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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.HBC 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: Monday, 25 February 2002, Suva

INTERIM JUDGMENT OF THE COURT

Introduction

The appellants separate actions first filed in the High Court in April of 1992 were consolidated in October of 1993 and in February of 1995 the trial commenced in the Lautoka High Court. The hearing had to be adjourned from time to time and was finally concluded in July of 1996 when a timetable for filing written submissions was established. There were some administrative difficulties and submissions were filed late

so that the judgment was not delivered until June 1998. Thereafter these appeals were filed.

In the High Court the appellants succeeded on liability as against the first respondent Lautoka Land Development. It was held however, that there was insufficient evidence to award damages. The judgment also held that both appellants failed on a variety of causes of action against the Attorney-General who was sued as for the Director of Lands.

The factual and legal issues in the appeal are complex and will be discussed in detail to the extent required, in the balance of this judgment.

Factual background : undisputed facts

The Director of Lands (conveniently referred to hereafter as the second respondent) was the owner of certain land at Lautoka known as the Navutu Industrial Subdivision. Initially the second respondent intended itself to subdivide the land and lease parcels of it to individual tenants for industrial purposes. Subsequently, however, it was decided to put the subdivision to tender for private development on the basis that the developer could sell individual lots to prospective purchasers who would then become tenants of the second respondent on 99 year leases.

The first respondent was the successful tenderer and thereby secured the right to develop the project initially over a period of two years commencing on the 1st of November 1984.

On the 8th of April 1986, some seven months before the subdivision was due to be completed, the first respondent sold to the first appellant (Manubhai) lot 33

on approved scheme plan 771 for a total price of $70,000. 00 Then on the 28th of May 1986 the first respondent sold to the second appellant (Elisha) lots 35 and 36 on the same scheme plan for a total purchase price of $38,000.00. When the two sales were effected it was obvious that the development was not going to be complete by 1st of November 1986. Indeed on the 13th of August 1986 the second respondent issued a further development lease to Lautoka for a period of 3 years 2 months and 19 days which effectively stretched the original two year period for development to 5 years.

When the 5 year period was up, however, the development was still far from complete. The first respondent then allowed a further period of 8 years and 2 months expiring on the 1st February 1998. During this third extension the first defendant ran out of resources and on the 8th of May 1995 Lautoka was placed in receivership by the Fiji Development Bank. By this time the bank was owed $1.1m

Although the second respondent endorsed his consent on the memoranda of agreement for sale between the appellants and Lautoka on the 27th of January 1988 the second respondent refused to issue approval notices (the equivalent of agreements to lease) until the subdivision was completed.

In due course the bank decided to complete the subdivision subject to the two appellants and presumably others, agreeing to an increase in purchase price of their lots of 20%. The additional cost to the bank to complete was apparently in excess of $5m but ultimately on the 23rd of January 2001 the appellants received title to their lots and were then free to build upon them and commence to use them for commercial purposes.

The coup of 1987 affected progress on all developments including the one in question and is part of the explanation for the length of the third extension which the second respondent granted.

While the appellants could have commenced building on the lots they had purchased prior to the issue of leases, nonetheless they would not have had title for the same. Not surprisingly they could not raise finance for such building until the leases were issued.

The Legal framework of the transactions

All the land in the subdivision in question belongs to the State. When the approval notice of lease (agreement to lease) was issued by the second respondent to Lautoka with effect from 1st of November 1984 it contained an express provision reading "this is a protected lease under the provisions of the Crown Lands Act." Section 13 of the Crown Lands Act, cap 132 provides :

> *"Whenever in any lease under this Act there has been inserted the following clause :-*
>
> *This lease is a protected lease under the provisions of the Crown Lands Act (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sub-lease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*
>
> *Any sale, transfer, sub-lease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."*

As between Lautoka and the second respondent on the one hand and Lautoka and the appellants on the other, the legal framework within which the appellants' leases would ultimately issue may be summarised as follows. First Lautoka obtained an agreement to lease for the period approved for the development of the subdivision subject to any extensions that might be granted. Pursuant to that agreement Lautoka was permitted to sell lots from the approved scheme plan which sales, however, would be null and void without the written consent of the Director of Lands as envisaged by section 13 of the Crown Lands Act set out above. When the subdivision was completed, and the purchasers had agreed to purchase and had paid the purchase price, they were to be nominated by the second respondent for the issue of approval notices and ultimately Land Transfer Act leases. In a number of cases approval notices were issued long before completion but that did not occur in the case of the appellants.

The agreements entered into between Lautoka and each of the appellants were in a standard form. Having set out the parties the recitals recorded that Lautoka had obtained an approval notice or lease to develop stages 1, 2 and 3 of the Navutu Industrial Subdivision and was required to complete the subdivision pursuant to the scheme plan and the local body approvals given, but otherwise had authority to sell lots the purchasers of which would ultimately receive 99 year leases from the State.

