

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA
APPELLATE JURISDICTION

CIVIL APPEAL NO: ABU 0022 of 2008

[On an appeal from a Judgment of High Court of Fiji at Suva in Civil Action No. 351 of 2001 on the 29th day of February, 2008]

BETWEEN:

RAJESH PRAKASH SHARMA f/n Vishwa Nand Sharma

Appellant

AND:

THE REGISTRAR OF TITLES

1st Respondent

NAVUA DRAINAGE BOARD

2nd Respondent

ATTORNEY GENERAL OF FIJI

3rd Respondent

Coram:

J. Byrne, JA
D. Pathik, JA
D. Goundar, JA

Counsel:

Mr. V. Mishra for the Appellant
Ms. S. Levaci & Ms. M. Rakiuta for the 1st & 3rd Respondents
Mr. V. Daveta for the 2nd Respondent

Date of Hearing:

16th September, 2009

Date of Judgment:

23rd October, 2009

JUDGMENT OF THE COURT

JUDGMENT OF BYRNE, J.A and GOUNDAR, J.A

[1.0] This appeal from a judgment of the High Court at Suva on the 29th of February 2008 poses for the Court's decision certain questions relating to the responsibility and liability of the Registrar of Titles for work done by a Drainage Board (The Navua Drainage Board) and/or other government departments for failing to register the re-alignment of a creek, in this case the Waikalou Creek, which is shown on Certificate of Title No.13177 as being in the vicinity of Queens Road between Sigatoka and Suva.

[2.0] The appellant claimed before Singh, J in the High Court that the Registrar of Titles should have :

- (a) Corrected the Register to acknowledge the re-alignment of Waikalou creek;
- (b) Registered the re-alignment of Waikalou Creek and/or ;
- (c) The Navua Drainage Board and/or other government departments should have registered the re-alignment of Waikalou creek.

[3.0] These claims were based on two alleged causes of action;

- i) Breach of Statutory duties;
- ii) Negligence

The trial took place before Singh, J on the 21st of January 2008 and he heard evidence.

BACKGROUND

[4.0] It was not disputed that in January 1998 the appellant purchased a piece of freehold land comprised in Certificate of Title 13177, the land we have just

referred to. The appellant checked the title before purchase. The title showed it was one continuous piece of land with the meandering Waikalou Creek forming the border on one side. After purchase the appellant engaged a Surveyor for subdivisional purposes. Soon after the surveyor began the survey he realized that the course of the Waikalou Creek had shifted. It was later learnt that the Waikalou Creek had been re-aligned at the request of the Navua Drainage Board by the Ministry of Agriculture. The re-aligned creek cuts across the land splitting it into two parts. The result of this re-alignment was that a piece of land about 1 ½ acres was separated from the rest by the new creek channel.

[5.0] The re-alignment of the creek was done sometime in 1981. The position of the new creek, that is the re-alignment, is not shown on the title or in any way endorsed on the title.

[6.0] The appellant's case is that he relied on the title when deciding to buy the land. He claims that the respondents were negligent in failing to have the re-alignment endorsed on the title and that they breached their statutory duties. Such conduct, he claimed, has caused him damage. All the statement of claim says is that there was a breach of statutory duties but these were not stated.

[7.0] The Learned Judge said that this made it extremely difficult for the opposing party to prepare its case, and we agree, but as the respondents did not take issue with the appellant on this, it can be safely ignored for the purposes of this judgment.

WAS THE APPELLANT AWARE OF THE RE-ALIGNMENT?

- [8.0] The first issue the Learned Judge had to decide was whether the appellant prior to purchase knew that the re-aligned creek cuts through the land he wanted to buy. The Judge said that if he found against the appellant on this, then the appellant would have to suffer the consequences and bear the losses.
- [9.0] The appellant in cross-examination admitted that he lived on the land in question with his father until 1998. In 1981 he was 17 years old.
- [10] His father did not own the land but only lived there. The Learned Judge found that the appellant knew that the Waikalou Creek had been re-aligned. He said that a major work like this with the use of machinery would not have escaped his attention in 1981. However, in 1981 he was a young boy and the Judge presumed in his favour that he would not have given a thought to buying this property. He found that there would be no reason for him to find through whose land the re-aligned creek cut through.
- [11] The Judge accepted the appellant's evidence that he only realized that the re-aligned creek cut through the land after he had bought it and after the surveyor brought this fact to his attention. We respectfully agree with this observation of the Judge.
- [12] This then led the Judge to consider whether, on that finding, the appellant could succeed. He held that he could not and reached his conclusion in the following way:

[13] He summarized the powers and duties of the Registrar under Sections 129 to 138 of the Land Transfer Act Cap. 131 succinctly and in our view correctly. The Judge said that the Registrar's basic duty was to attend to the registration of documents which comply with the requirements of the Act. His duties are not investigatory. He is not required to go on to the lands covered by titles to see whether plans are accurate. It is for the proprietors of land to notify the Registrar in the proper documentary form if there are any changes to the title. In the present case there was no evidence before the court that anyone brought the re-alignment of the channel to the Registrar's attention and the Registrar refused or neglected the registration. The Judge then concluded that it followed that the Registrar could not be held responsible for something of that he was not aware of. Again, we agree.

