IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 0084 of 2015
(High Court Civil No. 512 of 2005)

BETWEEN	:	**1. METUISELA CAMA**
		2. APAKUKI TUISUE
		3. TIMOCI TULELE
		4. EAGLE OCEAN HARVEST YOUTH GROUP
		Appellants
AND	:	**ATTORNEY GENERAL OF FIJI**
		Respondent
Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Guneratne, JA**
Counsel	:	**Mr. V. Maharaj for the Appellants** **Ms. T. Baravilala with Ms B. Kour for the Respondent**
Dates of Hearing	:	**10th and 22nd November 2017**
Date of Judgment	:	**30th November 2017**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions arrived at by Lecamwasam, JA.

Lecamwasam, JA

[2] This is an appeal filed by the Plaintiffs-Appellants (hereinafter to be referred as Appellants) against the judgment of the learned High Court Judge at Suva dated 16 October 2015.

[3] Facts of the case in brief are: the Appellants are members of a youth union called "Eagle Ocean Harvest Youth Group", being desirous of setting up a fishing depot at Lami made an application for the lease of a particular extent of land from the Lami foreshore to set up a fishing depot and to carry out the objectives of *inter alia*, providing multi skilled business training centre for unemployed youths, etc. having waited for 13 long years the said application was refused by the Director of Fisheries which prompted the Appellants to file action before the High Court at Suva for specific performance and alternatively for damages.

[4] Having heard the parties, the learned High Court Judge, Hickey, J held with the Appellants by making the following orders:-

> *"1. That this Honourable Court declares that Eagle Ocean Harvest Youth Group is entitled as against the state to a lease over 1,860 square meters of land situated at Tiri land, West of Queens Road, Lami, LD Ref. No. 60/737 subject to a number of conditions to be agreed between the parties within 28 days of the date of this judgment or, in the alternative, to be imposed by the Court.*
>
> *2. That the Plaintiffs have liberty to relist the matter on 7 days notice to seek in the alternative an award of damages should they find that within 28 days of this judgment that they have been frustrated by the defendant representatives in putting the above declaration into effect.*
> *..."*

[5] When the matter came up before Kamal Kumar, J, a few years later, he refused relief in regard to the award of damages which prompted the Appellants to file the instant appeal against the Attorney General of Fiji. The grounds of appeal of the Appellants in verbatim are as follows:-

> *1. The learned Trial Judge erred in law and in fact when he dismissed the Plaintiffs/Appellants claim for damages on the grounds :-'*
>
> *a) That the Plaintiffs/Appellants failed to provide evidence which is even vaguely precise to establish any loss or damage suffered as a result of Department of Lands refusal to issue the lease to the Plaintiffs as directed.*

b) *Plaintiffs should have provided financial statements to establish loss and not documents in the form of cheques, requisitions, invoices and its own undated report dating back to 1996.*

c) *Rejecting the Plaintiffs/Appellants claim at the rate of $4,000 per month.*

2. *The learned Judge erred in law and in fact in holding that the hearing of assessment of damages by the trial Judge, Justice Hickey was premature in so doing the learned Judge erred or overlooked the fact that the finding made by Justice Hickey on the issue in question was a finding of fact based on evidence and such finding could only be set aside or overturned by an Appellate Court and not by a Judge having equal jurisdiction to that of a trial judge.*

3. *The learned Judge erred in law in refusing costs of the proceedings to the Appellants.*

[6] In dealing with the instant appeal it is redundant to re visit Order 1 of Hickey, J as no party had preferred an appeal in regard to the first Order. The appeal is only in regard to the second limb of the Order which deals with the award of damages only. As per Order 2, the Appellants were at liberty to relist the case to seek in the alternative an award of damages which they did by filing summons dated 3rd November, 2008.

[7] At the outset, I must thank the learned Counsel for both sides for the invaluable assistance extended to Court not only at the argument stage but also by filing helpful written submissions on the matters in issue.

