

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0043 OF 1998S  
(High Court Civil Action No. ABC 239 & 240 of 1992L)

BETWEEN:

MANUBHAI INDUSTRIES LIMITED  
ELISHA ENGINEERING COMPANY LIMITED

*Appellants*

AND:

LAUTOKA LAND DEVELOPMENT (FIJI) LIMITED  
THE ATTORNEY-GENERAL OF FIJI

*Respondents*

Coram:

Sheppard JA, Presiding Judge  
Tompkins JA  
Smellie JA

Hearing:

Monday, 19 November 2001, Suva

Counsel:

Mr A.K. Narayan for the Appellants  
Mr D. Sharma for the First Respondent  
Mr W. Calanchini for the Second Respondent

Date of Judgment: Friday, 31 May 2002

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FINAL JUDGMENT OF THE COURT

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The Court is grateful to counsel for the thoroughly researched further submissions filed. Both sets of submissions recapitulate the effect of our interim judgment and we see no need to traverse those issues again.

We have reached the conclusion that the plaintiff's one remaining cause of action in negligence against the second defendant fails.

Although the submissions filed traverse all the possibilities raised in the interim judgment, we are satisfied that a combination of the provisions of section 28 of the State Lands Act (Cap. 123) and section 3 of the State Proceedings Act (Cap.24) - not previously drawn to our attention - lead inevitably to the result recorded in the preceding paragraph.

This is so irrespective of whether the Anns approach as exemplified in the decision of the Supreme Court of Canada in Cooper v. Hobart (neutral citation; 2001 SCC 79 File No.27880 - Judgment 16/11/2001) or the wider approach espoused by the New Zealand Court of Appeal in Turton v. Kerslake and Partners 2000[3NZLR 406] is adopted.

We assume, (without deciding), that in this case a *prime facie* duty of care can be established on the basis that the Director of Lands could reasonably foresee that if he granted a development lease to an under capitalised developer then parties such as the plaintiffs would suffer loss if that developer lessee went into liquidation. It may also be that regular and effective inspections by the Director would have resulted in termination of the lease or some other remedial action. But the evidence does not establish that any failure in that regard was causative of the plaintiffs' loss.

Be all that as it may, however, more is required than reasonable foreseeability, as the cases clearly show, before liability can be sheeted home. Considerations of policy and the effect of applicable statutory provisions also require

careful consideration.

The terms of the State Lands Act make it clear beyond question that when the Director of Lands granted the lease of the state land to the second defendant he was exercising a statutory power which the Act vests in him alone. Without that statutory authority his action would have been illegal.

The provisions of section 28 of the Act are equally clear. The section has the heading "Indemnification of Director of Lands and Officers" and reads as follows:

***"28. Neither the Director of Lands nor any authorised Officer shall be liable to any action, suit or proceeding for or in any respect of any Act or matter bona fide done or omitted to be done in the exercise of powers conferred by this Act."***

The plaintiffs argued in their supplementary submissions that section 28 provides immunity for the Director and other officers only in their personal capacities but that "The words of s.28 do not provide that the department or office of the Director of Lands shall have any protection from suit".

That argument is untenable for the following reasons. The State Lands Act came into force on the 1st August 1946 preceding the State Proceedings Act which was enacted on 1 January 1952. It follows that the intention of the legislators in 1946 was to provide personal immunity from suit for the Director at a time when there was no statutory

right to sue the State for negligence of its servants. The Director clearly is a servant of the state since he holds all State lands "for or on behalf of the State." (S.4(1)).

The passing of the State Proceeding Act s.3(1)(c) opened the door to actions against the Crown now the State, for torts committed by its servants or agents. The section which is headed "Liability of the Crown in tort" reads in part:

"3-(1) Subject to the provisions of this Act, the [State] shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject -

(a) in respect of torts committed by its servants or agents....."

