

**ATTORNEY-GENERAL OF FIJI v GRAHAM BURNETT
(ABU0023 of 2009)**

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP, CHITRASIRI and KOTIGALAGE JJA

24 February, 21 March 2012

10 **Damages — principles — distinction between special damages and general damages — negligence — reasonable care of seized boat — past loss of earnings — error of law — interest — Court of Appeal Rules rr 18, 18A, 20 — Criminal Procedure Code ss 103, 104, 105, 106, 107 — High Court Rules O 16 r 8, O 37 r 2, O 81 — Police Act s 17 — State Proceedings Act s 12.**

15 **Police and emergency services — search and seizure — whether seizure lawful — boat sold without authority — innocent purchaser — negligence — reasonable care of seized boat — special damages — general damages — past loss of earnings**

20 The appellant received a complaint from the respondent that his boat had been sold without his authority. The appellant seized the boat from the respondent and delivered it to the complainant. The High Court ordered the complainant to “return the boat with improvements and/or its value at \$25,000.00”. The High Court found that the respondent was an innocent purchaser for value without notice of any competing interests, and that the appellant was liable for damages for unlawful seizure and detention of the respondent’s boat. The appellant sought an order that the judgment be set aside.

25 **Held —**

(1) Seizure of the boat by police pursuant to a validly issued search warrant was not unlawful. However, the appellant was negligent and breached its duty imposed by statute to take sufficient care to ensure that the boat was preserved. Therefore the appellant was liable for damages as a result of its negligence in failing to take reasonable care of the boat’s preservation whilst on-going investigations continued.

30 (2) In this case, special damages should be taken as referring to past expenses and past loss of earnings as at the date of trial, whilst general damages should be taken as a reference to anticipated future loss as at the date of the trial and damages for any other past, present or future non-monetary damages or loss. By awarding past loss of earnings as general damages, the High Court has made an error of law. They are not general damages, rather they are monetary claims for past loss as at the date of trial.

35 Appeal against liability dismissed, appeal against part of quantum allowed, award of damages varied.

Ilkiw v Samuels [1963] 1 WLR 991, followed.

40 **Case referred to**

Tacirua Transport Co Ltd v Virend Chand [1995] 41 FLR 44, applied.

R. Green for the Appellant.

45 *V. Mishra* for the Respondent.

[1] **Calanchini AP.** This is an appeal from an ex tempore judgment of the High Court (Finnigam J) at Lautoka delivered on 10 December 2008. The Court entered judgment for the Respondent and awarded \$100,000 damages for unlawful seizure of a boat by Police. The Court awarded costs to the Respondent to be agreed and if not agreed to be taxed.

[2] The background facts were conveniently set out by the learned Judge and I intend to refer to those facts that are directly relevant to this appeal. The boat in question was initially purchased by a Peni Lesuma in 1986 for the sum of \$4500.00. In 1992 the boat was lengthened by a boat builder called George Morris. In 1993 Peni Lesuma and a Joseph Ierna entered into an informal arrangement whereby the boat would be used in a sport fishing venture at Taveuni. It would appear that at about the same time Peni Lesuma entered into a partnership arrangement with his brother Misa Lesuma. They carried on business under the registered business name of "*Sportfishing Taveuni*."

[3] It would appear that the boat then underwent further renovations which were paid for in part by Peni Lesuma, who was still the owner of the boat and partly by Ierna. Ierna also purchased and fitted two new Yamaha outboard motors at his own expense.

[4] After that, the Lesuma brothers left Ierna to operate the sport fishing business. Then Ierna placed two advertisements in a daily local newspaper advertising a boat for sale. It was in fact the boat in question. The Respondent answered the advertisement. He travelled to Taveuni and met with Ierna. He examined the boat. The Respondent made inquiries to confirm information that had been given by Ierna. The learned Judge was satisfied that this was not a hurried sale. The price was eventually agreed and on 1 June 1994 the Respondent paid \$21,000.00 by bank order to Ierna. The Respondent took the boat to Nananu-I-Ra.

[5] On 17 June 1994 Misa Lesuma went to look for Ierna at Taveuni. It appears that on the same day Ierna had left for the United States of America. Ierna had left without accounting to either Peni or Misa for money earned by the business and, of course, Ierna had by then sold the boat to the Respondent and departed with the proceeds.

[6] It would appear that Misa Lesuma then reported to the Taveuni Police that the sport fishing boat had been sold without his authority. On 10 August 1994 the Police at Rakiraki obtained and executed a search warrant. The boat was seized by the Police despite strong protests by the Respondent. It was taken to Taveuni and moored in front of the police station. Some time later it was given to Misa Lesuma.

