

A

## NATIVE LAND TRUST BOARD

v.

## PHUL KUAR AND ANOTHER

B

[COURT OF APPEAL, 1973 (Gould V.P., Marsack J. A., Henry J.A.)  
3rd and 19th July]

## Civil Jurisdiction

C

*Landlord and Tenant—licensee legally in possession of land—contemporaneous lease to another—sole right of occupation and enjoyment of land—damages for breach of terms of licence.*

*Damages—landlord and tenant—licensee legally in possession of land—contemporaneous lease to another—sole right of occupation and enjoyment of land—damages for breach of terms of licence.*

D

As a result of a mistake by the appellant, the second respondent was granted a lease of land over which a grazing licence was still in force in favour of the first respondent. The second respondent in spite of protestations by the first respondent took possession and converted all the goods and chattels found thereon to his own use. The trial judge awarded damages of \$20,062 against the second respondent which included \$5,600 against the appellant and the second respondent jointly.

The second respondent did not pursue his appeal.

E

*Held:* 1. As there was a definite grant to the first respondent of the sole right of occupation and use for grazing, there was an obligation on the appellant/grantor to do nothing to disturb this or authorise its disturbance by others.

2. The damages must be limited to those arising from the trespass of the second respondent by which the first respondent was deprived of the use of the land for 13 months. As special damages were not claimed, the sum of \$5,600 was excessive and would be reduced to \$2,500.

F

Cases referred to:

*O'Keefe v. Williams*, 11 C.L.R. 171.

*Hadley v. Baxendale* (1854) 9 Ex. 341; 2 W.R. 302.

Appeal against the judgment of the Supreme Court awarding the first respondent \$5,600 by way of damages against the appellant.

G

*C. L. Jamnadas* for the appellant.

*F. M. K. Sherani* for the first respondent.

*K. C. Ramrakha* for the second respondent who did not continue with his appeal

The following judgments were read:

H

MARSACK, J.A. [19th July 1973.]—

This is an appeal against a judgment of the Supreme Court given at Suva on the 2nd August, 1972 awarding the first respondent \$5,600 by way of damages against the appellant. At the hearing in the Court below there were two defendants, the second being Ratu Epi Rovawakulua; and the judgment referred to awarded

\$20,062.50 by way of damages against the second defendant. This sum included the \$5,600 for which the first and second respondents were made jointly and severally liable. At the hearing of this appeal, Mr K. C. Ramrakha on behalf of second respondent appeared and informed the Court that the second respondent did not wish to appear or be heard on the appeal. Accordingly, this Court is concerned only with the award of \$5,600 against the appellant; except that any alteration in this amount would necessarily involve a similar alteration in the judgment against the second respondent under the provision for joint and several liability.

The basic facts are not in dispute. In 1947 one Latchman Singh obtained from the appellant a Grazing Licence over some 80 acres of native land, known as Wainikeli and Natabuakana. This Licence was issued under the statutory powers held by the appellant Board. This Grazing Licence was still in force when the appellant issued a notice, dated 19th November 1969 but not served on the first respondent until 13th July 1970, terminating the Grazing Licence in so far as it affected portion of the land, being native reserve, as from 31st December 1970. The expiry date of the notice was subsequently extended to 31st December 1971, to which date the first respondent was entitled to possession of the land.

On the 30th October 1970 the appellant issued to the second respondent (who for the sake of clarity will be referred to in this judgment as Rovawakulua) a notice of provisional approval of a lease to him of the land already occupied by the second respondent. The notice stated that the lease would be for a period of 30 years commencing from the 1st July 1970, that is to say, three months prior to the issue of the notice. The notice further went on to say that Rovawakulua must not occupy the land until \$13.25 for stamp duty and on account of rent, was paid. This sum was duly paid.

On the 24th November 1970 the appellant forwarded to Rovawakulua a document referred to as a 'provisional approval of lease' of the land in question for 30 years from the 1st July 1970. Clause 3 of this document read:—

"You will not receive final notice of approval nor may you occupy the land provisionally approved for lease until the first six months rent and the estimated survey fee have been paid."

The rent for the first six months was paid. The estimated survey fee has not been paid, and the amount quoted under this head in the document is stated there to be 'subject to adjustment'.