BREACHES OF STATUORY DUTIES:

[14] The conduct of the respondents which allegedly amounted to negligence or wilful misrepresentation to the public and breach of statutory duties is set out in paragraph 8 of the Statement of Claim and we quote them verbatim from the paragraph : -

"The conduct of the defendants and/or their servants and/or their agents was negligent and/or careless and/or reckless. Particulars of negligence or the defendants are as follows:-

(a) allowing the area of land in Certificate of Title to be changed without making the necessary registrations(s) against Certificate of Title No. 13177 of an appropriate caveat and/or charge which would have given adequate warning to the plaintiff or other purchasers of the realignment of the Waikalou Creek and its consequences.

- (b) Allowing and permitting the re-alignment of Waikalou Creek to proceed when it left part of Certificate of Title No. 13177 on the other side of Waikalou Creek without road access.**
- (c) Not obtaining the access to the part Certificate of Title No. 13177 which fell on the other side of the Creek after re-alignment.**
- (d) Allowing a re-alignment of Waikalou Creek without submitting the necessary requests and plans to the Department of Lands and Survey and the Registrar of Titles."**

[15] The Learned Judge had the benefit of two expert witnesses as to the manner in which Drainage Boards operate. This was given by BARAM DEO who was Secretary of the Central Division Drainage Board which now incorporates Navua Drainage Board. He stated that the functions of the Drainage Board are to provide and maintain drains. The purpose of this is to improve agricultural land. Farmers seek assistance of the Board which then does ground work and obtains the necessary consents from the farmers to carry out the works.

[16] The Board lacks sufficient resources so it seeks assistance from the Ministry of Agriculture to carry out the actual work which is done by that Ministry. The work is only carried out after obtaining the consent of farmers whose lands are affected. His evidence was confirmed by that of SATYA NARAYAN SWAMI who is now retired. Prior to his retirement he was the Director of Land, Water and Resource Management with the Ministry of Agriculture. He had served in the Department for 21 years so he was well qualified as to drainage matters.

- [17] Both these persons were firm in their evidence that no work is ever done without the prior consent of farmers. Neither of them was aware of any case where the State had acquired land compulsorily to carry out drainage work.
- [18] Baram Deo in fact named Shiu Narayan as the farmer who had given his consent to the re-alignment. The Certificate of Title to the property shows that Shiu Narayan was a registered proprietor of the land in Certificate of Title 13177 up to 1987 so he was the owner of the land at the time of re-alignment.
- [19] The Judge remarked that these two witnesses were independent witnesses. They had nothing to gain. They both testified in a forthright and impressive manner. The Judge found as a fact that Shiu Narayan had consented to the re-alignment and the State had not trespassed onto the property and re-aligned the channel. There was no need for any compulsory acquisition. Shiu Narayan did not complain for six years while he remained as registered proprietor nor did his successor AGARWALA DEVELOPMENT LIMITED lodge any complaints.

SECTION 150 OF THE LAND TRANSFER ACT:

- [20] There is no provision in the Drainage Act which imposes a duty on the Drainage Board to register the existence of drains against a title. It was submitted by the appellant that if the re-alignment was done by consent, then the Minister should have invoked Section 150 of the Land Transfer Act and asked the Registrar to require the proprietor to deposit a plan certified by the Surveyor. Section 150 of the Land Transfer Act provides:

"The Registrar may require the proprietor of any land subject to the provisions of this Act; or any estate or interest therein, desiring to transfer or otherwise to deal with the same or any part thereof to deposit with the Registrar a plan of such land on such

scale and with such measurements thereon as may be prescribed and with such further information as the Registrar may require, and every, such plan shall be certified by a surveyor registered under the provision of the Surveyors Act."

- [21] It will be noted that the important words in the first sentence are : "*may require*". It is not mandatory. It gives the Registrar a discretion. So even if the Minister had asked the Registrar to deposit the plan, the Registrar was not in any way bound to ask Shiu Narayan to lodge a plan. The appellant says that this omission of the respondents makes them liable.

