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

CIVIL APPEAL NO. ABU0068 OF 2004S
(High Court Civil Action No. HBC 213 of 1968S)

BETWEEN: SUVA CITY COUNCIL

Appellant

AND: MUKTA BEN AND OTHERS

Respondents

Coram: Scott, JA
Wood, JA
McPherson, JA

Hearing: Thursday, 16th November 2006, Suva

Counsel:

A Patel	]	
F Khan	]	for the Appellant
	]	
J Logan	]	
F Keil	]	for the Respondent

Date of Judgment: Friday, 24th November 2006, Suva

JUDGMENT OF THE COURT

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[1] In 1964 the claimants, who are the respondents to this appeal, agreed to buy from one Sukichand his registered freehold interest in land contained in an allotment of some 40 acres situated near Kinoya Village. The contract of sale was completed by conveyance or transfer of the 40 acre lot on 16 October 1967. Before that date the appellant city council had resolved to acquire 20 of the 40 acre allotment as the site for a proposed electricity generating station. Notices of intention to acquire were served on the owner under the State Acquisition of Lands Act, as it is now entitled,

and the land was acquired on 25 September 1967, at which date the appellant Council took possession of the 20 acre area in question. It is accepted that the respondent claimants are successors to all the rights, so far as relevant, of Sukichand under the Act.

[2] The result was to transform the claimants' interest in the acquired land into a claim to receive compensation under the Act. A claim for compensation was lodged by their solicitor on 25 October 1967, and it is the quantification of the amount of the claim that is the principal issue on this appeal. However, before that issue was resolved by the determination of Winter J from which this appeal comes, it had been severed from another issue raised by the claimants, who were attempting to challenge the validity of the acquisition process. The challenge to validity was heard and determined first by Stuart J on 26 August 1975, before making the long journey to the Judicial Committee of the Privy Council, who on 12 December 1979 affirmed with costs the judgment of Stuart J confirming the validity of the acquisition of the claimants' land.

[3] That left the way open for determination of the quantum of the compensation to be awarded for the land compulsorily acquired. For the ensuing 2½ years the parties attempted to settle it by agreement; but, when their efforts proved futile, the matter was ultimately set down for determination in the High Court. A series of vicissitudes then further delayed the litigation until finally the claim was heard and determined by Winter J, who delivered judgment on 8 September 2004. It was by then some 37 years from the date of the acquisition, since which a further two years or more have elapsed.

[4] The learned Judge found

(1) that the value of the acquired land assessed under s.12(a)(i) of the Act was $40,000 arrived at by allowing $200 per acre for the 20 acres acquired;

(2) that in addition the claimants were entitled under s.12(a)(iv) to a further $300 per acre for injurious affection of 8 out of the remaining 20 acres retained, making a total of $2,400 on this head; and

(3) his Lordship allowed interest on the combined total of (1) and (2) of $42,240 at 10.5% compounded on yearly rests, which, produced a grand total of $1,705,709 by way of compensation inclusive of the principal sum of $42,240.

[5] His Lordship, however, declined to make a further award in favour of the claimants under s.13 of the Act for what may be shortly described as loss of rent or profits under that section.

[6] On appeal the principal issues are the correctness of his Lordship's award of $40,000 under s.12(a)(i) for the value of the land taken and $2,400 for injurious affection, and more particularly his power to award interest at compound rates on the total amount of that compensation; and, on the respondent claimants' cross-appeal, the refusal of the learned Judge to compensate them for loss of rents or profits under s.13.

[7] The appellant Council contested the Judge's findings in relation to the primary amount of $40,000 or of $2,400 awarded. However, having considered the reasons for judgment and the written and oral submissions on appeal, we are unable to identify any respect in which his Lordship erred in fact or law. He considered the evidence of the competing valuation experts placed before him, made appropriate findings based on those he accepted, and applied well settled principles of law in this field. We can see no reason for upsetting his decision on either of the two amounts of compensation awarded. We therefore turn to the matter of interest and its compounding.