The specific terms of each agreement can be summarised as follows : The appellant agreed to purchase and the developer (Lautoka) agreed to complete the development. Upon completion the developer would nominate the appellant to the second respondent for the issue of a lease. Additionally the developer within 14 days from the date of the agreement was to furnish the lessee with a letter from the Director of Lands confirming that the Director of Lands would issue a crown industrial lease to

the lessee of the appropriate lot or lots on the scheme plan. The purchase price was to be paid in the case of Manubhai by way of a deposit of $10,000.00 and the balance of $60,000.00 over a period of 24 months. That is by the 8th of April 1988.

In Elisha's case the purchase price of $38,000.00 was to be paid by a deposit of $3,000.00 and the balance of $35,000.00 over a period of 24 months. That is by the 28th of May 1988.

There was a schedule of conditions attached to each agreement. The first condition provided, inter alia, "the developer will at the expense of the developer in all things proceed without undue delay to take all necessary steps to construct all necessary roads, culverts, drains, sewerage lines, water mains and ancillary works (referred to as the "project works") and cause the necessary survey plan of the said Lot to be prepared and lodged with the Lands Department for approval ...."

Manubhai's Claim in the High Court

As to liability it was claimed that the provisions of the agreement of sale which had been entered into had not been complied with in that Lautoka had not completed the development. The letter which was to issue from the Director of Lands within 14 days was never forthcoming and the developer had not proceeded without undue delay. Nor had it taken all necessary steps to complete.

Manubhai claimed damages up to the date of trial on the basis that it had expected to be able to build in 1988 and profit from running its business from the land purchased. Its claim therefore was based upon the difference in the cost of building between 1988 and 1994 and loss of profits over the same period. The total claim was $1.59m

Elisha's Claim in the High Court

Elisha claimed on the same basis as to liability namely that the subdivision was never completed. The letter of approval from the Director of Lands never issued and the developer had not proceeded without undue delay nor had it taken all necessary steps to complete the subdivision.

Elisha also presented its damages claim on the basis of the additional costs of building as at 1994 plus loss of profits to 1994. In addition, extra cartage costs as a result of not being able to trade from the land purchased and additional running expenses on the same basis were claimed. The amount claimed was $0.82m.

The decision under appeal

The trial Judge held for the appellants against the first respondent Lautoka on the issue of liability on the basis of the breaches of contract set out above. That holding is not challenged.

The only remedy granted upon that finding of liability, however, was in effect specific performance.

Although his Lordship discussed the rule in *Hadley v. Baxendale* (1854) 9 Ex. 349 and the restatement of that rule in *Victoria Laundry v. Newman* [1949] 2KB 528 (CA) he nonetheless decided the issue of damages on the basis that the plaintiffs were required to show a difference in value between what they paid for land in 1986 and the value of the land when they became aware of the first respondent's breaches.

At page 114 of the record after setting out the claims of $1.59m and $0.82m referred to earlier his Lordship said:

> *"But as stated above the damages must be assessed as the difference between the price actually paid and the value of the land at the time of the breach. Since no date for completion appears in the respective agreements it would be open to the Plaintiffs to allege any completion date that entered their minds. The date of competition was left open i.e. for completion to be affected in a reasonable time. Although the Plaintiffs had established breaches of contract against the First Defendant they failed to adduce evidence as to the value of the lots at the time of the breach - it is not possible to say as to the time of the breach. Unless these lots begin changing hands in their undeveloped state it would be very difficult to obtain evidence as to enhancement, if any, in their value since 1986. Once the various plots are developed by the erection of buildings and the laying of gardens and so forth, the task of reconciling this developed value with an earlier undeveloped price would be difficult if not impossible. There is no evidence from the Plaintiffs as to the current market value of the lots sold."*

Turning now to the judge's conclusions regarding the appellant's claim against the second respondent. His Lordship observed first that the appellants claim against the second respondent was based on collateral contract; agency; legitimate expectation/estoppel; and breach of duty care and or negligence.

Each one of these propositions was addressed in the judgment. The collateral contract proposition was dismissed on the grounds that "the facts do not support that there was a collateral contract". In particular the judge pointed out that the appellants' dealings were all with the first respondent and accordingly there was no room for a separate collateral contract to arise between the appellants and the second respondent.

The second proposition was that the first respondent was the agent of the second respondent. By that means no doubt the appellants hoped to fix the second

respondent with the first respondent's defaults. But the judge held that on the evidence that proposition failed completely.

Thirdly the judge dealt with the doctrines of waiver and estoppel. Here he acknowledged that the appellants relied on the waiver by the second respondent of strict compliance with the development lease. His lordship held, however, that there was certainly no cause of action in waiver because there was no evidence of an agreement or a request by one party for forbearance by the other and no agreement to such a request. The estoppel argument was also dismissed on the grounds that there was no evidence that the appellants had altered their position to their detriment on the basis of any representation made by the second respondent.

The argument based upon legitimate expectation was summarily dismissed. The view expressed was that the only expectation the appellants could have had was that the second respondent would issue approval notices and subsequently leases when the subdivision was completed and title was deposited. As neither of those things had happened at the time of trial the legitimate expectation cause of action failed.