There is however, a proviso to the subsection the relevant portions of which read as follows:

"Provided that no proceedings shall lie ..... by virtue of paragraph (a) in respect of any act..... of a servant..... of the State unless the act would apart from the provisions of this Act have given rise to a cause of action in tort against that servant..... or his estate."

Provided then, that the Director could escape personal liability by virtue of s.28 of the Act, the plaintiffs' action against the Attorney- General as representing the State

must fail. Subsection (4) of section 3 of the State Proceeding Act reinforces that conclusion.

As is well established, however, a provision such as s.28 of the Act negating liability does not provide a blanket immunity. The Courts have distinguished between "ordinary" and "special" functions in such cases. A leading case is Board of Fire Commissioners of NSW v. Ardouin (1961) CLR 105 where the High Court of Australia held that a provision, s.46 of the Fire Brigades Act 1909-1956 (NSW) protecting the Board from liability "for any damages caused in the bona fide exercise" of its powers did not extend to negligence on the way to a fire resulting in a road accident in which the plaintiff Ardouin was injured. The ratio of that case has been followed consistently by the High Court. A recent example is Australian National Airways Commission v. Newman (1987) 162 CLR 466. There the statutory provision extended protection to "anything done or purporting to be done" under the Australian National Airways Act. The Court held it did not extend to running a staff canteen in the kitchen of which the plaintiff had slipped on a greasy floor suffering injury. Ardouin and Newman are examples of the "ordinary" functions category.

In Ardouin, however, the Court explained the other category of "special" functions. Dixon CJ said at page 109:

"When s.46 speaks of the bona fide powers, which of their nature will

involve interferences with person or property..... it means a plain exercise of statutory power to do what would otherwise be illegal acts."

Taylor J. thought s.46 specified only "extraordinary powers." Kitto J at p.117 said:

"In my opinion the meaning (of s.46) is that the immunity attaches in respect only of damage resulting from any act which, if it had been negligent, would have been the very thing, or an integral part of or step in the very thing which the provisions of the Act other than s.46..... gave power in the circumstances to do, as distinguished from an act which was merely incidental to, or done by the way in the course of the exercise of the power."

As we have already pointed out the granting of the lease was the "very thing" which the Act in s.5 authorised the Director, and no other, to do.

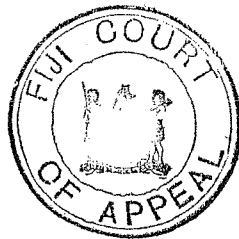
We are satisfied therefore that absent the State Proceedings Act, s.28 would have protected the Director from liability provided the granting of the development lease to the 1st Defendant was effected bona fide.

It follows that to overcome this statutory immunity in respect of the exercise of statutory powers the plaintiffs had to prove that the Director did not act bona fide when granting the lease to the second defendant.

Provisions such as section 28 can sometimes be surmounted by showing gross negligence or reckless disregard. There was no direct evidence to that effect and we are not prepared to draw inferences at this late stage of already protracted litigation.

As mentioned s.28 has to be read in conjunction with the proviso to subsection 3(1) of the State Proceedings Act. That provision operates to exempt the State from liability because its effect is to render the State Immune from suit when the negligence relied on is that of a servant or agent who is himself immune.

The Court has sympathy for the position the plaintiffs find themselves in and is mindful of the trial Judge's criticism of the Director of Lands in the matter. In the circumstances while the judgment and costs in respect of the first defendant as recorded in the interim judgment are confirmed, as between the plaintiffs and the second defendant each party will bear its own costs.



*J. J. Sheppard*

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Sheppard JA, Presiding Judge

*R. Tompkins*

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Tompkins JA

*Robert Smellie*

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Smellie JA

**Solicitors:**

Messrs. A K Narayan and Company, Ba for the Appellants  
Messrs. R Patel and Company, Suva for the 1st Respondent  
Office of the Attorney General Chambers, Suva for the Second Respondent

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