[7] On 2 May 1995 the High Court at Lautoka had made an order directing Misa Lesuma to "*return the boat with improvements and/or its value at \$25,000.00.*" Misa Lesuma did not comply and it was only after a court order was obtained in August 1995 that the boat was recovered from Misa Lesuma and returned to the Respondent. As the learned judge noted, "*it had been sunk, it was damaged and it needed repairs.*"

[8] The Respondent had commenced these proceedings in the High Court at Lautoka by writ dated 30 March 1995. The Appellant was joined as First Defendant for and on behalf of the Commissioner of Police pursuant to s 12 of the State Proceedings Act Cap 24. Misa Lesuma had been joined as Second Defendant "*trading as Sports Fishing Taveuni*". The learned Judge described the position of Misa Lesuma on page 1 of his judgment in this way:

"There was another defendant but the default judgment has been entered against him in liability. He was not served with notice of today's hearing so no further judgment may be entered against him. He is sued as a trading entity and his partner in the trading name was at court yesterday and gave evidence but he is not involved otherwise in the case."

[9] Before considering the Respondent's claim against the Appellant, it is necessary to make a brief observation about the manner in which Misa Lesuma had been joined.

5 [10] First, it must be recalled that Misa Lesuma did not trade as "*Sports Fishing Taveuni*." Sports Fishing Taveuni was a registered business name (a firm name) under which both Peni and Misa Lesuma carried on business in partnership. If it was the intention of the Respondent to join Misa Lesuma in his individual or personal capacity then the reference to the trading name was
10 surplusage and added nothing to the character in which Misa Lesuma was being sued. If it was the intention of the Respondent to sue the partners then the firm name should have been used. It should have appeared as "*Sports Fishing Taveuni (a firm)*". However O 81 and the benefits of suing by the use of the firm name are only available in respect of transactions carried out in the course of business.
15 When sued in the firm name the partners of the firm at the time the cause of action arose will be jointly and severally liable. In this case, since the Respondent had proceeded against Misa Lesuma, he alone would have been personally liable, although possibly jointly and severally with the First Defendant in the absence of any notice having been filed and served under O 16 r 8 of the High Court Rules.
20 Furthermore, as the learned Judge correctly noted, the Respondent was required to give notice to Misa Lesuma under O 37 r 2.

[11] The claims against the Appellant and Misa Lesuma were set out in paragraphs 5 to 8 of the Statement of Claim:

25 "5. That on or about 10th day of August 1994, Police officers, servants and/or agents of the First Defendant unlawfully seized the boat from the Plaintiff and subsequently gave possession to the Second Defendant.

6. That the Second Defendant is and has been, since seizure from the Plaintiff, wrongfully in possession of the said boat.

30 7. That further and/or in the alternative the First Defendant has been negligent or is in breach of his duty to carry out proper investigation before delivering the boat to the Second Defendant.

Particulars of Negligence or Breach of Duty

35 [a] Seizing the boat from the Plaintiff on a mere report of stolen boat by Second Defendant.

[b] Unreasonably delaying investigations or failing to expedite investigations inspite of requests for expedition by the Plaintiff.

[c] Failing to return the boat to the Plaintiff despite various demands for such return.

40 [d] Handing possession to the Second Defendant in all the circumstances.

[e] Failing to follow the correct and proper procedures in the face of competing claims to ownership.

[f] Failing to make any proper, adequate or diligent investigation or enquiry.

45 8. That by letters dated 3rd February 1995, the Plaintiff demanded the return of the said boat from the Defendants but they have neglected, wilfully refused or have wrongfully failed to deliver it up to the Plaintiff, and have thereby converted the same to the Second Defendant's use and have wrongfully deprived the Plaintiff of the use and possession thereof."

50 [12] Having considered the evidence the learned trial Judge found that the Respondent was an innocent purchaser for value without notice constructive or otherwise of any competing interests and that he had taken care to ensure that this

was so. In respect of the liability of the Appellant, the learned trial Judge set out his findings on page 8 of his judgment as follows:

- 5 “1. I find it clearly established that for the boat in question the plaintiff was an innocent purchaser for value without notice constructive or otherwise of any competing interests and that he had taken care to ensure that his was so.
2. I find that the police did not have a complaint of anything other than conversion i.e. unlawful sale.
- 10 3. I find the police were entitled and duty bound to investigate that complaint to see whether it was actually a complaint of a crime or an offence that had been committed.
4. I find that clearly this investigation demanded a gathering of facts from the interested parties who were still available for interview to see what each claimed to be the facts.
- 15 5. I find that the investigation did not necessarily include seizing and impounding the disputed property.
6. I find that the police did not become aware until after the seizure that (a) ownership was disputed and (b) Misa Lesuma personally had very little claim to possession if any.
- 20 7. I find that the police were unreasonably slow in carrying out their duty to obtain confirmation of the plaintiff's claim that he had the right of ownership and Misa Lesuma's claim that the boat was his. I find that once aware that the plaintiff had bought the boat they were unreasonably slow in restoring it to his possession.
8. I find that the police were entirely outside any rights or duties they had when they gave the boat in their possession held by them for investigation only of a complaint, to the complainant who had shown little or no right to have it.
- 25 9. I find therefore that the police are liable to the plaintiff in damages for unlawful seizure and unlawful detention of the plaintiff's boat.”