Finally the judge dealt with the allegation of breach of duty of care owed by the second respondent to the appellant. At page 110 of the record the judgment reads :

> ***"It has been submitted that the Second Defendant did not make proper investigation before granting Approval Notice to the First Defendant to develop the land in question and the First Defendant still has not developed the land that the Plaintiffs have suffered as a result."***

Reference was made to *Abhay Shankar and Another v. Housing Authority and Lautoka Rural Local Authority* FCA Civil Appeal No.55 of 1991 but the

judge distinguished that case from the circumstances confronting him. He said later on page 110 of the record :

> *"But in the instant case First Defendant was in breach of contractual agreement with the Plaintiffs. Although the Second Defendant was to see the First Defendant developed the land (sic) fulfill its obligations to the prospective purchasers it owed no duty of care in my view to the Plaintiffs."*

The broad issues on appeal

While the matter was put in various ways by counsel before us in our view there are two broad issues in this appeal.

First is the question of whether the appellants should have been awarded damages against the first respondent and if so in what amounts.

Secondly is the question of whether the appellants should have succeeded against the second respondent and if so on what causes of action and what amounts of damages should have been awarded.

Features common to both appellant's claims for damages against the first respondent

These may be enumerated as follows.

1. Both appellants signed up within a few months of the expiry of the first two year period. The evidence shows that the project was far from complete at that stage and the inference can be drawn that neither appellant expected the title to be available and to issue by 1st November 1986.

2. Both were affected by the 1987 coup. The evidence as to the coup's effect on economic activity was conflicting. Mr. Daniel Elisha who was President of the Fiji Chamber of Commerce at the time gave evidence that the effect was short lived. The Director of Lands on the other hand gave evidence to the effect that all land development stalled for 2 years until 1989. On the balance of probabilities the Director's view is the more reliable.

3. The second respondent gave his consent to both transactions when approximately 80% of the purchase price had been paid on 27th January 1988. Up until then the contracts between the appellants and the first Respondent were subject to Section 13 of the Crown Lands Act referred to earlier.

4. Both appellants intended to erect on the land they were purchasing from the first Respondent commercial premises to facilitate and enhance the profitability of their respective businesses.

5. Both appellants gave evidence that in the period between purchase and the issue of the leases when they would finally be able to borrow and build the cost of construction had risen. The period from the second respondent's consent pursuant to clause 13 of the Crown Lands Act to the issue of title (i.e. 27th January 1988 to 23rd January 2001) is a period of 13 years.

6. Neither appellant established that the first respondent was aware of any particular use that the land was to be put to or any special commercial opportunity which was dependant upon timely issue of the approval notice (agreement to lease) or titles. In that sense the second rule in *Hadley v. Baxendale* (supra) had no application. But it was reasonably foreseeable on the

part of the first respondent that delay in completion would result in loss, in particular in relation to the loss of use of capital paid up to purchase and increased costs in relation to the erection of premises from which business activities could be conducted.

7. It was further reasonably foreseeable that complete failure by the first respondent to bring the development to fruition, resulting in a creditor stepping in and completing would result in added costs to the appellants. The evidence admitted on affidavit in respect of events subsequent to the High Court hearing identifies those extra costs in each case.

During the hearing it was put to Mr. Narayan counsel for the appellants that the only reasonably foreseeable categories of loss were the three discussed above i.e. loss of use of capital, increased building costs and increased acquisition costs as a consequence of the first respondent's failure resulting in its creditors stepping in to complete. Counsel was not able to suggest any other basis for the assessment of damages. Mr. Sharma appearing for the first respondent on the instructions of the Receiver was not able to advance any argument to support the conclusion in the court below that despite a finding of liability no damages should be awarded to the appellants. Mr. Sharma also accepted that the assessment of damages should be based upon the above three categories.

There is a further feature common to both appellants which concerns timing. When reasonably could they have expected that the subdivision would be completed and approval notices and/or leases issued so that building could commence? How many years delay can it reasonably and fairly be said either the first or the second

respondents were responsible for? And what is the actual time span during which building was delayed and what evidence is there as to the building costs during that time span?

As to when the appellants could reasonably have expected the subdivision would be completed, it appears that when they purchased in April and May of 1986 almost 75% of the first two year period allowed to the first respondent to complete had elapsed. It would have been glaringly obvious that more than two years were required to complete. Had the 1987 coup not intervened, it might have been reasonable to expect that when a further three years were added the period to November 1989 would have been sufficient. The Director of Lands evidence was, however, that the 1987 coup caused a delay of perhaps two years. That was a completely unforeseen event for which neither of the parties were responsible and in our view that means that the November 1989 date pushes out to say mid-1991. Another indicator is it took the Fijian Development Bank from May 1995 to January 2001 to complete which also is a five year period.

Just as the coup was unforeseen, so was Hurricane "Kina" and of course the lost business opportunities which both appellants relied upon to increase their damages are not to be taken into account because there is no evidence that the respondents knew of them or should have foreseen them – See our earlier discussion of the second limb of *Hadley v Baxendale* (supra).