SECTION 140 OF THE LAND TRANSFER ACT

- [22] The appellant relies on Section 140 of the LTA. This section permits someone affected by the Acts or omissions of the Registrar of Titles or clerks in his office to bring an action for damages. The Section is in the following terms:

"Any person who either before or after the commencement of this Act –

- (a) sustains loss or damages through any omission, mistake or misfeasance of the Registrar or any of the his officers or clerks in the execution of their respective duties; or***
- (b) is deprived of any land subject to the provisions of this Act, or of any estate or interest therein, by the registration of any other person as proprietor of such land, estate or interest, or by any error, omission or misdescription in any instrument of title, or in any entry or memorial on the instrument of title, or has sustained any loss or damage by the wrongful inclusion of land in any instrument as aforesaid, and who by this Act is***

barred from bringing an action for possession or other action for the recovery of such land, estate or interest,

may bring an action against the registrar as nominal defendant for the recovery of damages."

IS THE APPELLANT ENTITLED TO DAMAGES UNDER SECTION 140?

[23] Before Section 140(a) applies, a plaintiff must show that the loss was sustained as a result of omission, mistake or misfeasance of the Registrar or one of his clerks in the execution of their duties. Omissions of anyone else besides these persons will not permit a claim under the Section. Therefore to qualify under Section 140(a) a plaintiff must show that:

- i) He suffered loss or damage
- ii) Through
- iii) The omission, mistake or misfeasance of the Registrar or his clerks,
- iv) In the execution of their duties.

[24] In *Registrar of Land v. Marshall (1995) 2 NZLR 189* Hammond, J expressed the view that the word '**through**' is a major limitation on the subsection. It does not cover all losses. He stated:

"the word 'through' is surely a major limitation on the subsection. It immediately separates the Registrar General from the position of a guarantor of the system in respect of all actions of him or his officers. The word comprehends that there must be a causal nexus between the loss or damage sustained and the actions complained of. The mere fact that something "went wrong" does not trigger a right to compensation. There has to be a

relationship between the Registrar's wrong and the result. The public purse is thereby protected in the sense that it is only the wrongful consequences of act by public officials that redound in a public debit."

[25] Like the Learned Judge, we can find no omission by the Registrar. Prior to 1981 the Title correctly showed the boundaries and the river channel. If the registered proprietor goes behind the back of the Registrar and then re-aligns the channel, we fail to see how the Registrar can know this unless he is made aware of it.

Again, like the Learned Judge, we are satisfied that the Registrar was unaware of it. Accordingly, we agree with the Judge that Section 140 does not help the appellant.

THE DRAINAGE ACT:

[26] There is no provision in the Drainage Act which requires the Drainage Board to register the re-alignment. There was no acquisition by the Respondents. The land remained the property of the registered proprietor. The Drainage Board was only trying to assist the registered proprietor. We agree with the Learned Judge that at the time when the re-alignment was made in 1981, the acquiring authority could only acquire land if it was needed for a public purpose. In the present case, there was no evidence before the Judge to suggest that the land was acquired for a public purpose. The only evidence was that the various farmers wanted re-alignment for their own benefit and not for the public benefit.

[27] There is a further reason for supporting the finding of the Learned Judge that the Registrar was not liable for non-registration of the re-alignment of the Creek and

this is found in **Section 37** of the Land Transfer Act (Cap 131) which provides as follows:

"No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on, or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instruments."

- [28] This provision assumes the existence of an instrument which, if not registered, does not have any effect on a title but once registered has the effect described in the instrument. In the present case, first, there was no instrument and secondly it was not registered. Thus, the re-alignment had no effect on the title so far as registration and indefeasibility is concerned. Certainly it had an effect on the land but not on the Register because nothing was registered.

INDEFEASIBILITY OF TITLE

- [29] Ever since the Land Transfer Acts in Australia and New Zealand and this country were enacted, there has been controversy as to what is the meaning of "indefeasibility". What was it intended to mean, and should it now be modified so as to permit just outcomes in a wide variety of circumstances? Like all new systems, and in the realm of land law, the Torrens System was revolutionary compared with the old conveyancing practices, problems arose in the implementation and practice of the system. Probably these were due to the existence of unreal expectations of what the system of registered title would deliver, particularly as its object was to correct and replace many of the deficiencies of the old land law. Certainty of title was the object and, it is only fair to say that the system has succeeded.

