Kingdom of Tonga v Mokofisi

Privy Council
Appeal No 7 / 1990

20, 30 March 1990

Appeal - award of damages - principles to be applied by appellate court
Damages – exemplary damages - principles for awarding

The appellant appealed against the amount of damages awarded to the respondent in respect of unlawful encroachment on to his land and removal of top soil and coral by the Ministry of Works, on the ground that the award of $5000 for loss of amenities was excessive, and the award of $2,000 for exemplary damages was inappropriate.

HELD:

1. The award of $5,000 for loss of amenities was not shown to be manifestly excessive and so should not be interfered with;
2. The award of $2,000 for exemplary damages was not appropriate since exemplary damages should be awarded only in the three categories set out in *Rookes v Barnard* [1964] A.C.1129 and none of these was present in the current proceedings.

Cases considered :

Rookes v Barnard [1964] A. C. 1129 [1964] 1 All E. R. 367

Counsel for the appellant : Mr K. Whitcombe
Counsel for the respondent : Mr W. C. Edwards

Judgment of the Privy Council

This is an appeal against the quantum of damages awarded the Respondent following encroachment on his land and the removal of top soil and coral by the Ministry in the course of working its quarry on adjoining land.

Damages totalling $15,212-50 were awarded made up as follows

Loss of land:	2287-50
Loss of amenity:	5000-00
Barrier fence:	5000-00
Conversion of top soil:	925-00
Damages at large:	2000-00
	$15,212-50

Only the awards for loss of amenity ($5000) and damages at large ($2000) were challenged.

As a result of the Ministry's activities 150 sq. metres of his allotment was lost to the Respondent.

It appears that on the "loss of amenity" aspect the Trial Judge was primarily dependent on the evidence of a Mr Lemoto, a professional valuer of long experience employed by the Ministry of Lands, and his own inspection of the property. Mr Lemoto said that he took two factors into account, the disfigurement of the boundary that had been excavated and the loss of privacy due to the removal of rocks. Having said that, he conceded that the assessment of the damage in money terms posed problems as there was no precedent available in Tonga. In the end he estimated that the disfigurement aspect could justify an award of between 5% and 25% of the total value of the allotment and the loss of privacy between 7½% and 25%. His value for the allotment was $15,500. In answer to a question from the Court Mr Lemoto conceded that the Court could award "$1,875 or $7,750 or anything in between and not be wrong." Faced with that situation the Trial Judge could do little else but fix damages at about the mid point, which is what he did in awarding $5,000.

Mr Whitcombe submitted that there was an element of duplication in the award, in that the "Respondent had already been compensated for the loss of his land; and whether or not there was encroachment, the Respondent had always faced the prospect of a 20 ft. drop close to his boundary

The sum awarded for loss of amenities is, in our opinion, on the high side, but not to the point of being manifestly excessive and so justifying our interference.

As for the award of $2000 as "damages at large" this is what the Trial Judge had to say;

> "Finally this is a case where in the assessment of damages there ought to be an element reflectiong firstly that the damages are to be awarded at large and not limited to provable specific pecuniary loss. This arises from the affront caused by the torts of trespass to land and unlawful conversion. Secondly, this element should reflect aggravated damages for the Defendant's conduct right up to the conclusion of the trial *(Cassell*

& Co. v Broome [1972] 1 All E. R. 801 (HL) 824,836, 870); as stated earlier it is disappointing and regrettable that from the time when the Plaintiff first raised the matter with the Defendant over a period of almost 3 years, right up to the trial, the Ministry of Works seems to have ignored the instructions of the Minister of Lands to negotiate an out-of-court settlement and does not appear to have taken the matter seriously. Even in the face of a substantial claim for damages the Ministry does not seem to have made any realistic assessment of the damages which a court was likely to award so that they might compensate the Plaintiff properly. Government departments in particular owe a duty to the public to deal in a proper manner with rightful claims made against them. By contrast the Ministry of Lands took the Plaintiff's request seriously and gave him what help it could. For all this element the Court awards the Plaintiff the further sum of $2,000."

What we are dealing with here is really an award of exemplary damages, imposed as a punishment for the Ministry's failure to act responsibly, and, as the Trial Judge said for the "affront" caused by the trespass. He referred to the case of *Cassell & Co, v Broome* [1971] 1 All E. R. 810, a defamation case.

Mr Whitcombe made the point that there was no prayer in the Statement of Claim for an award of exemplary damages and that seems true enough. Of more importance however is that the issue of exemplary or aggravated damages does not assume the same proportions in trespass or damage to land as it does in defamation and in other torts affecting dignitary interests.

The whole approach to exemplary damages has been changed by the decision in *Rookes* v *Barnard* (1964) A.C. 1129, (since approved in *Broome* v *Cassell*). Exemplary damages are now recoverable only where the circumstances of the case bring it within one of the three categories set out by Lord Devlin in *Rookes* v *Barnard*. It is Lord Devlin's second category, which applies where a defendant has acted tortiously with a view to profit, that is most likely to lead in practice to exemplary damages in cases of trespass to land. The present case did not involve a profit motivated trespass.

We do not regard this as an appropriate case for an award of exemplary or aggravated damages.

The appeal is therefore allowed to the extent that the award of $2000 as "damages at large" is quashed. No order for costs.