

In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 312 of 2015

Between: Rokolua Lala
Plaintiff
And: Fiji Roads Authority
First Defendant
And: Attorney General of Fiji
Second Defendant

Appearances: Mr S. Lateef with Ms Kunatuba for the plaintiff
Ms O.Solimailagi with Ms S. Daunabuna for the first and second defendants

Date of hearing: 23rd February, 2016

Judgment

1. By originating summons filed on 25th September, 2015, the plaintiff, the owner of the property on CT No 23165 at Queens Road, Lami, seeks the following orders:
 - a) *A Declaration that the First Defendant compensate the Plaintiff as per an independent valuation for damages caused by the First Defendant (or its predecessor) to the Plaintiff;*
 - b) *A Declaration against the Second defendant ordering the Second defendant to consider and order payment of damages as per the Fiji Roads Authority Decree ;and*
 - c) *A Declaration that the Fiji Roads Authority Decree is infringing on the Constitutional Rights of the Plaintiff and or does not protect the Defendants against claims or negligence in common law and which occurred prior to the promulgation of the Decree.*

The affidavit in support

2. The plaintiff, in his affidavit in support of the summons states that in or about 2010, the first defendant, formerly known as the PWD constructed a drain through the middle of his property, negligently and without his or the previous owners' permission. The construction has significantly damaged his property, as during periods of heavy rain it is prone to flooding. It has indirectly caused damage as it has created cracks along the outside of his wall and the veranda has to some extent, given way and consequently crushed the sewer pipe rendering it ineffective.

3. The plaintiff, in his affidavit continues to state that as a result of the "*illegal, careless and negligent work of the 1st Defendant's predecessor(PWD)*", he and his family have suffered personally and financially by repairing and living in conditions below standard, due to the flooding. The damages include:
 - a) *Constant eroding of soil.*
 - b) *Fertilised soil being washed away.*
 - c) *Overflowing during heavy periods of rain.*
 - d) *Sinking of the rear porch to my house.*
 - e) *Flooding of compound during rainy days.*
 - f) *Sewerage systems severely affected.*
 - g) *Deterioration to building structures lifespan.*
 - h) *Disruption to further development.*
 - i) *Improper drainage system to Road construction.*
 - j) *Unhygienic conditions during wet season.*
 - k) *Causing under utilization to property.*
 - l) *And sudden changes to ground condition.*

4. The plaintiff states that the "*PWD is now the Fiji Roads Authority("FRA")*" and concludes that no serious recourse or compensation has been offered to him, despite several meetings.

The affidavit in response

5. Neil Cook, Chief Executive Officer of the Fiji Roads Authority, (“FRA”) in his affidavit in response states that if work was carried out on the property by the former PWD, then any claim ought to be brought against the Ministry of Infrastructure and Transport. The FRA is only accountable legally for liabilities or obligations of the former Department of Roads. PWD is not a predecessor of FRA. FRA was established to replace the Department of National Roads rather than PWD.
6. The FRA denies that the works carried out on the drain significantly damaged the property. The existence of the drain on the property facilitates the movement of water from the surface to the exit channel. The plaintiff’s property would be subject to stationary bodies of water without the drain, as it is the lowest lying property in the vicinity. He neither admits nor denies that the drain has dramatically increased in size over the years.
7. The affidavit in response states that when the plaintiff lodged a complaint, FRA engaged its Professional Consultant Engineers, MWH to carry out an assessment of the plaintiff’s property and prepare an Engineering Report and Topographical survey of the property. The report demonstrates that the plaintiff’s structural dwelling is a modest home that was not built recently nor appears to be well designed or constructed. It is situated on low lying land adjacent to the sea and likely to have been part of a natural waterway prior to the Queens Highway realignment. FRA has been genuine in its efforts to assist the plaintiff, despite not being liable for the alleged damages and made a ‘without prejudice’ settlement offer to the plaintiff to resolve the issue.

The affidavit in reply

8. The plaintiff, in his affidavit in reply states that the PWD is the “*predecessor*” of the FRA. The transition from PWD to FRA was a two step process. PWD was re-organised and became the Dept of National Roads, (“DNR”). The DNR then was re-organised and became the FRA. The plaintiff annexes a copy of the Technical Assistance Completion Report.

The determination

Is the PWD now the FRA ?