- [30] As was stated in *Fels v. Knowles (1906) 26 NZLR 608 at page 620*: "the cardinal principle of the statute is that the Register is everything, and that except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world". Perhaps one of the most useful although cryptic statements about indefeasibility of title is that of Sir Garfield Barwick in *Breskvar v. Wall (1971) 126 CLR 376 at 385* that the Torrens System **"is not a system of registration of title but a system of title by registration"**.
- [31] Basing his argument on indefeasibility of title the appellant then submitted to this Court that Singh, J. in effect held that the appellant must go behind the Register kept at the Office of the Registrar of Titles and sue his predecessor in title for the Register not being correct and not reflecting what is on the ground. It was submitted to us that under the Land Transfer Act a duty had been placed upon the state to keep the Register accurate and this was not dealt with in the judgment.
- [32] We cannot agree with this submission. To do so would involve reading in to the various sections of the Act to which reference has already been made, words which are simply not there, a course of which the courts have consistently disapproved.
- [33] It is probably too pessimistic to submit, as does the third respondent that this would result in the emptying of Consolidated Funds, but undoubtedly the State coffers would be at risk and the person responsible for paying for that risk of course would be the ordinary law-abiding taxpayer. It might be said that this individual has already enough of such burdens to bear without requiring him to

accept anymore. We therefore reject the appellant's arguments on failing to register.

[34] We pass finally to the alleged breach of statutory duty. We reject this briefly because we can find no evidence, nor did the Learned Judge, of any provision which shows any proximity between the Registrar of Titles and the Appellant in supporting a claim for negligence. This is because neither the appellant or anybody else lodged anything with the Registrar to show the re-alignment.

[35] It is also clear that the Drainage Board does not have a proximate relationship with the appellant for the following reasons:

- (i) Another person (Shiu Narayan) owned the property when the re-alignment was done and;
- (ii) Shiu Narayan gave his consent to the Board to perform the drainage works 17 years before the appellant bought the property.

For these reasons we are satisfied that the appellant's claim is not justified and his appeal must be dismissed with costs. The respondents suggest an amount of \$3,000. We consider this is too low but if the Respondents are prepared to accept this sum we shall order it.

JUDGMENT OF D. PATHIK, J.A

- [1] I have had the advantage of reading the Judgments of my learned brother Judges and I agree with them that this appeal must be dismissed with costs for the reasons given by them.
- [2] I would, however, add my own views on certain aspects of the issues raised herein arising particularly as a consequence of the drainage work done on the land.
- [3] The background facts are well summarized by them.
- [4] The issue in short is how far the respondents are liable for non-registration of a memorial on the Certificate of Title although not required to register under the Land Transfer Act and the Drainage Act after the widening of Waikalou Creek.

Claim under s140 of Land Transfer Act

- [5] I hold that the appellant is not entitled to damages under **s140** of the **Land Transfer Act**.
- [6] I reject counsel's submission that "*Section 140[b] is a wide and inclusive subsection and we submit covers our client irrespective of whether there has been any negligence by the Registrar or his employees. All the appellant had to show is an error in the title or omission or mis-description in the title. It gives the appellant a clear cause of action ."*
- [7] This proposition is unsupported by any authority.

- [8] The appellant says that he relied on the Register which he says is "*guaranteed by the Government and has suffered although no fault of his own.*"
- [9] To my knowledge there is no known case in Fiji where under section 140 compensation has been paid because the area or the measurements on a Certificate of Title have been wrongly shown. In the absence of specific provision in the Act, I interpret s140 to mean that **in an ordinary guaranteed title the land which is guaranteed is the land as originally pegged**. The appellant in this case is in possession of that land and he has got everything which the State through the Registrar of Titles has guaranteed.
- [10] In the present case the land herein does not fall in the category where the respondents are liable to pay compensation or damages to the appellant. Therefore s140 does not assist the appellant enabling him to make a claim as he is doing in this case.
- [11] One thing I would like to point out is that the appellant purchased the property with eyes open. He was familiar with the property as he lived there when he was young.
- [12] I might add that it is the accepted conveyancing practice to, apart from doing a proper search of the land, one should go a step further and ascertain from the municipal council whether there is a Town Planning Scheme which is likely to affect the land being purchased. Had this been done by the appellant or his advisers he would have learnt a bit more about the land he was buying. What was preventing him from inspecting the land himself rather than relying on the Register kept at the office of Registrar of Titles? He himself is to be blamed for his negligence for the damage which he has allegedly suffered.
- [13] Under the **Land Transfer Act, Cap 131** registration requires that all documents conferring an interest in land must be registered. In Fiji this is done with the Registrar of Titles [the first Respondent [R1] herein].

