricity Authority for its power lines was then in existence or was proposed. As a result of all this there was no evidence of whether the Rural Authority knew (or ought to have known) of the easement later shown on the 1981 plan, or, as we earlier said, when it became aware.

In those circumstances we do not think it would be a proper inference for this Court to draw that the Rural Authority was, at any relevant time, aware of the existence of the easement. This is so even though the Rural Authority filed and gave no evidence. It is probably open for the Court to draw an inference that it was in possession of the original subdivision plan, but this, as we have said, did not show any easement.

The Public Health Act Cap 111, and the regulations made under it, deal with the actual erection of buildings, including

their height. An application for approval to erect a building has to be made to the local authority, plans submitted, approval obtained and so on. Part VIII - Buildings, of the Public Health Regulations deals with this. The Public Health (Building) Regulations also deal with the construction of buildings, including building height restrictions. However, neither the Act nor the regulations actually touch upon the problem here, so far as we have been able to ascertain, a factor relied upon by counsel for the Rural Authority (the local authority) to escape liability.

The Electricity Act Cap 180, under which the Electricity Authority is setup, deals, among other things, with heights of buildings. Regulation 27 of the regulations made under that Act provides:

> *"27-(1) The minimum conductor clearances from ground, buildings and structures required for the installation of overhead supply lines at any point on a span at a temperature of 122 F. in still air shall, except with the written consent of the Authority, be not less than the distances set out in the table below:-"*

The table gives figures for various situations both in relation to systems carrying up to a voltage of 660 volts, and then from 661 up to 11000 volts. As to roofs it provides 9ft and 15ft respectively. It proceeds:-

> *"For voltages over 11,000 there shall be such clearance as the Authority may require."*

It will be remembered that the lines running across the appellants' property and over their house are uninsulated and carry 33000 volts. The word "conductor" is not defined in the Act or the regulations, but "supply line" is; it is defined in s.2 of the Act as:-

> *""supply line" means a conductor or conductors or other means of conveying, transmitting or distributing energy, together with any casing, coating, covering, tube pipe, insulator or post enclosing, surrounding or supporting the same or any part thereof, or any building or apparatus connected therewith for the purpose of transforming, conveying, transmitting or distributing energy;"*

No point has been taken that the provision for minimum distances would not apply here. We think it can be assumed that a distance of not less than 15ft applies in this case. Reg. 33 has the heading:-

> *"Building alterations not to make overhead lines accessible"*

Sub-reg. (1) provides:-

> *"33(1) If, at any time after the erection of an overhead supply line belonging to the Authority or a licensed supplier, any person proposes to erect a new building or other structure, whether permanent or temporary, or to make any permanent or temporary addition or alteration to a building or structure, he shall, if the new building, structure, addition or alteration shall or may be liable to render the overhead supply line accessible to any person without the use of a ladder or other special appliance, give notice in writing of his intention to commence the work to the Authority or licensed supplier and shall not commence work on the building, structure, addition or alteration until the Authority or licensed supplier has certified in writing that the overhead supply line will not be or be*

liable to become so accessible either during or after the execution of the work.

..."

That provision would not, we believe, obviate the necessity of also obtaining local authority approval. Who might be responsible for giving the required notice in a case where the person who proposes to make the building alteration has no legal interest in the land, and the local authority has required the owner, here Housing Authority, to approve the work, like Jesting Pilate, we do not stay for an answer.

What appears to be of more direct relevance is the necessary implication to be drawn from the legislation that persons are not prohibited from building below high tension lines, whether carrying up to 15000 volts or more. There is nothing that we can discover in the legislation which might require the Electricity Authority to obtain any kind of easement that would enable it to run power lines across any property carrying whatsoever volts. Indeed, to what extent s.49 of the Land Transfer Act Cap 131, which deals, inter alia, with easements in gross, requires registration of any easement again we need not pause to consider. We believe it is sufficient for the purpose of this case that the Housing Authority notified this easement on the plan of subdivision submitted for registration.

What is the effect of all this.

First, it seems that the appellants' land was subject to an easement. We have not seen the certificate of title. We are content to assume that if, or when, one exists it shows or will show that the land is burdened by such an encumbrance.

Second, the easement is not in evidence. The Court is not aware of what, if any, restriction(s) it imposes.

Third, the mere presence of the power lines would not, of itself, prevent building on the lot, nor, indeed, where the appellants' house is sited. It would only effect the height to which any building may be erected. Reg. 27 of the Electricity Regulations gives no power to the Authority to prevent erection, except, we suppose, by requiring a clearance that makes building impossible from a practical point of view.