Damages against the first respondent : Manubhai Industries

On the basis of the matters discussed in the preceding section of this judgment, the only items for which damages can be recovered by Manubhai against the first respondent are the three earlier identified:

- Loss of use of capital
- Increased building cost
- Increased acquisition cost to aquire contracted lots

The loss of use of capital is to be calculated from 30 June 1991 which we have fixed as the reasonable time of completion and 23 January 2001, the actual completion date (a period of 9½ years). Counsel for both the appellants and the first respondent accepted that a reasonable return on capital invested in a commercial venture would be not less than 15% compounding. On that basis Manubhai stood out of the use of $70,000 for 9½ years and is entitled to $199,177 compensation for that loss calculated at 15% per annum compounding.

The evidence of Mr Daniel Elisha was that he had contracted to build Manubhai's industrial depot and had initially calculated it would cost between $700,000 and $800,000. Giving evidence in February 1995, he estimated the cost would have risen over the period say from the end of 1986/early 1987 to February 1995 by 25%. That is an average over the eight years of just over 3% per annum. Mr Patel for Manubhai gave no evidence of original or increased costs. In the circumstances the best we can do is allow as damages for increased building costs on say $750,000 over the period of 9½ years at 3% non-compounding a figure of $213,750.

Finally, there are the increased costs proved by affidavit received on the appeal when the Fiji Development Bank decided to complete but only on the basis that

all purchasers of lots pay an extra 20% on their original purchase price. That cost the first appellant another $14,000. In addition, there would have been some additional legal costs associated with renegotiating that increased price. They could not have been as high as the $4,805 claimed, however. The bulk of that figure would be costs associated with the issue of the lease which Manubhai would have had to bear in any event. We allow $1,000 of additional cost.

Judgment for the first appellant against the first respondent will therefore be for the following:

1	Loss of use of capital	$199,177.00
2	Increase in building costs	$213,750.00
3	Additional costs to acquire contracted lots	$15,000.00
		$427,927.00

The judgment sum of $427,927.00will carry interest at 10% from 23 January 2001, the date on which the leases issued to the date of this judgment.

The issue of costs will be discussed later in this judgment.

Damages against the first respondent : Elisha Engineering

The approach to damages for Elisha is all but identical to that adopted for Manubhai.

Loss of use of capital is to be calculated at 15% compounding on Elisha's purchase price of $38,000 from 30 June 1991 to 23 January 2001 (9½ years) which computes to $104,589.00

Mr Elisha gave evidence that the original cost for building for his company was $182,000 but giving evidence in May 1995 he said the cost at that time would be $260,000. That represents an increase of over 40% for the eight years in question which is hard to reconcile with his 25% increase in cost for the Manubhai building over the same period. It may be, however, that the Elisha Engineering building required additional features not present in the Manubhai building. In the circumstances we consider an overall increase in costs of 32.5% should be allowed which represents just over 4% per annum non compounding for the 9½ years involved which represents a recovery under this head of $69,160.00

The 20% increase represented $7,600 for Elisha and again we would allow $1000 costs associated with renegotiating the original price.

Judgment for the second appellant against the first respondent will therefore be for the following:

1	Loss of use of capital	$104,589.00
2	Increase in building costs	$69,160.00
3	Additional costs to acquire contracted lots	$8,600.00
		$ 182,349.00

The judgment sum of $182,349 will carry interest of 10% from 23 January 2001 to the date of this judgment.

Again the question of costs will be dealt with later in this judgment.

Appellants causes of action against the second respondent

We have no doubt the trial judge was right to dismiss the causes of action based upon collateral contract and agency substantially for the reasons he gave.

Similarly he was right to dismiss the cause of action based upon legitimate expectation. Legitimate expectation is a relatively recent concept which evolved in the area of public law where the established procedural approach is an application for judicial review rather than a writ for damages. In rare cases there can be exceptions. *R K Latchan Buses Ltd v. The Attorney General & Ports Authority of Fiji* Civil Appeal No. 90 of 1995 relied upon by the Appellants was such an exception. But this case does not qualify in that way.

The causes of action based upon waiver and estoppel were dealt together by Mr. Narayan, counsel acknowledging that there is a degree of overlap in respect of both propositions. Provided the factual foundation is available it is now clearly established both in Fiji and elsewhere in the common law world that equitable estoppel can found a cause of action. The law in this area was extensively examined by this court in *Public Trustee of Fiji v. Krishna Nair* Civil Appeal No. ABU 0010 of 1996 where the judgment of the court at page 7 under the subheading of "Equitable estoppel" discussed the applicable law saying:

> ***"...it is well established in the law of Fiji and, indeed, the wider scope of the doctrine as formulated in Australia and New Zealand in the last decade and a half has been accepted and applied by this Court. (See for example, Attorney General and Fiji Trade and Investment Board v Pacoil; Civil appeal number 14 of 1996)***

... However since the decision of the High Court of Australia in Waltons Stores (Interstate) Ltd v Maher, (1987 - 8) 164 CLR 387, the restriction of estoppel to cases in which there was a pre-existing contractual relationship (as, for example, in Legione v Hateley, (1982 - 3) 152 CLR) was removed and the remedy extended. Following an extensive review of the authorities, Mason CJ and Wilson J, at 406, indicated that:

> *... the doctrine extends to the enforcement of voluntary promises on the footing that a voluntary departure from the basic assumptions underlying the transactions between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. Humphreys Estate (1987) 1 AC 114, suggests this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party."* (emphasis added)

In the same case at 428 Brennan J set out the matters that must be proved.