- [14] The registration which involves entering a memorial on the title is intended to be read by people other than the person who entered it, and it will normally be accepted as accurate what is on the title. [**South Pacific Property Law** by Sue Forran & Don Paterson].
- [15] All that the Registrar of Titles does or is required by law to do is to registrar whatever document is lodged with him under the law. He is not required to go around inspecting the land for any changes to the contour or area of the land, etc. The Registrar's function is clearly set out in the Land Transfer Act and he cannot go outside it in the performance of his duty.

The Navua Drainage Board

- [16] As for drainage work carried out on the land, there is no statutory requirement that there ought to be an entry on the title. It is not an 'interest' which is registered under either the Land Transfer Act or the Drainage Act, cap 143.
- [17] It is not the Registrar who is liable to answer for the dire straits the appellant is in for it is due to his own neglect to ascertain the exact condition of the land.
- [18] I find that there is no statutory breach on the part of the Registrar of Titles [R1] or the Navua Drainage Board [R2].

The Torrens System and Registration

- [19] Unless an instrument is **registered** the Registrar of Titles bears no liability as it is clearly stated in **s37** of the Act as follows:-

"No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any

estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument."

- [20] Under the **Torrens System** registration is everything and registration cures any defect in the instrument registered.
- [21] Under s140 the appellant will not be entitled to compensation where as in this case there was no registration of the drainage works carried out and the title did not show it either. The appellant says that this is an error, omission or misdescription which entitles him to compensation. I disagree.
- [22] This argument fails as illustrated by **Triesta Investments Pty Ltd –v- Watson [1963] 64 SR [NSW] 98** for:

"In this case the claimant's title was not indefeasible because of the overriding operation of the relevant resumption. The claimant argued that it had suffered a loss as a result of an error, omission or misdescription in the register. Section 127 provides for a claim against the assurance fund in such circumstances. The majority of the court held that as the Registrar- General had no duty to note resumption orders on certificates of title, no error, omission or misdescription had occurred. As a result the claimant was not entitled to compensation under s127."

- [23] Under the provisions of the Drainage Act there is no requirement to register an instrument to show how the land has been affected.
- [24] The problem in this case which is as in **Trieste** [supra] could be remedied by amending the Act requiring the statutory authority [the Drainage Board] to notify the Registrar of Titles of drainage works and that the Registrar be required to note this on the register.

[25] If this is not noted then a person suffering loss could claim compensation under s140. If the lack of notification was a result of the authority's failure to notify the Registrar, then the Registrar would be indemnified by the Drainage Board in this case.

Conclusion

[26] In Fiji the Torrens System has stood the test of time. It is a system of registration of land which was introduced in South Australia by Robert Richard Torrens [born in Cork in 1814]. He was educated at Trinity College Dublin and arrived in South Australia in December 1840. He became Registrar General in 1852 and soon began his land title registration crusade.

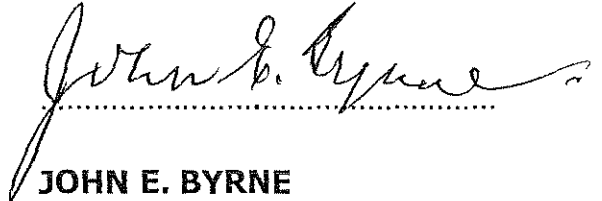
[27] To my knowledge there has never been any suggestion, unlike in Australia, for the need for reform of the system. I also consider there is no need for one as it has worked perfectly well.

[28] The way counsel for the appellant argued in this case suggests to that there is a lacuna in the law in so far as requirement for registration of drainage works under the Drainage Act is concerned.

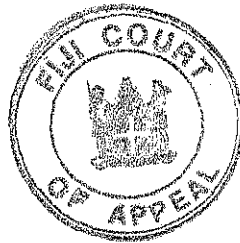
[29] The legislature had not given any thought to amending the Drainage Act to allow for registration. If the appellant is allowed compensation which cannot happen under s140 it will open the flood gate and the country will go bankrupt. The appellant has been very bold in demanding compensation when he himself should have been more vigilant and not so negligent in not ascertaining what he is purchasing much more so when the land is in Fiji and not far from Suva.

[30] This I find is a frivolous appeal and is an abuse of the process of the court. It is dismissed with costs.

Dated at Suva this 23rd day of October 2009.

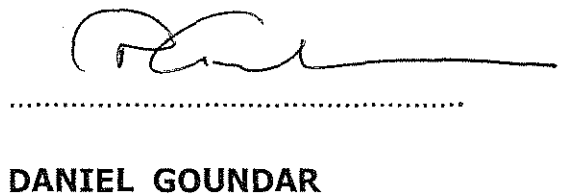

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JOHN E. BYRNE

JUDGE OF APPEAL




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DEVENDRA PATHIK

JUDGE OF APPEAL


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DANIEL GOUNDAR

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