[8] It is as well to begin with some elementary observations. Compounding of interest involves nothing more than adding to the principal sum the amounts of interest that have accrued after a period of time and then calculating interest on that compound of principal and interest; and so on until the indebtedness is discharged. It is a process followed as a matter of course by banks and other borrowing and lending institutions including such simple forms as post office savings accounts. All that differentiates it from simple interest calculations (which cannot be finally carried out until the full period is known) is the selection of "rests" at which interest so treated as having accrued. That difference can, however, have an enormous impact on the amount ultimately payable.

[9] As a general proposition, however, the common law, unlike some other legal systems such as Scots and Roman Dutch law, has never fully countenanced the charging or recovery of interest of any kind. The reasons for this are historical and have their source in the attitude of the pre-Reformation Church, which condemned the charging of interest as "usury." See the remarks of Lord Wright in ***Riches v Westminister Bank*** [1947] AC 390, 400; and *McGregor on Damages* (17th ed; 2003) para. 15-001, at 530. This attitude was supported by various early English statutes limiting interest rates that might be charged by agreement, which were not finally repealed in England until the Usury Laws Repeal Act 1854; 17 & 18 Vict. c 90.

[10] Whether these early statutes were received in Fiji at the foundation of the colony has, so far as we aware, never been decided. They were not, for example, imported into India; and in New South Wales there is an early decision in which, after considering the variety of interest rates then obtaining in other British colonies around the world, the Supreme Court held that usury statutes limiting interest rates were inapplicable in eastern Australia: ***MacDonald v Levy*** (1833) 1 Legge's Reports 39. For a brief period in and before 1875, the laws and statutes applicable in New South Wales prevailed in Fiji; but it remains true to say that in both jurisdictions the common law approach has obtained perhaps through some form of judicial osmosis. The question how far the common law rule in this particular was adopted

as applicable in Fiji under s.31 of the Supreme Court Ordinance 1875 was not argued before us, and it remains for decision on some future occasion.

[11] The distaste of the common law for the charging or recovery of interest was not imitated, or to the same extent, in equity, and it is the equitable rule that has come to dominate the assessment of compensation for the compulsory acquisition of land. For this, the explanation lies in the origins of the law relating to compulsory taking of land in 19th century England. The Acquisition of Lands Act, or its colonial predecessor and others like it elsewhere, are to a large extent modelled on provisions of the English Land Clauses Consolidation Act 1845 (8 & 9Vict. C.18). See ***Director of Buildings and Lands v Shun Fung Ironworks Ltd***. [1995] 2 AC 111, at 124-125. The principles applied to the compulsory acquisition or "compulsory purchase" of land were derived from the practice of the Court of Chancery in proceedings for specific performance of voluntary agreements for the purchase and sale of land.

[12] Those principles were succinctly stated by Sir Owen Dixon in ***Commonwealth v Huon Transport Pty Ltd***. (1945) 70 CLR 293, at 323-324. Referring to the rule that, "in the absence of any statutory indication to the contrary, moneys payable as compensation for land compulsorily acquired bear interest from the time of dispossession", his Honour went on:

> "The rule springs from the doctrine that a notice of requisition, or a notice to treat, establishes the relation of vendor and purchaser, and it rests upon the view that 'the right to receive interest takes the place of the right to retain possession",

citing ***Inglewood Pulp and Paper Ltd. v New Brunswick Electric Power Commission*** [1982] AC 492, 499 in the Privy Council. As his Honour explained:

"The purchaser cannot retain the purchase money and at the same time be placed in occupation of the land or in receipt of the rents and profits, unless he pays interest on the purchase money, representing, as it does, the capital contained in the land."

Without quoting in full the extract that follows from the speech of Lord St Leonards in ***Birch v Joy*** (1852) 3 HLC 565, 590, it is enough to say that his Lordship observed that on a purchase and sale the parties "change characters in a court of equity", the vendor becoming the owner of the money and the purchaser becoming the owner of the estate.