Fourth, there is nothing to suggest that the original plans for the house to which approval was given, or some other structure, would not fall outside any clearance required by the Authority, and hence be permitted to remain on site. There is an adjoining house of one story on land over which the power lines run (record p.67).

Fifth, the Rural Authority gave approval to both applications of the appellants. The Housing Authority was required to give its consent.

Sixth, the Housing Authority was aware of the existence of the power lines and of the existence of the easement. We infer that the Rural Authority was aware of the existence of the power lines. We infer that both Authorities were aware of this location vis a vis the plaintiffs proposed building. That must have emerged upon inspection and/or the Housing Authority's consent to the plans.

Now what is the effect of all this?

First, we deal with the building.

Leaving the appellants on one side for the moment, we have no hesitation in finding that the facts gave rise to a duty of care on the part of the Rural Authority, and that it was in breach of that duty. Forget any application of the maxim "ignorantia juris laud excusat" because the Rural Authority did not claim that it was unaware of the requirements of the Electricity Act and regulations. It must have been aware of the existence of the wires, obviously uninsulated, that they ran directly over the proposed building and alterations, that the plans showed that the roof of the building, when erected, would come within 4 to 5 feet of the wires; it made no attempt to require the appellants to ensure that this was in order, it did not warn them of any problem in this area, it did not inform itself whether this aspect was in order, complied with the law or anything else; it just gave approval; it gave approval to plans that involved a contravention of the law in relation to the

height of the proposed building. To us this establishes a lack of due care on its part.

It was submitted on behalf of the Rural Authority that it had no duty other than to ensure that the various aspects of the building complied with the necessary standards of construction.

We do not agree. The law, through the Electricity Act and the regulations made under it imposed restrictions on the erection of buildings under high tension lines. We do not think it sufficient for the local authority to say, in effect: "We were aware of the wires, we were aware that the building was going to be erected directly underneath. We were aware that the roof would come within 4 or 5 feet of them; whether that should be further investigated is of no concern to us. We'll approve the plans anyway." To approve the plans would be, to people in the position of the appellants, an invitation to break the law. We do not believe we need say more.

So far as any responsibility of the Housing Authority so far as concerns the building, we will deal with that later. The same with the appellants.

So far as concerns the easement, we have no hesitation in finding that the Housing Authority was negligent.

The submission on its behalf was basically "caveat emptor": this was in effect the way the Judge decided the case. May be

the appellants in law now have an interest in land burdened with an encumbrance; there has been no attempt in these proceedings to try and extricate them from the lease. But that is by no means the end of the matter. These people went to the Housing Authority and sought from it a piece of land to build a house. They were given a Housing Authority application form to fill in. There were taken by an officer of that Authority, or met him there, where he found their lot, or they chose it, with the assistance of a plan of subdivision which showed no easement. They commenced to build with the assistance of a plan given to them which showed no easement. The Housing Authority financed the purchase by them and advanced money to build the house. The purchase or sub-lease document they were required to sign was prepared by the Housing Authority on a Housing Authority form. The same applied to the mortgage document. A plan of the land they were acquiring was annexed either to the sub-lease document or to the mortgage (sup. record p.186). By the time these documents were executed the plan showing the easement had been registered by the Housing Authority for about a month. For some reason he was told he could not "take the deeds", which must mean the lease and mortgage documents (record p.68). The Housing Authority had prepared the plan showing the easement in 1980 or 1981.

It is our conclusion that the Housing Authority was at fault in not drawing the appellants' attention to the existence of the easement. The Judge seems to have taken the view that the appellants should have made independent inquiries about the title

and what they were going into, by failing to do so they were the authors of their own wrong, as it were. But they had committed themselves long before any title documents were prepared, with the full support of the Housing Authority. Why would they go and search any title before they signed anything except the original application. What would they search? Even if they knew the number of the DP, of which there is no evidence, would it have been available before it was registered? Here are two people seeking assistance from a government instrumentality to build a house, which gave them the opportunity to do so, assisted a choice provided finance, prepared the necessary documents - a guide, philosopher and friend as it were. The suggestion that these people should have sought independent legal advice at some stage which is not specified does not commend itself to us. In our opinion it was the duty of the Housing Authority to tell them what they were truly getting, and it did not do so. It is certainly liable in negligence.

In these circumstances we are also of the opinion that the Housing Authority must also bear some responsibility for damages, if any, that flowed from the appellants putting a building on the easement. The evidence discloses that if there was to be a house built on the lot of the kind the appellants wanted, it had to go on the easement. Indeed the evidence is that nothing but a shed could be erected without encroachment on the easement. So it seems to us that the failure to disclose the existence of the easement had a direct bearing on the erection of the building, and that if the appellants suffered loss through the building

aspect, this naturally and probably flows from the breach of duty to disclose the existence of the easement.

