IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC093 OF 2005 **NO. 3/2006L**

BETWEEN: **MAUI BAY LIMITED**

PLAINTIFF

AND: **FINAU TIKOISUVA, JOSUA VAKARARAWA, ELIKI KILINISAU, SEMI TUKAWAKAWA, MATAIASI BULIVOU, VULISONI SIGACIWA, TOMASI SALAIWAI, PENI MOALA, SOROVI BULAMAIBAU, FILIMONE KOTOIONO, VIKA LAGONI** and **TAIONE KOTOYAWA**

DEFENDANTS

R Patel & Co for the Plaintiff (City Agents: Young & Associates)
Tuberi Chambers for the Defendants (City Agents: Vuataki Qoro)

Date of Hearing: 18 November 2005
Date for Submissions of both parties: 9 December 2005
Date of Ruling: 13 January 2006

FINAL RULING OF FINNIGAN J

I have before me an unusual application. It is an Oral application by the Defendants for compensation for houses and crops. The Plaintiff owns certain land upon which the Defendants have been living. In an application commenced by the Plaintiff by Originating Summons on 4 April 2005 the Court on 26 August 2005 made by consent the following orders;

IT IS HEREBY ORDERED BY CONSENT as follows that;-

1. The Defendants and other occupiers are to give immediate vacant possession of the Plaintiff's land comprised in Certificate of Title Volume 29 Folio 2872;

2. The Defendants are to remove the structures that have been erected on the Plaintiff's land or forfeit the same;

3. The Defendants' Summons dated 15th August 2005 is withdrawn forthwith;

4. Execution of the Orders is stayed until the 7th October 2005 to enable the parties to attempt resolution on the issues pertaining to the payment of any compensation;

5. There is no order as to costs on the interlocutory Summons;

6. The matter is adjourned to 7th October 2005 at 9.00am for mention only.

Inherent in those orders is an agreement by the parties "to attempt resolution on the issues pertaining to the payment of any compensation". As it happens, both parties appeared on 7 October 2005 and stated their positions at length to the Court but the interim stay order was not extended. The fact that both parties seem to hold themselves still bound by their agreement for stay of the possession orders indicates an underlying respect and mutual goodwill.

As it happens, the attempts to resolve the claim by the Defendants for compensation as a pre-condition of their departure have been (so far as the affidavits revealed) feeble and never likely to bring an agreement. By agreement between Counsel I am to attempt to resolve the issue by this ruling upon the five affidavits filed and upon the submissions filed by Counsel for the Plaintiff on 10 November 2005 and the submissions filed by Counsel for the Defendants on 7 December 2005.

By any view of the facts and the consent order however, there is nothing left in the present proceedings and this final ruling, brings them to a close.

The Application:

There is no application. Ever since Counsel appeared on 13 May 2005 there has been agreement between them that there would be an order for possession which would not come into effect pending resolution of the issue of compensation. No orders were made that day and the matter was adjourned until 19 August 2005 to allow three months for the negotiations. There was little serious attempt in my view to find common ground and nothing had been achieved by 19 August. On 15 August 2005 the Defendants filed an application which is difficult to comprehend but it signals at least the Defendants' intention to make a written application for compensation. It is this unusual summons, said to have been issued under Orders 14 and 19 of the HCR, which is referred to as withdrawn by consent in the terms set out above. Since the parties are ad idem about my resolving the issue I have accepted the invitation and will say what I can in an attempt to help the parties.

The Facts:

The history of occupation of the land in question is clear enough in the affidavits and annexures, though the various deponents have attempted to argue some variations. From the affidavits, which are argumentative among themselves and still untested as to credibility and probative value, I hold without difficulty that the essential facts are as follows.

With valid authority derived from the then title holder the 12th Defendant and some others began to live on the land in the 1960s. On 29 September 1983 the then titleholder gave a valid authority to five persons which was set out in writing and is as follows;

TO WHOM IT MAY CONCERN

Re: LENNOX ESTATE – MUAVUNISE – C.T. NO. 29/2872

This is to certify that I, as Trustee, do hereby give my authority to Mr Taione Kotoyawa, Asivorosi Senikaucava, Livai Kalou, Meli Puamau and Samuela Sukabula to stay on a freehold property known as "Muavunise" consisting of approximately 281 acres, situated at Baravi in the province of Nadroga as caretakers.

Any unauthorized persons entering the above private property is liable for prosecution.

