

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 26 of 2003

BETWEEN : **EDWARD VINCE JENNINGS** of Nadi Town, Nadi, Business
Proprietor

Plaintiff

AND : **PARWATI DEVI** also known as **PARWATI** daughter of Krishna
Nair of Qeleloa, Navo, Nadi, Domestic Duties

1st Defendant

FINAL JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr A. Sahu Khan for the Plaintiff
No Appearance

Solicitors: Messrs M. K. Sahu Khan & Co. for the Plaintiff
Defendant In Person

Date of Hearing: 16 July 2007
Date of Judgment: 7 August 2009.

INTRODUCTION

[1] The Plaintiff in this case claims damages from the Defendant for conversion by the Defendant of the Plaintiff's workshop, tools and marine equipment.

- [2] This is one of those cases where the trial Judge was not able to deliver the Judgment and Counsel agreed that I do so using the trial Judge's notes of evidence and documents filed in court.
- [3] I have considered the evidence and the court documents and find that the Defendant is liable to the Plaintiff for damages for conversion, interest thereon and costs.
- [4] These are my reasons.

CASE HISTORY

- [5] This is another one of those cases that suffered a long and arduous journey through the Court. The Writ of Summons was filed on 21 January 2003. The Defendant filed her Defence and Counter Claim on 21 February 2003. The Plaintiff having not filed his Reply and Answer within the time limited by the High Court Rules, the Defendant took advantage of his failure and entered Default judgment for her Counter Claim against the Plaintiff on 18 March 2003. Somehow the Plaintiff managed to file his Reply and Answer on 23 May 2003. On 29 May 2003 he filed an application to set aside the Default judgment. A timetable was set by the Court for the filing of affidavits to be used in the hearing of the Plaintiff's application to set aside. The application was called on several occasions and on one of those the Plaintiff failed to appear and the Court struck out the Plaintiff's application. The Plaintiff filed another application on 15 April 2005, this time to reinstate his earlier application to set aside the Default judgment. When this application was called on 4 August 2005, the parties agreed to set aside the Default judgment. The Reply and Answer that was filed earlier was refiled and reissued on 15 August 2005. The Summons for directions was eventually issued and the Order made by consent on 4 October 2005. The practice at the time was that the parties need only file their list of documents

before the matter is set down for trial. There was no need for a pre-trial conference or filing of trial documents and copy pleadings. The matter was first set down for hearing on 21 June 2006. The hearing did not proceed so the matter was rescheduled for 25 September 2006. The Defendant had, in the period leading up to this, changed solicitors. On 25 September 2006, the Defendant's new solicitor was given leave to withdraw and the Defendant was left unrepresented. She was given more time to find another solicitor. The Defendant apparently did not speak English. She asked for a two month adjournment. The Plaintiff did not appear on 25 September 2006 so the matter was further adjourned to November 2006. That was the last time the Defendant appeared in Court. Several adjournments later the matter was set down for trial on 2 July 2007. On **2 July 2007** only the Plaintiff appeared with his Counsel so the Court ordered the hearing to proceed in the absence of the Defendant. It was necessary for the Plaintiff to prove special damages and it appeared that the Plaintiff was not in a position to prove it by way of documentation so the hearing was further adjourned to 16 July 2007. On **16 July 2007**, the Defendant again did not appear so the Court struck out her Defence and Counter Claim and the Plaintiff went ahead and gave his evidence.

THE TRIAL EVIDENCE

[6] The Plaintiff tendered a bundle of documents as his documentary evidence.

[7] He also gave oral evidence. He ran a recreational and commercial scuba diving operation at Denarau. He also ran an engineering workshop called Marine Engineering. The engineering workshop was run from the Defendant's land. There was another engineering company on the land before him. That company owned a workshop on the land and was interested in selling its workshop to the Plaintiff. The Plaintiff entered into a sale and purchase agreement for the workshop, paid up and moved in. He discussed his interest in buying the land

with the Defendant and on December 1998 they entered into a sale and purchase agreement for the purchase of the land. Both parties agreed to be represented by the same lawyer. The sale was subject to the consent of the Director of Lands because it was a Crown lease. In the process of obtaining the Director's consent he found out that the Defendant had already entered into a similar agreement with someone else for the same land. He could not get consent because that other person had beaten him to it. By this time he had already paid the full purchase price for the other company's workshop, tools and equipment and nearly half of the purchase price for the land into the solicitor's trust account. The sale did not proceed obviously but by this time he had been in occupation of the land for sometime. He remained on the land as a monthly tenant with the agreement of the Defendant, paying rent and even advancing monies to her in the hope that he could rescue his sale and purchase agreement. That was not to be because subsequently the Defendant evicted him. He came to know about it when he drove past one day and saw his property locked down and people moving his equipment. He was told not to enter. He did not receive a notice to quit. He sought the assistance of the Police to salvage his equipment and boat but only managed to retrieve the boat. He lost everything else.

[8] He provided a list of items that were left behind and lost totalling \$18,000 and quotations and other documentation to support his claim.

[9] He also claimed the \$20,000 he paid to the other company for the workshop and other items.

[10] The Defendant did not appear to defend so I accept the Plaintiff's evidence in its entirety.