What about the appellants? Should they have made inquiries from the Housing Authority. Has their conduct in assuming that the wires, whatever they carried, could be insulated? Should they bear any of the responsibility for any loss that may have occurred?

The appellants were aware from the beginning that the lines now over the lot they chose. Certainly, at least by the time the Housing Authority provided them with a site plan for Mr Razaak they must have been aware that any house would be right under the uninsulated wires. They did nothing, neither they nor Mr Razaak. We believe that any reasonable purchaser, about to undertake construction would, either themselves or by this agent, the designer, ask the question: "What about those wires overhead? They run right across here and right up or down the subdivision. Is that of any significance? I think we should ask". Such an inquiry was never made at any stage, even when the second story was to go on. The only inquiry was about insulation at a later stage. Enquiry could have caused disclosure of the easement, it should have, and if it did not, that might be another story (not of the building), not perhaps giving other grounds for redress. But it was not made. We are of opinion that the failure to do this demonstrates a lack of due care by the appellants in their failure to take those steps that a prudent prospective purchaser and prospective builder could be expected to take.

So the facts disclose, in our opinion, negligence by the Rural Authority in relation to the building, negligence by the Housing Authority with respect to the encumbrance, with some consequential responsibility in relation to the building, and negligence by the appellants, at least in relation to the land.

As the result of our findings we believe that responsibility for any damages suffered by the appellants will fall upon the parties as follows: the appellants 20%, the Housing Authority 40% and the Rural Authority 40%. We are able to apportion the responsibility by reason of some consent orders that were made at the conclusion of the hearing before us.

So we turn to the matter of damages.

There is no evidence of the terms of the easement of the Electricity Authority, nor what, if anything, it might prohibit in the way of activity on the easement itself. From what we have said earlier there does not, by law, seem to be any restriction upon the erection of buildings except as to height. So if the evidence remains as it is, it would seem that the value of the land burdened with the easement would not be different from that without it except so far as the value might be affected by height restrictions. Evidence was given at the hearing that the land was in effect useless, had no value, but this was based on what appears to be a false premise, namely that nothing could be erected under the wires. If the matter is governed solely by the legal restriction we have mentioned, the value of the land has

never been ascertained, and any damages on this score unable to be ascertained.

So the matter will have to go back to the High Court for further evidence as to what the easement provides, and what effect, if any, it has on value. If the erection of a building is not prevented, then what can be erected, and what effect this might have, if any, on value. There may be other matters. Can the presently offending structure be approved if reduced in height, if that is possible, and at what cost? If that is not structurally possible, what is the cost of demolition? The cost of the building to its present state may be relevant. There may be other matters relevant to damages. It all depends, as we see it, on findings of fact as to what, if anything may, by law, be done on this land.

At the conclusion of the hearing before this Court we made certain orders that were not objected to, and which are embodied in the formal orders hereunder. We also noted an agreement between the parties as follows:

> Note that in the event that the Court sets aside the judgment of Sadal J and in the event that it makes a finding that the appellants were responsible for some portion of the damages suffered by reason of contributory negligence then the parties agree that it is open for the Court to make the necessary orders to apportion the damages according to the

degree of negligence that it finds to have existed between the appellants and the first and second respondents.

Perhaps any advice to the parties by this Court at this stage is otiose. But it must be quite apparent that some compromise, and not further litigation, would be in the best interests of all of them.

The formal orders will be:

Appeal allowed.

The orders made by Sadal J on 5th July 1991 and entered on 12th August 1991 are set aside and in lieu thereof we give judgment for the appellants. We remit the matter to the High Court for the assessment of damages payable to the appellants to be apportioned as to 40% payable by the first respondent and as to 40% payable by the second respondent.

On the application of the first respondent we amend the statement of defence of the first respondent so as to add in paragraph 11 thereof the words "or in part" after the word "wholly".

On the application of the second respondent we grant leave to the second respondent to amend its statement of defence so as to add a further paragraph 6 in the same terms as those contained in paragraph 11 of the statement of defence of the first respondent as amended.

Matter is remitted to the High Court for further hearing on the matter of the ascertainment of damages.

The orders for costs will be:

Order the respondents to pay the appellants' costs in the High Court up to the date of entry of this judgment. Thereafter each party is to pay its own costs in the High Court.

The respondents to pay 80% of the appellants' cost of the appeal.

.....
Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

.....
Sir Moti Tikaram
Resident Justice of Appeal

.....
Sir Edward Williams
Justice of Appeal