Signed
MILES JOHNSON

On 1 October 2004 the property passed to a Mr D.C Miller and on 15 December 2004 he transferred it to Maui Bay Limited a company of which he is a Director. This company, the Plaintiff, intends to subdivide and sell the land to residents and investors. In October 2004 and again in March 2005 the Plaintiff served notices on each of the twelve Defendants requiring them to leave the property. There were some others, including some of those named as caretakers in the written authority above, who accepted a payment of $5,000.00 each and took themselves elsewhere. The 12th Defendant first-named in the written authority has claimed leadership of the remainder and is demanding rather more than what the others accepted.

The main deponent for the Plaintiff is Mr D C Miller, but in support the Plaintiff has filed also an affidavit by Livai Kalou who was one of the five caretakers named in the 1983 authorisation. He has accepted $5,000.00 and departed. Thus two of the original caretakers, this person and the 12th Defendant, are in dispute in their affidavits. However one clear fact that emerges from their different accounts is that all of the twelve Defendants derived their authority to be on the land from either the 1983 written authorization or from invitation issued to them by the 12th Defendant (and perhaps others?) as named caretaker(s).

I am unable to accept the statement of Livai Kalou in paragraph 8(a) of his (second) affidavit that he (and others) knew nothing of the coming of the first eleven Defendants on to the land.

The Submissions:

Counsel for the Plaintiff takes a simple line. He submits that the Defendants are squatters without rights who have already conceded a

consent order for vacant possession. He submits that if they have a claim sustainable at law it should be made properly as a claim for damages based on known legal principles and supported by sworn evidence. He relies on dicta of Denning M. R. in **McPhail –v- persons, names unknown**[1973] 3 All ER 393 (CA), and **London Borough of Southwark –v- Williams & Anr.** [1971] 2 All ER 175 (CA). He adopts the definition of Lord Denning in **McPhail** (at Page 395j) of a "squatter". He adopts also the proscription of necessity as an excuse for occupation of land enunciated by Lord Denning in **Borough of Southwark** (above), at page 171e. I doubt however that this 1973 authority is the last word in English law on squatters.

He cites a judgment of Tuivaga J (as he then was) **Attorney-General –v- Hardeo Shandil** (1974) which I find is reported at 20 FLR 93. On this authority he submits that even if the Defendants had obtained permission for the buildings they have erected on the land which is denied and has not been claimed that has no relevance to the question of their right to be on the land.

None of these authorities have helped me much. **McPhail's** case is authority for the proposition that where a Plaintiff applies as he has in the present case and shows entitlement to possession the Court is bound to make an order for recovery of possession and has no authority to give the Defendants time to obey. It is for the owner to do that, not the Courts. This is what the plaintiff did following the Consent Order in the present case. This notwithstanding that the application for possession is made under **Order 113 High Court Rules**, and by **Order 113 Rule 6** the Court may fix a date. The Plaintiff did not seek one. As for necessity, it is not raised by the Defendants as a defence in the present case. They in fact offer no defence.

As for the principle in **Hardeo Shandil**, it goes both ways. The question of legality of structures built on the land has no effect on a claimed right to occupy.

The Defendants do not claim a right to occupy. They are merely taking advantage of the concession given to them to extract some compensation before leaving. What is the justification for their claim? I am afraid there is not much help either in the submissions for the Defendants. Counsel cites a dictim of Scarman L J **Crabb -v- Arun District Council** [1979] Ch 1 179, at 193. If a Plaintiff claims a right in equity the Court must answer three questions. First is there an equity established, second what is the extent of that equity and third what is the appropriate relief to satisfy the equity. I look to the submissions to see what is the equity that is established in the affidavits. Counsel seems to base himself on claimed promises made as inducement for the Defendants to consent to the order for possession. These promises are said to have been promises to negotiate (good faith is not mentioned) and settle some compensation if the Defendants allow the Plaintiff access to the land. The evidence for this such as it is, is said to be in paragraph 6 of Taione Kotoyawa's first affidavit and paragraphs 19 to 22 of his supplementary affidavit. Regrettably, the statements in these paragraphs do not present a clear factual picture to me. There may well have been negotiations and promises but they are not set out in the affidavits. There was no order made on 13 May 2005. I do not know what transpired between the parties.

This claim should be properly made and proved, or else abandoned.

It is equity that the deponent says in his affidavit is the legal basis for the Defendants' claim and this is reinforced by Counsel's submission.

He relies on a judgment of the High Court of Australia **The Commonwealth of Australia –v- Verwayen** [1990] 170 CLR 394. He submits on that authority that the Plaintiff should be estopped from questioning the legal basis of the Defendants' claim because by its conduct it has induced the Defendants to consent to an order for possession. I cannot find that submission supported in the affidavits. From the affidavits I have little doubt that something like this occurred but I do not know what it was.