> *"In my opinion, to establish an equitable estoppel, it is for the plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act or avoid that detriment whether by fulfilling the assumption or expectation or otherwise."* (emphasis added)

Brennan J pointed out, as did Mason CJ and Wilson J, that it is the unconscionable conduct of the defendant that both attracts the jurisdiction of a court of equity and shapes the remedy. Similarly in the case of *Commonwealth v Verwayen,*

(1990) 170 CLR 394, at 440 Deane J explains that the doctrine of estoppel by conduct is founded upon good conscience but adds that the notion of unconscionability is better described than defined. He continues;

> ***"As Lord Scarman pointed out in* National Bank Plc v Morgan, *(1985) AC 686, definition 'is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case. The most that can be said is that 'unconscionable' should be understood in the sense of referring to what one party 'ought not, in conscience, as between the parties, to be allowed' to do ...the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a 'real process of reasoning and judgment' in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case."*** *(emphasis added)*

The final cause of action upon which the appellants rely is that pleaded in negligence. Indeed Mr. Narayan described it as the one upon which he most relied. In the context of this case the factual matrix necessary to support estoppel overlaps with that required in negligence. The components of negligence have been variously described. In Charlesworth and Pearcy on negligence 9th Edition at page 60 the components are described shortly as ;

> ***"1. the existence of the duty to take care, which is owed by the defendant to the complainant;***
> ***2. the failure to attain that standard of care, described by the law, thereby committing a breach of such duty; and***
> ***3. damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant."***

Clerk and Lindsell on Torts 17th Edition of page 219 sets out a rather more detailed and academic list of requirements for establishing the tort of negligence. For our purposes perhaps the most useful summary is that succinctly set out in the Law of Torts by Fleming 8th Edition page 105 which reads as follows :

"The elements of the cause of action for negligence may, therefore, be itemised as follows:

1. A duty, recognised by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks. This is commonly known as the "duty issue".

2. Failure to conform to the required standard of care or, briefly, breach of that duty. This element usually passes under the name of "negligence".

3. Material injury resulting to the interests of the plaintiff . . . .

4. A reasonably proximate connection between the defendant's conduct and the resulting injury, usually referred to as the question of "remoteness of damage" or "proximate cause".

5. The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered. This involves a consideration of two specific defences, contributory negligence and voluntary assumption of risk."

The other aspect of the claim calling for some comment is the fact that all the damages claimed here are in the nature of economic loss. Here we enter into a difficult and evolving area of the law. Initially injury to the person or damage to property was required before liability for negligent acts would be imposed. All that changed with *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 where a cause of action for negligent misstatement resulting in economic loss was recognised. Since then the Courts and academics have struggled with what Lord Denning described as "an impossible distinction" while seeking to identify the circumstances where economic loss is recoverable and at the same time to avoid the opening up of "a field of liability of indeterminate ambit". The result to date has been a category by category, if not case by case, approach with no finite guidance merging other than the requirement that all relevant aspects be considered. Fleming the Law of Torts, 9th Edition, published in 1998 at p 202 sets out a summary of what has emerged since *Hedley Byrne*. It reads as follows:

"Summary

In light of more than three decades' experience with the problem of pure economic loss since Hedley Byrne *relaxed the categorical exclusionary rule, the following generalisations may be tentatively ventured:*

1 *No simple formula will fit the various situations. (One important variation is that between cases within and without the matrix of a contract (see section 7, Tort and Contract); another is between situations with a potential of affecting only single individuals and others affecting multitudes.)*

2 *In particular, there is no presumptive rule of liability, as there is for physical injury caused by active negligent conduct. Quite to the contrary: rather than asking 'Why not', we should be asking 'Why'.*

3 *Nor has proximity, a catchword which has gained some prominence in this context, proved a useful guide for inclusion or exclusion; it represents at best, here as elsewhere a conclusion reached on grounds of legal policy which ought to be specifically and clearly articulated.*

4 *In order to qualify for recovery, a claim must at least pass the following hurdles:*

(a) *The defendant's duty must not be 'indeterminate in amount, time and class.'*

(b) *Where the plaintiff had reasonably available alternative means for self-protection, for example by contracting with the defendant or a third party, and deterrence would not otherwise go by default, tort intervention will be withheld.*

5 *While reliance is undoubtedly a necessary causal qualification in a claim for misrepresentation, it is not an indispensable element in other situations.*

6 *The decisions discussed in sections 5 and 6 (as also in chapter 22 on defective structures and chapter 28 on misrepresentations), straddling the judicial encounter so far with the problem of tort recovery for economic loss, provide the best guidance for the likely judicial response to situations old and new.."*

If judgment entered against the second respondent on what cause or causes of action and what quantum of damages

We consider first Waiver and Estoppel.