[8] In paragraph 30 of his judgment, Kamal Kumar, J had observed thus:-

"Once again with all due respect, I note that the hearing on assessment of damages was premature for the following reasons:-

(i) In terms of Order No.2 the plaintiff was only to re-list the matter for assessment of damages, should they found that within twenty eight (28) days of the declaration they have been frustrated by Defendant's representative in putting the Declaration into effect;

(ii) No evidence was produced by any Affidavit or oral evidence by Plaintiffs to establish that Defendants' representative have in any way frustrated the Declaration to be put into effect."

[9] When the Appellants filed summons, it was stated: *"... for an Order that the within action be restored to the cause list and directions be given with regards to assessment of damages by the Plaintiff in terms of paragraph 2 of the decision given by this honourable Court in these proceedings on 25th July 2008 and ..."(vide page 558 HCR)*

[10] Hence it is clear that the Appellants filed the above motion to have the action restored to the cause list in terms of paragraph 2 of the decision with regards to assessment of damages. Although no oral evidence or affidavit evidence in support of the Appellants contention is produced, it is obvious that there was no reason for the appellants to take steps to issue summons unless they were frustrated as envisaged in the second part of the decision of Hickey, J. It is reasonably surmised that the appellants moved to take steps to issue summons as the Respondent's representative or the relevant ministry had frustrated the declaration that was to be given effect.

[11] It is noteworthy to mention that the appellants' filed summons long after the lapse of 28 days since Hickey, J's judgment. This is further sustained by the failure on the part of the respondents to produce any documentary evidence to buttress their position that the appellants were given a new lease subsequent to the date of the judgment, hence the appellants cannot be faulted for availing themselves of the only remedy available to them, i.e. to come before court once again to compel the execution of the order of Court. Therefore I am unable to agree with Justice Kumar's view that this application was premature or the appellants have waived their rights to the declaration in paragraph 1 of Hickey, J's judgment.

[12] When the case came up before Kumar, J, the task at hand for him was solely to make an assessment of damages. If the learned Judge was not convinced with the available evidence, prudence would only have demanded that he take cognizance of the other available evidence without dismissing the claim of the appellants. As per paragraph 55 of the judgment of Kumar, J it is in evidence that there had been cheques, requisitions, invoices and a report dating from 1996. This would have been sufficient for the learned Judge to make a reasonable assessment.

[13] It appears that, when the trial Judge held that 'the plaintiffs have failed to provide any evidence in support of their claim for any damages or loss suffered by it' (at paragraph 28 of his Judgment), the learned Judge was referring to the evidence of Metuisela Cama's and Mr. Jitendra Singh's oral evidence as well as the documentary evidence (viz: the invoices requisitions, receipts and cheques), which all related to the period of 1994 to 1996, whereas the relevant period under

cheques), which all related to the period of 1994 to 1996, whereas the relevant period under consideration was April 1996 and thereafter. In other words although the evidence regards the income generated for 1994 to 1996 was there, there was no evidence in regard to April, 1997 and thereafter.

[14] But, Justice Hickie's judgment in granting the declaration was on the basis that, the lease which the appellant was sanguine of obtaining had been refused unlawfully and that the appellant had been unlawfully evicted (vide para 171 at p68 HCR) from the land which was the subject matter of the said lease. The need for assessing and awarding damages therefore arose in consequence thereof.

[15] The inquiry thus boiled down to as to the basis on which an income generating business in respect of which evidence for the period 1994 to 1996 was available could be projected for the period April, 1999 and thereafter.

[16] The Appellants had ceased to be operational by 3rd January 1998. How could the Appellants then have shown any income for 1998 and thereafter? How could the Court have done its best to assess the Appellant's loss given the fact that, the loss claimed by the appellant was prospective and contingent?

[17] The sum of $4,000 has been claimed by the Appellant apparently, on its past performance. This is the only basis I can think of for the appellant to have arrived at that figure. Though speculative, it at least provided the Court with a basis. Indeed as Vaughan Williams, LJ said in **Chaplin v Hicks** [1911] 2LB788 C.A.: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoers of the necessity of paying damages".