Counsel relies also on **Waltons Stores (Interstate) Ltd –v- Maher** [1988] 164 CLR 387 for his argument on equitable estoppel, but I find the facts insufficient for application of that doctrine.

Comments:

There is no undertaking by the Plaintiff and no order in force which prevents the Plaintiff from enforcing immediate possession. According to the consent order the Defendants may either remove or forfeit the buildings erected on the land. However, if the registered proprietor of land or his predecessor has created any interests in the land, his title may be subject to those interests.

To obtain a remedy the Defendants must establish their claim at law and I accept that this includes a claim in equity. If they establish a cause of action and entitlement to a remedy then their remedy would be in damages.

The Defendants may well have rights but litigation would be needed to establish them if they are not conceded. In **Maharaj –v- Chand** [1986] 3 All ER 107 the Privy Counsel in an appeal from Fiji

about Section 12 of the Agricultural Landlord and Tenant Act Cap 270 held that "neither the terms nor the spirit of [S.12] are violated by an estoppel or equity operating solely ***inter-partes***". It held that the right to occupy a house, where it exists, is a purely personal right, which is outside the scope of Section 12. In 1965 the English Court of Appeal had established that where a person expended money on the house of another in the expectation, induced or encouraged by the owner of the house, that he would be allowed to remain in occupation, an equity was created such that the court would protect his occupation of the house, and the court had power to determine in what way the equity so arising could be satisfied; **Inwards –v- Baker** [1965] 2 QB 29.

In a bilateral dispute the law and the courts exist to give a fair deal to both parties, to balance according to law what each party claims as against the other is the fair thing. In the present dispute the Plaintiff is purchaser of certain land and the Defendants are the people living on that land. Both sides have strongly stated claims and in my view unrealistic expectations.

The purchaser of the land is unrealistic in both law and justice in my view, expecting to give 30 days' notice to people who have lived on the land with some claim of right for long periods. Some claim up to 45 years, some 20 years and some perhaps less.

Those people, labelled "squatters" by the purchaser, are themselves unrealistic in their heady – and quite informal – claims for money compensation for crops, trees and houses. Without considering any law as to landlord/tenant and law as to fixtures, since neither party has yet addressed these, it seems to me that so far as crops and trees are concerned if a landowner allows an invitee to grow crops and trees for sustenance and income then a good rule of thumb might be that those

items belong while in the ground to the landowner and are grown by his goodwill but belong to the grower once harvested.

I have had no submissions about this, but it seems to me therefore that the crops and trees in the ground if not genuinely ready for harvest belong *prima-facie* to the purchaser, the Plaintiff. The houses and church however I gather from the consent order to be removable and thus not fixtures. They can be subject to some sort of claim, perhaps e.g. indemnity value, or costs of removal or replacement. Even the Plaintiff has obtained a valuation of the buildings for that very purpose but it seems the offer of that sum has not been made. From the affidavits it is my opinion *prima facie*, hat the Plaintiff's valuation as an offer would be much closer to a legal and equitable solution to the impasse then the Plaintiff's present position and would probably settle the matter.

Future Actions:

I take the opportunity to express obiter some other views. Prima facie all the Defendants were on the land with proper authority. For over 20 years the titleholder allowed the five caretakers freedom in how they carried out their functions. It never was heard, and its successor in title cannot now be heard, to say that these caretakers acted beyond their authority in doing three things which were clearly foreseeable, some even necessary for the caretaking functions. These were first to build homes second to grow trees and crops and third to invite their families and others to share the caretaking function with them. The titleholder reserved a right to prosecute any unauthorized persons entering the property. Authorised by whom? Clearly, over the years as they passed, authorized by the caretakers.

The Plaintiff inherited the obligations of the previous titleholder. It is bound to recognize that what the previous titleholder allowed was more than mere possession. The written authority given in 1983 recognised a situation that may have existed already for 20 years before that. Mere notices to quit and minimal exgratia payments were an inadequate response to the real situation. The Plaintiff gave its first notices before it was itself a registered titleholder. It was in a hurry to get started on its project. But why should it not accept its own evidence of the indemnity value of the structures which the Defendants must remove or leave behind? Its own valuer values the structures at $84,145.00 (Livai Kalou affidavit filed 26 August 2005, annexure 15).

There can be no question of costs and I make no order.

This final ruling brings the present proceedings to an end.

D.D. Finnigan
JUDGE

At Lautoka
13 January 2006