Rovawakulua then went into possession of the land. On the 1st December 1970 Rovawakulua sent a notice to Latchman Singh stating that the latter was not entitled to possession of the land in question, and he would not permit Latchman Singh to trespass on the land any more or to remove anything from it. Latchman Singh complained immediately to the appellant. A land agent employed by the appellant Board went on to the land; the land agent informed Rovawakulua that the provisional approval notice had been issued by mistake and that he must restore the farm to Latchman Singh. Rovawakulua refused to vacate the property and the appellant Board took no further action in the matter. Rovawakulua and his workmen proceeded to seize all the goods and chattels belonging to the first respondent and to convert them to his own use. The first respondent, the successor in title to Latchman Singh, has been deprived by this action of Rovawakulua of the use of the land and has lost the revenue accruing from her farming activities. The trial Judge assessed the value of the building, livestock and chattels, the property of the first respondent seized by Rovawakulua, at \$10,062.50. He assessed the loss of net income as \$5,600 and he also awarded exemplary damages against

- A Rovawakulua in the sum of \$5,000. As has already been stated, the award of \$5,600 damages was made against the appellant and Rovawakulua jointly and severally, and it is against that part of the judgment that this appeal is brought.

The notice of appeal sets out four grounds in the following terms:—

- B “ 1. The learned Judge erred in fact and in law in holding that under the grazing licence issued by the first defendant to the plaintiff the relationship of landlord and tenant was subsisting between the first defendant and the plaintiff at all material times.
2. The learned Judge erred in fact and in law in holding that the first defendant's action in granting a Provisional Lease to the second defendant materially contributed to the plaintiff being dispossessed and deprived of her grazing land.
- C 3. The learned Judge erred in fact and in law in holding that the first defendant was liable for the unlawful acts of the second defendant although the learned Judge held that the second defendant became a trespasser on the grazing land with effect from the 3rd day of December 1970.
- D 4. The learned Judge failed to consider the submissions made by Counsel for the first defendant that the plaintiff failed to minimize her losses by taking immediate steps to obtain an interim injunction in the action against the second defendant restraining the second defendant from interfering with the plaintiff's use and occupation of the said grazing land pending the determination of the action.”

At the hearing of the appeal, counsel for the appellant applied for leave to argue an additional ground, that the damages awarded against the appellant were in reality special damages which had not been pleaded; and in accordance with the general principle that special damages must be claimed specifically and proved strictly, it was not competent for the trial Judge to award the sum in question.

- E Upon consideration, the Court ruled that this should have been included as a formal ground of appeal and as this had not been done, leave to argue it would be refused.

The argument of counsel for the appellant on the first ground of appeal was based largely on the contention that if any claim could properly be brought against the appellant Board in respect of what had happened, it was only by way of a breach of the implied covenant for quiet enjoyment; and a covenant for quiet enjoyment arose only in the case of a lease or similar tenancy. It was true that the licence issued by the appellant Board to Latchman granted to him ‘the sole right of occupation and use for grazing’. That, in appellant's contention, did not amount to a lease or a similar tenancy; no covenant for quiet enjoyment could therefore be implied; and accordingly, there was no foundation for the first respondent's claim against the appellant.

- G The law regarding the implied covenant for quiet enjoyment is set out shortly in 23 Hals. (3rd Ed.) p. 603, para 1295:—

“ It has long been established that, if a landlord demises his property to a tenant and enters into no express covenants for title or for quiet enjoyment, certain promises are implied by him by force of the word ‘demise’, namely..... that the tenant shall have quiet enjoyment of the premises. Such promises are also implied by force of equivalent words of letting.”

- H It is clear that the covenant is implied when, as in the ordinary lease or similar tenancy, there is no express provision amounting to a covenant for quiet enjoyment. But in the present case there is a definite grant of the sole right of occupation and use for grazing. This necessarily imports an obligation on the part of the

grantor or licensor that he will do nothing to interfere with the right of the licensee to sole right of occupation and use for the stated purpose. If then the Court holds that any action taken by the licensor, here the appellant Board, interferes with that sole right of occupation and use, then the appellant Board must be held liable for a breach of the terms of the licence. Accordingly, in my view, there is no need to rely on any implied covenant for quiet enjoyment.

Turning now to the second ground of appeal, counsel argued that the appellant Board did not authorise Rovawakulua to go on the land and was accordingly in no sense responsible either for the trespass or for the unlawful acts committed by him. Counsel relied to a great degree on clause 3 of the provisional approval notice issued on the 24th November 1970, which has already been quoted. In counsel's contention this document made it abundantly clear that Rovawakulua had no right whatever to occupy the land until six months' rent and the estimated survey fee had been paid; and though the rent had been paid and accepted by the Board, the survey fee had not. Accordingly, any action by Rovawakulua to take possession was in flagrant disregard of the terms of the licence granting him rights over the land.