In effect the trial Judge found there had been neither because, as he put it, "there was no talk or representation from the second defendant (respondent)". That finding is clearly supported by the notes of evidence. What had happened, however, was that between 1 May 1985 and 1 April 1987, (the appellants it will be recalled had signed up with Lautoka in April and May of 1986) some nine approval notices were issued to various entities purchasing lots in stages 1 and 2 of the Navutu Industrial Subdivision and one in stage 3. It appears, however, that most if not all of these related to dealings before the first respondent became the developer. A representative of the first respondent showed to Mr Daniel Elisha one or more of these earlier notices and represented that similar notices would be available to other purchasers. But for Elisha it was acknowledged that there was no "direct representation" by or on behalf of the Director of Lands and Elisha did not take legal advice or otherwise make any independent check before signing up.

Manubhai and Elisha were closely associated in this matter. Their businesses were complimentary in the building and construction industry. Their representatives visited the industrial site together and had joint discussions with the Lautoka representative before committing to the contracts. Also Elisha was a builder and it had been informally arranged that it would construct the building Manubhai had in mind for the lot it intended to purchase.

Mr Dinesh Patel, managing director of Manubhai, gave evidence. His deceased uncle had made the decision to purchase back in 1986. In his evidence in chief, Mr Patel said nothing about any representation from Lautoka or anyone else regarding the issue of an approval notice.

The evidence of Lautoka and for the Director of Lands confirmed that some nine approval notices had been issued. The issue of such a notice to one of the first respondent purchasers, however, clearly would have been contrary to the terms of the arrangements between the first and second respondents. A Mr Sharma, a senior Lands Department officer, confirmed that the issue of the nine notices "was done by mistake". Furthermore, when the holder of the office of Director of Lands changed after the 1987 coup, the next incumbent insisted on compliance with the terms of the contract between the first and second respondents and refused to issue any further approval notices until the subdivision was fully completed and the necessary plans deposited.

There was no evidence that the second respondent had made any representations to the appellants, let alone agreed, that agreements to lease would issue before completion of the subdivision and deposit of the plan. Nor was there evidence that the second respondent was aware of the agreements entered into until consents pursuant to s 13 of the Crown Lands Act were sought some 18 months after signing. When the appellants solicitors sought the issue of approved notices by letter dated 20 February 1991 the Director of Lands responded that "approval notices of lease in respect of your abovenamed client lessees will be issued only when the development has been completed". (P 139 of the record)

We are of the clear view that what happened between the parties was insufficient to establish either Waiver or Estoppel. We need go no further than the two High Court of Australia cases cited earlier (*Waltons Stores (Interstate) Ltd v Maher* and

Commonwealth v Verwayen). Those two cases show that to succeed here the appellants would have to establish first that they were entitled to rely on an assumption induced by the second respondents upon which they had acted to their detriment. Secondly, that for the second respondent to seek to resile from being bound would be unconscionable.

Brennan J put it this way in *Verwayen* at p 428:

> ***"The judgments of a majority of the Court in* Waltons Stores v Maher *held that equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from that promise."***

Also what, in the same case, Deane J said at p 440 (already quoted in part earlier) on unconscionable conduct bears repeating in full:

> ***"The doctrine of estoppel by conduct is founded upon good conscience. Its rationale is not that it is right and expedient to save persons from the consequences of their own mistake. It is that it is right and expedient to save them from being victimised by other people. The notion of unconscionability is better described than defined. As Lord Scarman pointed out in* National Westminster Bank Plc v Morgan, *(1985) AC 686, definition 'is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case. The most that can be said is that 'unconscionable' should be understood in the sense of referring to what one party 'ought not, in conscience, as between the parties, to be allowed' to do. In this as in other areas of equity-related doctrine, conduct which is 'unconscionable' will commonly involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. That being so, the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a 'real process of consideration and judgment' in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be***

inadequate to exclude an element of value judgment in a borderline case such as the present."

As recorded above, the second respondent made no representation by words or conduct to induce an assumption that approval notices would issue before the subdivision was completed. Furthermore, the second respondent was unaware that the appellants had contracted with the first respondent until some eighteen months after the event. That being so, there is no basis in our view upon which it could be said that the second respondent's refusal to issue approval notices was unconscionable. In our view the Director of Lands who took over after the coup, properly in the State's interests, insisted on the terms of the contractual arrangement with the first respondent being complied with before agreements to lease or leases under the Land Transfer Act issued. Had the appellants taken legal advice or otherwise made appropriate enquiry independent of the first respondent, they would have been alerted to the correct position.

Turning to the final cause of action based upon negligence and bearing in mind our earlier comments regarding the recovery of economic loss. There are two aspects to this part of the case. First, there is the allegation that by issuing the nine approval notices to the purchasers of other lots, the second respondent had represented to the appellants that they too would be issued with the same notices prior to the completion of the subdivision.