9. The plaintiff claims that the FRA is the successor of the PWD. The written submissions filed on behalf of the plaintiff submits that the PWD was reorganized in the context of the Public Enterprises Act 1996. The DNR absorbed all the functions of PWD. The FRA was then created in 2012, to absorb all the functions of DNR.
10. The first defendant, the FRA disputes that it is the successor of the PWD and states in the affidavit in response filed on its behalf that:
- *The “FRA is only accountable legally for any liabilities or obligations of the former .. “DNR”.*
 - *“PWD is not a predecessor of FRA. FRA was established to replace the Department of National Roads rather than PWD”.*
11. Section 3(a) of the Fiji Road Authority Decree, 2012, provides that the “*principle objectives of this Decree are to –*
- (a) give effect to the re-organisation of the Department of National Roads; and*
 - (b) make provision for the effective management and administration of the road systems”.*
12. Section 18 provides:
- 1) *As from the commencement of this Decree, all moveable property vested in the State immediately before that date and used or managed by the Department, and all assets, interests, rights, privileges, liabilities and obligations of the State relating to the Department shall be transferred to and shall vest in the Authority without conveyance, assignment or transfer.*
 - 2) *Every right and liability vested in Sub Section (1) in the Authority may, on and after the commencement of this Decree, be sued on, recovered or enforced by or against the Authority in its own name and it shall not be necessary for the Authority or the State to give notice to any person whose right or liability is affected by the vesting.*(emphasis added)
13. The section provides that all liabilities and obligations of the State relating to the Dept, vest in the State.

14. It follows that first defendant takes over the liabilities and obligations of the DNR, which formed part of the PWD.

15. The defendants claim indemnity from suit, in terms of section 38A of the Decree.

Section 38 A(1) reads :

Neither the Committee, the Change Manager, the Authority for any officer, servant, workman, or labourer employed or engaged by the Committee, the Change Manager or the Authority shall be liable for any action, suit, proceeding, dispute or challenge in any Court, Tribunal or any other adjudicating body for or in respect of any act or omission done in the exercise or non-exercise of the powers conferred by or duties prescribed under the provisions of this Decree or any other written law.

16. On a reading of section 38(A) (1), I would agree with Mr Lateef, counsel for the plaintiff that the section is specific to acts and omissions done in the exercise or non-exercise of the powers or duties prescribed under the Decree. The section does not contemplate alleged acts of negligence committed before the Decree came into existence.

17. As such, the Decree does not, in my view grant immunity to the FRA for acts of the PWD.

18. I turn to the facts .

19. The plaintiff claims that the drain was constructed on his property by the PWD, without his or the former owner's consent. The plaintiff relies on a letter dated 21st April, 2015, from the plaintiff and the previous owner which states that their consent was not obtained for the construction five years earlier.

20. The defendants submit that it has maintained at all times that it has no knowledge of the construction of the drain on the property.

21. Be that as it may, the crucial question is whether the PWD had caused damage to the plaintiff's property, as alleged.

22. It is contended on behalf of the plaintiff that the first defendant was negligent, as the Engineer's Report attached to the defendants' affidavit in opposition "admits" that:

*the ground surface is very lumpy which **suggests that the earthworks were poorly excavated;***

the current drain is unlined and it is evident that the natural soils are susceptible to erosion (by flowing water); If the drain is left unlined, the soil will be eroded and continue to result in loss of land within the property...

The broken/disconnected sewer pipe discharge system may have been adversely affected by PWD earthworks.

The open joint allows raw sewerage to flow to the surface drain very close to the dwelling with unpleasant smells and unhygienic conditions being the daily result.

23. In my view, the phrases I have highlighted clearly do not admit liability for the works by the PWD. I would also refer to the "Conclusion" and "Recommendation" in the Engineer's Report, which I would reproduce in its entirety.

24. The "Conclusion" provides:

It is not possible to prove or disprove a direct link between the construction of the open drain and the poor condition of the dwelling; however it does seem unlikely that existence of the drain has had any significant adverse effect on the building.

It is possible that the sewer pipe was damaged by drain construction earthworks.

It is evident that the drain sides are continuing to erode; resulting in a loss of land to the owner.

It is certain that storm water flow volumes, velocity and intensity will have increased due to the construction of "new" Queens Roads.

Future upstream development will only increase the rate of run-off. At high volume flows, storm water can overtop the drain side and flow towards the dwelling.

It is likely that "new" Queens Road and the 900 diameter culvert were constructed before Mr Durunibou purchased the property.

It seems reasonable to accept that the PWD did excavate the drainage (twice) after Mr Durunibou purchased the property.

25. The "Recommendation" reads:

FRA does not admit liability for the problems claimed by Mr Durunibou.

FRA acknowledges that the drain now carries higher volume and velocity flows than the natural water course would have done.

FRA offers in good faith to arrange repairs to the sewer pipe system.

FRA offers in good faith to arrange a cut-off surface drain along the toe of the "new" Queens Road batter.

FRA engages a consultant to design improvements to the drain to protect the land and 'future proof' the storm water capacity.

26. In my judgment, clearly there has been no admission of liability by the first defendant.

27. For the reason outlined, I dismiss the plaintiff's originating summons.

28. **Orders**

(a) The summons of the plaintiff is declined.

(b) The plaintiff shall pay the defendants costs in a sum of \$ 1500 summarily assessed .



A.L.B. Brito-Mutunayagam

Judge

9th June, 2016