[13] The Act contains no express provision for the payment of interest on compensation. It is on the equitable principle that the claimants' right to interest on the amount of the compensation awarded must be founded in the present case. The decisions of the Privy Council in the ***Inglewood Pulp*** case, and of the High Court of Australia in the ***Huon Transport*** case and in ***Marine Board of Launceston v Minister of State for the Navy*** (1945) 70 CLR 518, are based on the application of the equitable doctrine to compensation for compulsory acquisition of land in which possession has been taken without paying its value to the owners. That is what happened here when, on 25 September 1967, the Council took possession of the land without paying the price. There is nothing in s.8 of or elsewhere in the State Acquisition of Land Act to displace the presumption or implication that in a case like this interest is to be payable on or as part of the compensation money from the time possession was taken. This leaves for consideration the question whether the learned Judge was wrong in law in compounding or calculating interest on yearly rests rather than as simple interest.

[14] Under statutory provisions authorizing orders for the payment of interest, the power to do so is usually, if not invariably, left to the discretion of the court or tribunal. Assuming the existence of the power, its exercise would on appeal be governed by the rules regulating appeals against the exercise of a discretion. Here, however, the

question is as to the power to apply a compound interest rate to the principal amount awarded. For the claimants Mr Logan submits that the awarding of interest is in substance part of the compensation, which the authorities stress is to provide "fair" or "fair and adequate" compensation, sometimes also described as the principle of "equivalence" for what has been taken: see ***Director of Buildings v Shun Fung Ironworks Ltd***. [1995] AC 111, at 124-125. Nevertheless Mr Khan appears to be right in saying that there is no reported instance anywhere in the Commonwealth in which compound interest has been allowed on a compensation claim. Even in equity, he submitted, compound interest is awarded only for fraud and for breach of fiduciary duty or breach of trust. That is so even though, once the analogy is adopted of a sale of land, there is a loose sense in which, under a specifically enforceable contract for the sale of land, a form of trusteeship is said to arise: see ***Lysaght v Edwards*** (1876) 2 Ch D 499, at 507, and the earlier references here to the remarks of Lord St Leonards in ***Birch v Jay*** (1852) 3 HLC 565, 590. We do not think, however, that the decisions in ***South Australian Land Commission v Perry*** (1977) 15 SASR 315 or ***R v Compensation Court*** (1900) 2 WAR 242 are determinative of the question in favour of either party to this appeal.

[15] The assiduity of Mr Logan succeeded in turning up a decision of the Court of Appeal of Belize in ***San Jose Farmers Co-operative Society Ltd. v Attorney-General*** (1991) 43 WIR 63, in which it was held that a statutory provision requiring interest to be paid at a fixed simple rate of 6% per annum did not amount to "reasonable compensation", within the meaning of the Belize Constitution, for the compulsory acquisition of land. The decision, however, falls short of recognising that an award of compound interest ought to have been authorised or substituted in its place.

[16] In the end, we have come to the conclusion that, although equity made a practice of allowing interest on compensation money once possession was taken by the purchaser or the acquiring authority, there is no authority statutory or otherwise for holding that it would allow interest at compound rates. See the discussion in *Stonham Vendor and Purchaser*, at paras 595, 1161, and 1166. The reason why the

result appears so startling in the present case (more than $1.5 million in interest) is the very lengthy period over which it has accrued. To this, the claimants can fairly respond that, since the City Council, or its successor in title, has had the benefit of the land (on which it constructed a power station), it ought to be required to pay interest at prevailing rates, which in everyday existence would include interest compounded at reasonable intervals. The answer to that contention is that the equitable practice, which is the only basis on which the claim to interest is legally capable of being advanced here, never countenanced an award of compound interest in circumstances like these.