THE PLAINTIFF'S CASE

[11] Counsel for the Plaintiff submits that the Defendant was the bailee of the Plaintiff's goods. He therefore owed a duty of care to return them when asked

and to protect them from loss or harm. He referred to **Joseph Travers & Sons v. Cooper (1915) 1 KB 73** and other cases dealing with negligence of a bailee.

- [12] I think however, this case is one more of conversion rather than breach of duty by a bailee. Counsel referred me to a passage from the well referenced text "**Clerk and Lindsell on Torts**", 15 Edn, at page 54:

"Provided that a defendant voluntarily deals with another's goods in such a way as to constitute a denial of the latter's rights in them or an assertion of rights inconsistent with those rights (Oakley v. Lyster (1931) 1 KB 148) he will be liable though he acted in the utmost good faith. (Hollins v Fowler (1875) LR 7 HL 757; Consolidated Co v Curtis (1892) 1 QB 495; Marfani & Co Ltd v Midland Bank Ltd (1968) 1 WLR 956, 971)."

- [13] The facts in **Oakley v. Lyster (1931) 1 KB 148** are similar to the facts of this case. In that case the Plaintiff stored stuff on land which he had leased. The owner of the land subsequently sold the land to the Defendant. The Plaintiff's stuff was stored on the land when the Defendant bought it. The Plaintiff tried to recover and sell his stuff but the Defendant refused to let him in claiming that he bought the land and everything on it including the plaintiff's stuff. The Plaintiff sued the Defendant for damages for conversion of his stuff. One of the points argued in that case was whether the Defendant could be liable for conversion when he was not in actual physical possession of the plaintiff's stuff. Three judges of the English Court of Appeal unanimously said yes. At page 155, Greer LJ explained the reason for saying yes in this way:

"In this case what the [defendant] did was this: he had bought the farm on which the stuff in question was lying and the only way in which he could assert his right of possession was by saying to all the world that no one should have it without his permission. That in substance is what he said. In those circumstances it is right to say that he was in possession of

the stuff and was exercising control over it in derogation of the rights of the true owner...the causes of action in their essence ... do not depend so much on the assertion of rights by the defendant; they depend upon whether the defendant has interfered with rights of property and those rights include rights of possession, and if the defendant is proved to have prevented the true owner from exercising his rights it is quite clear that there is a cause of action... I agree that the language used by Kelly CB in England v Cowley LR 8 Ex 126, 131 supports the view that even in a case where the possession has not been taken by the defendant but all that has happened is that the defendant claims to exercise as against the plaintiff the rights of owner in respect of the goods that is sufficient to support an action for conversion."

- [14] There is no doubt in this case that the Plaintiff is the true owner of the workshop and the goods retained by the Defendant. It is equally as clear that the Defendant had exercised ownership rights over the Plaintiff's property inconsistent with the rights of the Plaintiff as the true owner. In accordance with these principles therefore the Plaintiff has proven his case of conversion of his property by the Defendant.
- [15] I accept the oral and documentary proof that the value of the property that the Plaintiff was unable to retrieve and lost was \$38,000. I make no differentiation between the workshop and the other items of property. The purchase price of \$20,000 is the value of the workshop that he lost.
- [16] I therefore award damages for the Plaintiff in the sum of **\$38,000**.
- [17] Incidentally, I note that the sale and purchase agreement for the land, clause 2 (a), only required the Plaintiff to pay the \$20,000 deposit to the Solicitor's trust account "upon grant of consent by the Director of Lands". The Director's consent was not granted here because of the Defendant's dishonesty but the Plaintiff said in evidence that he had already paid the \$20,000. The deposit

should be returned if it has not already been done. This is not the subject of the claim here so I cannot make any order for its return. The Plaintiff will have to seek recovery in separate proceedings. This case highlights the risks of both parties being represented by the same lawyer. I must stress that the lawyer concerned is not one of the lawyers involved in this case.

INTEREST ON DAMAGES

[18] The Plaintiff claims interest under the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27]**. I have discretion whether to award interest or not. The delay in getting this matter to trial was caused in a significant way by the Defendant entering default judgment in March 2003, precipitously in my view. She also caused substantial delays in having her lawyers withdraw and then failed to engage other lawyers as well as failing to appear in Court. I think therefore that the Plaintiff is entitled to interest for the delay in not getting his judgment earlier. I also think that the Defendant had acted dishonestly in a situation where she was clearly wrong.

[19] The current rate of interest used by this Court is 6%. I award interest over the period from the issue of the writ in 2003 to the date of this judgment, a period which I will take as 6 years. The interest component is therefore 6years x \$38,000 x 6% = **\$ 13,680.00**

COSTS

[20] Costs follow the event. This is not a complicated case. I make no allowance for the interlocutory attendances. I therefore award costs of **\$1,000** to the Plaintiff to be paid within 21 days.

ORDERS

[21] I therefore order that:

1. The Defendant pays the Plaintiff the sum of **\$38,000** as damages for conversion.
2. The Defendant pays the Plaintiff the sum of **\$ 13,680** as interest on that sum.
3. The Defendant pays the Plaintiff's costs of **\$1,000** within 21 days.

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Sosefo Inoke
Judge