In this connection, it is, I think, significant that at no time prior to the Court hearing did the appellant Board make any reference to the non-payment of the estimated survey fees. At no time did the Board's representative inform Rovawakulua that he was not entitled to go on the land because the estimated survey fees had not been paid. All that was said was that the provisional approval notice had been issued by mistake, and that therefore the first respondent was still entitled to possession of the land. Thereafter, the Board took no steps to eject Rovawakulua on the ground that he had occupied the land in violation of the terms of the approval notice.

In my opinion, the actions of the Board in issuing the notices of the 30th October and 24th November 1970 would, in the circumstances outlined, give Rovawakulua every reason to believe that he was entitled to go on the land and take possession, particularly as he paid the sums specifically demanded by way of rent and stamp duty. This is to some extent supported by the evidence of the appellant's agent Nemia Drauna, who stated:—

"I think Ratu Epi moved into the land by reason of the approval notice."

The notices of 30th October and 24th November 1970 both stated that the lease provisionally granted took effect from 1st July 1970. There is no doubt in my mind that the reasonable and probable consequence of the issue of the notices and the acceptance of rent would be that Rovawakulua would enter into possession of the land; and this would be in contemplation both by Rovawakulua and the Board itself. That being so, the appellant Board had in my view committed a breach of their contract with Latchman, one of the terms of which was that Latchman should have the sole right of occupation and use of the land for grazing purposes. On this basis, the appellant Board would, in my opinion, be liable in damages for the loss of use of the land during the period involved. Once it is decided that the entry of Rovawakulua on to the land was the result of action taken by the appellant Board—and I do not think any other conclusion is possible on the evidence—then, in my opinion, the principle expressed by Griffith C.J. in the Australian case of *O'Keefe v. Williams* 11 C.L.R. 171 at p. 192 can properly be applied:—

"When one man is put in possession of land by another, full effect cannot be given to the intention of the parties without implying an obligation that the lessor shall neither disturb the possession himself nor authorise its disturbance by others."

**A** To adopt the reasoning of Griffith C.J. on p. 192, I am of the opinion that a contractual obligation is to be implied in a case such as this, to the effect that the grantor of a right of sole possession of land will not disturb or authorise the disturbance of the grantee in his occupation. If I am correct in this, then the first respondent has a rightful claim against the appellant Board, in respect of the entry of Rovawakulua on to the land through the acts of the Board.

**B** With regard to the third ground of appeal, I think it is not necessary to say more than this: that though the appellant Board can be held to have authorised the entry of Rovawakulua on to the land, there is no ground for holding that the appellant authorised, expressly or by implication, the unlawful acts performed by Rovawakulua in the way of seizure of the first respondent's stock and chattels or his objectionable conduct generally.

**C** With regard to ground 4, it is hard to say in what way the first respondent could have taken more steps than she did in the direction of minimizing her loss. The day after the notice of the 1st December 1970 was issued by Rovawakulua, Dharamjit Singh, who holds a power of attorney from the first respondent, went to the offices of the appellant Board in Suva to complain of what had taken place; and he also consulted her solicitors. Her solicitors immediately communicated with both the appellant Board and Rovawakulua and, when they were not able to secure any relief by correspondence, issued a writ claiming, inter alia, possession of the land on the 10th March 1971. In the event, I do not think the first respondent could have done anything more than she did to have Rovawakulua removed from the land. That being so, and as in my opinion the liability of the appellant Board must be limited to the damage suffered by the respondent from being deprived of the use and occupation of the land, I can find no merit in this ground of appeal.

**E** It then becomes necessary to assess the quantum of damages to which the first respondent is entitled. These damages must, in my opinion be limited to those arising from the trespass of Rovawakulua by reason of which the first respondent was deprived of the use of the land for the balance of the term to which she was entitled, some 13 months in all. In accordance with the principle laid down in the well known judgment in *Hadley v. Baxendale*, cited in 11 Hals. (3rd Ed.) p. 241, para 409:—

**F** “The damages to be awarded for breach of contract are thus damages for the ordinary consequences which follow in the usual course of things from the breach, or for those consequences of a breach which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract.”

**G** I am unable to ascertain from the judgment appealed from upon what basis the learned trial Judge assessed damages at \$5,600. The only evidence on the subject of damages strictly referable to the issue of trespass was to the effect that the net income received by the respondent from her farming activities was \$200 a month. Special damages were not claimed, and this Court must endeavour to the best of its ability to assess reasonable compensation for the loss of use of the land for the term of 13 months. My own view is that the award of \$5,600 is excessive and I would, taking all relevant considerations into account, reduce the amount to be awarded to the first respondent from \$5,600 to \$2,500.