It can be said at once that there is no indication in the evidence that the second respondent agreed to shoulder any responsibility to the appellants by issuing the notices to the nine third parties. That, however, is not necessarily the end of the matter because in negligence actions the Court in effect simply imposes responsibility where negligent words or actions are relied upon by sufficiently proximate plaintiffs. So the crucial question on this part of the case is whether there was a sufficiently close or

"special" relationship between the appellants and the second respondent to justify the imposition of a duty.

Our discussion earlier in this section of the judgment regarding the facts in relation to estoppel and waiver is again relevant here. As the second respondent made no representations directly or indirectly to the appellants and was indeed unaware of their interest until some time later, there was no special or close relationship. The representations the appellants relied upon were in fact made by the first respondent using approval notices issued by the second respondent to third parties. There is no evidence that the second respondent knew of the use the first respondent was making of those notices or even that it had possession of them, far less that the Director of Lands would have approved had he known.

Those being the facts, we are satisfied that this leg of the appellants' negligence claim fails especially as the more cautious approach adopted by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 602 is now followed by the Courts in Canada, Australia and New Zealand.

The alternative basis upon which the negligent cause of action is advanced relates to an alleged breach of duty owed to the purchasers of lots in the first respondents' subdivision prior to its completion. The breach is based upon the undisputed evidence that the first respondent was grossly under-capitalised, ($100,000 of equity and mortgage facilities of $800,000 or thereabouts), for a development which cost $5 million plus to complete. The contention is that the Registrar of Lands should have assessed the first respondent's suitability for such a major development because it was readily apparent that if it did not have the capacity to see the matter through, investors such as the appellants would suffer financially. The appellants, it was

submitted, were a sufficiently approximate and discrete group for the law to impose such a duty upon the second respondent.

The evidence was, however, that despite the fact that the Director himself had initially considered carrying the development of the industrial subdivision through, there were no details on his files as to what it would have cost. Nor were there any records of investigation as to the first respondent's suitability, either on a stand-alone basis or compared with other tenderers to undertake such a major enterprise. Finally, the evidence was that supervision and site inspections to see whether the first respondent was performing were sporadic and over some periods non-existent.

Given those circumstances, if a duty is held to have existed, there may be a sufficient evidential foundation for finding that it had been breached.

It is at this point we must return to a closer consideration of the circumstances under which economic loss for negligent conduct can be recovered. Before doing this, however, we record the manner in which the trial Judge dealt with the issue. At p 110 of the record His Lordship said:

> ***"Fifthly, the Plaintiffs also rely on breach of duty and negligence to found liability of the Second Defendant. The Plaintiffs rely on paragraphs 13 and 14 of their Statements of Claim. For Plaintiffs to succeed they must establish that there was a duty of care owed to them by the Second Defendant. It has been submitted that the Second Defendant did not make proper investigation before granting Approval Notice to the First Defendant to develop the land in question and the First Defendant still has not developed the land that the Plaintiffs have suffered as a result. The Plaintiffs referred to the case of*** Abhay Shanker and Another v Housing Authority and Lautoka Rural Local Authority ***FCA Civil Appeal No. 55 of 1991. Here the plaintiffs had bought a piece of land from the Housing Authority which had failed to disclose that power lines ran along a 30 links reserve or easement across plaintiffs' land. The second defendant, Lautoka Rural Local Authority had approved a building plan which was contrary to certain laws. The Court held that both the***

defendants owed a duty of care to the plaintiffs and were liable for 80% of the damages. The negligence was based on certain breaches of rules and regulations. But in the instant case First Defendant was in breach of contractual agreement with the Plaintiffs. Although the Second Defendant was to see the First Defendant developed the land fulfill its obligations to the prospective purchasers it owed no duty of care in my view to the Plaintiffs."

But at the end of his judgment on p 114 and on to p 115 His Lordship added, perhaps *obiter dicta* but certainly contrary to his earlier finding:

"However, I do like to add that the Office of Director of Lands takes a large part of the blame in the delay of the competition of this 'Navutu Industrial Subdivision'. Full and proper inquiry should have been made before granting approval notice to the First Defendant, Lautoka Land Development (Fiji) Ltd for the developing of this land in this "Navutu Industrial Subdivision'. This Court cannot make an order that the Director of Lands issue leases to the Plaintiffs but I do like to see speedy action taken by the Office of the Director of Lands to have this subdivision completed and the plaintiffs be issued with the leases which they have been expecting for a long time. The present situation can only be described as a mess fraught with further possible actions. The Office of the Director of Lands is morally bound to unscramble the mess it has created. The only just solution is the development to be completed as soon as possible and the Plaintiffs get their leases."

The rejection in the finding on p 110 of the *Abhay Shankar* case suggests a preference for the English approach as exemplified in the decision of the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 although that decision has not been followed in New Zealand, Australia and Canada. The New Zealand situation is informative because the law for that Dominion was finally settled in the Privy Council where the majority of the Judges were also members of the House of Lords. In the Privy Council, however, in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, Lord Lloyd delivering the judgment of their Lordships said at p 519 after a careful and detailed survey of both New Zealand and English authority at line 55 and onto p 520:

"But in the present case the Judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do this? The answer must surely be yes. The ability of the common law to adapt itself to the differing circumstances of the countries in which it is taken root, is not a weakness but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other."