[17] The calculation undertaken by Winter J on the basis of compound interest at 10½% therefore cannot stand. It was not submitted that we should arrive at and substitute some higher rate of simple interest, and we therefore propose to allow simple interest at 10½% per annum on the amount of compensation awarded under s.12(a)(i) of $40,000. We feel bound to say that the award of interest on the sum of $2,400 awarded as compensation for injurious affection cannot be justified. Having regard to ***Commonwealth v Huon Transport Pty Ltd***. (1945) 70 CLR 293, at 324, such compensation was not within the equitable rule or principle on which interest can be awarded in a case like this. As Dixon J said there:

> "That being the ground of the rule, applying alike to voluntary and compulsory sales, it does not extend to compensation for injurious affection, upon which interest is not payable unless an intention to give interest upon unpaid compensation appears in the statute."

With respect, we find this conclusion compelling as a matter of logic.

[18] This leaves for determination the matter of s.13 of the Act and the cross-appeal. Section 13 provides that, when the acquiring authority has entered into possession of any lands, the Court may award compensation "for loss of rents and mesne

profits" for the period between the time of entry into possession and the time of payment of compensation under the Act. Mesne profits is the old name for damages for trespass, being the loss suffered through being out of the possession of land: see 23 *Halsbury* (3rd ed), para 1230. They are only recoverable against a former tenant who withholds possession after the lease has been determined and has remained in possession: ibid, at 250. Counsel on both sides of this appeal were unable to identify the source of s.13; but it seems possible it is to be found in s.124 of the Land Clauses Consolidation Act 1845: see 10 Halsbury (3rd ed) para 148. In this instance, the subject land was not let but was being used by the proprietor as a dairy farm at the date of acquisition, so there is no question of any rent or mesne profits being lost by the Council's entry into possession. It follows that there could and can be no question of any compensation under s.13 for that loss. The cross appeal must be dismissed.

[19] The result of this reasoning may be summarised as follows. The learned Judge was empowered in equity to award simple interest on the value ($40,000) of the land as he assessed it, but not compound interest, and not interest simple or compound on the award of $2,400 for injurious affection. So far as concerns the rate, there was evidence before the Court that justified the adoption of the rate of 10.5% selected and applied by the Judge , but not the provision for compounding at annual or other rests. This is because, in the end, the respondents' claim to interest was enforceable not expressly under the Act itself, but through the medium of the equitable practice of allowing interest on the amount of unpaid purchase moneys from the time when the acquiring authority took possession of the land, as it did on 25 September 1967.

[20] The interest will continue to accrue until paid to the respondents, which has not yet taken place. Since we do not know precisely when that will happen, the appropriate course, in the hope of bringing some degree of finality to this long drawn out litigation, is to make the following orders:

(1) Allow the appeal and set aside the judgment and orders of the High Court made on 8 September 2004, 27 September and 17 January 2005.

(2) Determine that the amount of compensation due to the respondents in respect of the acquisition under the Acquisition of Lands Act by the appellant on 25 September 1967 of the land acquired on that date is:

(a) $40,000 for or on account of the market value of the Act under s.12(a)c(i) of the land acquired, with interest thereon calculated until the date payment is made to the respondents at the rate of 10 ½% per annum simple interest.

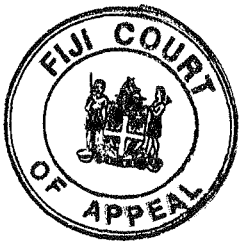
(b) $2,400 for or on account of injurious affection under s.12(c)(iv) of the Act of other land of the respondents, but without interest.

[21] Order that the appellant pay to the respondents the costs of and incidental to the proceedings in the High Court (in which the respondents substantially succeeded); but that there be no order as to the costs of this appeal.

[22] Dismiss the respondents' cross-appeal and order that they pay the appellant's costs of and incidental to that cross-appeal.

[22] There will be liberty to apply as to the calculation of the total of interest payable at the simple rate of 10 ½% p.a. to the date payment is made.

Scott, JA



Wood, JA

McPherson, JA

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