**H** I would therefore allow the appeal to the extent of quashing the judgment for \$5,600 and substituting one for \$2,500 in favour of the first respondent against the appellant. This, as has been pointed out, would entail a reduction of the damages payable by second respondent from \$20,062.50 to \$16,962.50. Although the appellant



would thus have succeeded in some degree, I do not think it is a proper case, in view of all the circumstances, to allow costs against the respondent. I would therefore make no order as to the costs of the appeal.

HENRY J.A.

The facts relevant to this appeal have been stated by Marsack J.A. I agree with his judgment but wish to add some remarks of my own. In view of the conditions set out in the documents of 30th October 1970 and 24th November 1970, it became necessary to consider whether or not appellant had made a sufficient grant to Ratu Epi to support a claim that appellant's earlier grant to Respondent of the sole right of occupation and use for grazing had been breached. In my judgment the evidence established that Ratu Epi was correct in concluding that he was entitled to immediate possession. The date of commencement of his licence was July 1 1970. The first notice was complied with and in its terms there was then nothing to prevent Ratu Epi from considering himself to be the licensee and entitled to possession. The document of November 24 1970 confirmed a term commencing on July 1 1970, although it added further conditions concerning an estimated survey fee of \$285 and the payment of the first six months' rent.

The failure to comply with these conditions was not put forward as a reason why Ratu Epi was wrong in taking the view that he had a present grant as from July 1 1970. The sole ground taken was that a mistake had been made in issuing the documents at all. This mistake clearly referred to an error in thinking that Wainikeli was then available as the subject matter of a grant to Ratu Epi. The relevant evidence of the land agent in respect of an interview with Ratu Epi on December 3 was as follows:—

I spoke to Ratu Epi whom I know (witness points to Ratu Epi). I told Ratu Epi that a mistake had been made by the Board as Wainikeli is clear of reserve. I told him that the approval notice was given in error. I told him to vacate the land and that he could move to Natabuakana on 1st January. Ratu Epi said he would not vacate the land. P.W.1 was there. I tried to explain to Ratu Epi that some money would be involved. Ratu Epi did not reply. But Vatilai replied on his behalf and asked me as to who was responsible for the error. I replied that it was the Board.

This witness also said that he thought Ratu Epi moved onto the land by reason of the approval notice. This is opinion evidence and is inadmissible. Yet it is an inference the Court is entitled to draw. For myself, I would draw that inference.

In cross-examination a further passage appears, namely:—

I see Exhibit 9, pages 3 and 4 were sent to me. As a result I went out to the area. I went to try and persuade Ratu Epi to give back the land to plaintiff. I tried my best to get him to give back the property. I went to settle if I can but I did not force the issue otherwise there might be trouble.

I was to ask Ratu Epi firmly to leave the land. Ratu Epi firmly refused. I was to return and report back. I was not to put pressure on Ratu Epi and I was to tell Dharam Jit Singh to stay as he was.

There was no specific finding on this evidence but, in my judgment, in the circumstances of this case, the action of appellant and its agent amply demonstrated that the grant was recognised by appellant but was being explained away solely as a unilateral mistake on its part. At no time was it claimed that the conditions

A (which were varied in the second document) were conditions precedent to the right of Ratu Epi to enter under a licence which had as its commencement date, July 1 1970. There was ample evidence to prove a breach of the earlier grant expressly made to Respondent.

I would allow the appeal with the consequences set out in the judgment of Marsack J.A.

**B** GOULD V.P.

I have had the advantage of reading the judgment of Marsack J.A. in this case. I agree with it and desire only to add a few words on an aspect of the construction of the licence held by the first respondent, the disturbance of which was the cause of these proceedings.

C The right granted to the first respondent was, as my learned brother Marsack has said, "the sole right of occupation and use for grazing". It might well be argued that this did not necessarily mean the sole right of occupation and use of the land but that a limitation was implicit in the words "for grazing", so that it might be possible to grant to another a right not incompatible with exclusive use for grazing. Perhaps, a right to enter and take metal from a quarry.

D It is only necessary to say that no such situation arises in the present case where the rights granted to the second respondent clearly included full possession of the land for all purposes, and as clearly contravened those enjoyed by the first respondent, whether her sole right of occupation and use be read as unlimited, or as restricted by the words "for grazing". The rights conferred by the appellant Board upon the second respondent, undoubtedly included the right to use the land for grazing, which by its earlier contract the appellant Board had exclusively conferred  
F upon the first respondent.

As the members of the Court are all of the same opinion the appeal is allowed to the extent indicated in the judgment of Marsack J.A.

*Appeal allowed to the extent of reduction in the amount of judgment.*