[18] In the written submissions filed on behalf of the Respondent it is stated that the income shown by the Appellants is not in respect of the relevant period. I too agree with these submissions. However, income prior to the relevant period can be used for the purpose of calculation, in arriving at a reasonable figure.

[19] No doubt the evidence of income in respect of the relevant period after 1996 is not available. On the other hand, one cannot say that the failure to grant a lease had not caused any loss to the Appellants. Therefore in order to remedy such a loss, it is the duty of Court to award damages to make good the loss.

[20] As observed in the New Zealand case of **Newbrook v Marshall** (2002) NZLR 606 in relation to assessment of damages:

> *"where there are variables involved as usually occurs in assessment of business profits or losses, if precise figures had to be proved few plaintiffs could succeed, where, as here, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the Courts. It is not a matter of whether an expert could give a reasoned assessment and could defend the number he or she came up with. The assessment of damages often involves so many unquantifiable contingencies and unreasonable assumption that in many cases realism demands a rough and ready approach to the facts."*

[21] As observed by Vaughan Williams, L.J in **Chaplin v Hicks** (1911) 2KB 788 C.A. and also by Devlin, J in **Biggin v Permanite**(1951) 1K.N. 422 at 438. *"Where precise evidence is obtainable, the Court, naturally expects to have it [but] where it is not, the court must do the best it can".*

[22] The case at hand is a fit case where the court should **"do the best it can"** in the face of a lack of precise evidence which would assist the court in an accurate almost scientific assessment. The Court should not absolve itself of the obligations to mete out justice merely because exact and precise figures are not available.

[23] The Respondent in his written submissions dated 22nd September 2008 (page 302 HCR) before the High Court had stated that the period of lease would be only for 5 years. In view of this, court could not consider any period beyond 5 years. After all, it is the prerogative of the government to decide the duration of the lease period.

[24] Apparently the learned Judge had regard to the fact that there was no evidence placed before Court for 1997 and thereafter when the appellants had been evicted from the land in question in January 1998.

[25] While that remains true, there was however the counter-factor that, the appellants, from 1994 had been allowed by the respondent to remain on the land in question carrying on business, de-facto, though expecting to obtain a lease for 5 years as revealed from the evidence but, for whatever reason (not revealed in evidence) which had not been given.

[26] In that regard, Justice Hickey in the original action by the Appellants, had granted the declaration that was sought, leaving the matter of assessment of damages on foot. That was the factor that is to be in the Appellant's favour, implied in the granting of the said declaration was the fact that the eviction was wrongful.

[27] In the result, counting the time that the Appellants had got into possession and had been allowed to remain in occupation (since 1994 to January 1998), the period of the lease that they had been sanguine of obtaining a lease had stood reduced to 1 year, when the appellants had been unlawfully evicted.

[28] While refraining from making any comments in regard to the impugned judgment of the learned High Court Judge, Kumar, J's criticism of Justice Hickey's judgment in granting the said declaration, I shall confine myself to consider as to whether and what damages the Appellants (if at all) ought to be awarded.

[29] In that regard given the fact that the Appellants had been generating income from 1994 to 1996 (on which there is evidence on record), I feel that, on a balance, the sum of $4000.00 claimed by the Appellants for a month is reasonable, given the fact that in the period 1994-1996 their highest incomes for a single month had been the sum of $18,000.00 (odd) and $10,000.00(odd). Hence what was claimed is very much a modest amount of $4000.00 only.

[30] Thus without the need to address such considerations as "contingencies, variables and vicissitudes of business life" (being criteria considered in authoritative precedents across the globe) I opt to use $4000.00 as the basis for the loss that the Appellants had claimed and proceed to make order awarding the sum of $48,000.00 ($4000 x 12).

Guneratne, JA

[31] I agree with the reasoning and conclusions of Lecamwasam, JA's judgment.

Orders of the Court are:

1. *Appeal Allowed.*
2. *Respondent to pay $48,000.00 to the Appellants.*
3. *Interest at the rate of 4% from the date of eviction up to the date of judgment of this Court.*
4. *Respondent to pay $5000.00 as costs to the Appellants.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice J. Guneratne
JUSTICE OF APPEAL