"Those comments of Lord Lloyd are equally applicable to Fiji. No arguments on issues of policy or conditions as they apply in the Republic of Fiji were addressed to us. Nor was there any reference to the substantial body of case law which has developed in various common law jurisdictions in relation to the liability for negligence of Public Bodies. See for example *Clark & Lindsell* 18th edition (2000), chapter 12 "Liability of Public Authorities", paragraphs 12-03, 12-04 and 12-05 and paragraphs 12-19 to 12-25 inclusive; also the discussion on policy in relation to Local Authorities commencing at paragraph 12-55. The leading New Zealand text, Todd *et al* "*The Law of Torts in New Zealand*", 3rd edition (2000) at pages 333-348 under the heading "Liability of Public Bodies" is also instructive. And in those jurisdictions where, unlike the United Kingdom, *Anns v London Borough of Merton* [1978] AC 728, is still good law, it seems an increasingly sophisticated approach is being taken with particular reference to the applicable contractual and/or statutory setting. See the recent judgments of the New Zealand Court of Appeal in *Turton v Curslake & Partners* [2000] 3 NZLR 406 and of the Supreme Court of Canada in *Cooper v Hobart* (Neutral citation: 2001 SCC 79 File number 27880 – Judgment 16/11/2001). The consequence is we do not feel able to decide this issue without further assistance from counsel.

We propose therefore to adjourn this part of the appeal to allow Counsel for the appellants and the second respondent to file further submissions on the above points. We also draw attention to chapter 9 of Salmond & Heuston "*Law of Torts*", 21st edition, where at paragraph 9.4 on page 201 and following, under the heading "Concepts now used to determine the existence of a duty", the following factors are considered:

- Foresight
- Reliance
- Assumption of responsibility
- Proximity
- Just and reasonable
- Policy

All the above issues should be addressed. Furthermore, the 9th Edition of Fleming, "*The Law of Torts*" also has an interesting and informative commentary commencing at page 193 under the heading "Economic Interests". We will also require submissions on the terms and significance of the Crown Lands Act (CAP. 123), a copy of which should be provided.

We call for these submissions promptly but recognising that counsel will have to have time to carry out the appropriate research.

We require the appellant's submissions to be filed with the Registrar of the Court of Appeal in Suva for distribution to the Attorney General and the members of the Court within 21 days of the handing down of this interim judgment. The respondent's submissions in reply are to be similarly filed for distribution within 21 days of receipt of the appellant's submissions. The appellant may reply (strictly addressing only new points or authorities) within seven days of the receipt of the respondent's submissions. We emphasise that the above timetable must be strictly adhered to. This Court will again assemble in May 2002 when final judgment in this matter will be delivered."

We can indicate, however, that as presently advised we consider the measure of damages in tort should liability attach to the second respondent would be the same as that recorded against the first respondent for breach of contract.

Before leaving this section, we add by way of addendum that it will not have escaped the parties and their counsel that having resolved all issues in the appeal

and indicated the level of damages should liability be found on this one remaining issue, the matter is ripe for a sensible commercial resolution.

The second respondent's application for amendment to plead contributory negligence

With significant encouragement from one member of the court. Mr. Calanchini applied during the course of his submissions on behalf of the second respondent for leave to amend the second respondent's pleadings to allege contributory negligence on the part of the appellants in the event that the second respondent was found liable in negligence. Upon reflection, however, the court is of the firm view that the application for leave should be refused. The appellants pleaded precise particulars of negligence against the second respondent and those particulars were specifically responded to by the second respondent in its statement of defence to the appellant's amended statements of claim. Had an application to raise contributory negligence by way of amendment been made during the course of the trial in the High Court it may well have been allowed. But at this late stage, (over five years after the second respondent's amended statement of defence was filed), to grant such an indulgence would be unjust to the appellants.

Decision

In this interim judgment the first and second appellants' appeals are allowed as against the first respondent and the amount set out on pages 15 and 16 respectively together with interest thereon are hereby awarded.

The first and second appellants' appeals against the second respondent fail on all causes of action save negligence. The cause of action in negligence as to liability is further reserved pending receipt of further written submissions. If, however, liability is established then the damages will be as awarded against the first respondent. There will, however, be no double recovery. The appellants will be free in the event of securing judgments against both respondents to elect which respondent they will execute judgment against.

Irrespective of the outcome of the liability issue in respect of the negligence claim against the second respondent, there will be only one composite award of costs to both appellants since they were represented by the same counsel and solicitors throughout. The costs will be $9,000 in the High Court and $3,000 in this Court together with filing fees and reasonable disbursements as fixed by the Registrar. If both respondents are found liable, the first respondent will bear two thirds of the costs and the second respondent one third. If the second respondent is not found to be liable, then the costs will fall entirely upon the first respondent.

Sheppard JA

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Tompkins JA

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Smellie JA

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