30 [13] The Respondent claimed that he had suffered loss and damages together with inconvenience and mental anguish. He particularised the loss and damages as follows:

- “Particulars of Loss and Damages
- (a) loss of said boat valued at \$25,000.00
- 35 (b) loss of business at a rate of 2000.00 per week from the date of seizure which continues to escalate
- (c) Deprivation and personal enjoyment of the said boat.”

[14] The Respondent claimed from “the Defendants”, jointly and severally:

- 40 “(a) Return of the said boat with improvements and/or its value at \$25,000.00.
- (b) Damages
- (c) Costs.
- (d) Further or other relief as (the Court) deems just and expedient”.

45 [15] As the learned trial Judge noted, after the claim was filed on 30 March 1995 the boat was returned to the Respondent in August 1995 but in a damaged condition. The Judge continued at page 2:

- 50 “There has been no Amended Statement of Claim filed so the Plaintiff relies on his original pleadings to recover different and further damages for the cost of restoring the boat to its condition when it was seized. These damages are special damages and there is no plea in the Statement of Claim for special damages. Counsel seeks judgment for these special damages under its claim (a) “return of the said boat _ _ and/or its value of \$25,000.00.

The Plaintiff seeks also (b) “Damages” unspecified and general damages may be awarded under this head.”

[16] Then at page 9 the learned Judge returns to the question of damages and states:

5 “[28] _ _ _ Paragraph (a) has now become a new claim of damages for lost value of the boat i.e. value lost since the proceedings were commenced (up to \$25,000.00).

10 [29] The Plaintiff has the boat. He has repaired it. He has paid for the repairs. I am enabled to award him the costs of these repairs as general damages up to \$25,000.00 under this head. His evidence about this was summarised in counsel’s submissions at para. 26 page 4 of her written submission and in it is a list of money:

 \$4000 travel to Taveuni to recover the boat

 \$4000 repairs to boat itself

 \$400 motor repairs

 \$6000AUD motor repairs

15 \$2000AUD missing equipment, for which some invoices have been presented e.g. a fire extinguisher.

20 [30] After assessing these claims for loss I assess general damages under this head at Fiji dollars \$15,000.00. This includes general proven loss and a sum of general compensation for items such as proved inconvenience and hardship which to some degree the above list of expenditure does represent.

25 [31] I turn to claim (b) damages in general. As put in counsel’s submissions these items are special damages. They include:

 \$81,576.00 cancelled business

 \$40,000.00 notional lost business

 Total \$121,576.00

30 [32] I cannot award these as special damages. Proof is not sufficient for special damages and in any event the Plaintiff has not pleaded for special damages. However I am persuaded well beyond the balance of probabilities that the loss of reputation was a major consequence of the first defendant’s unjustified action. Following as a reasonable consequence of that was the loss of forward-booked business and the loss if possible future business for a period of more than two years. I am satisfied that this loss of business proves hardship and inconvenience and unjustified failure of business expectations.

35 [33] I would rate these losses in the circumstances of this case as detailed by the Plaintiff in evidence as substantial losses meeting substantial compensation. It is difficult to assess a figure but with some guidance from the Plaintiff’s evidence and from the two items presented above I make an assessment in general damages at \$85,000.00. The total award under both heads therefore in general damages is \$100,000.00.”

40 [17] The Appellant now seeks an order from this Court that the judgment be wholly set aside on the following grounds:

 “1. That the learned Trial Judge erred in law and in fact in holding that the Plaintiff/Respondent was an innocent purchaser for value without notice constructive or otherwise of any competing interests.

45 2. That the learned Trial Judge erred in law and in fact in not adequately directing/misdirecting on the law provided under the Sale of Goods Act Cap 230.

 3. That the learned Trial Judge erred in failing to give any or sufficient weight to the fact that Joseph Ierna was not registered with the Registrar of Companies as a partner for Sports Fishing Taveuni.

 4. That the learned Trial Judge erred in failing to give any or sufficient weight to the residential/immigration status of Joseph Ierna.

50 5. That the learned Trial Judge erred in failing to consider and take into account the legal requirements that Joseph Ierna had to discharge as a foreign investor.

6. That the learned Trial Judge erred in law and in fact in awarding damages in the sum of \$85,000.00 for loss of reputation and loss of business to the Plaintiff/Respondent.

And further Take Notice that the Appellant reserves the right to alter, amend or add any further grounds of appeal upon compilation of the High Court Records."

[18] So far as the last paragraph of the notice is concerned, it is appropriate at this point to bring to the attention of legal practitioners the provision in the Court of Appeal Rules dealing with amendments to an appellant's notice and grounds of appeal. Rule 20 states:

"(1) A notice of appeal or respondent's notice may be amended:

(a) by or with the leave of the Court of Appeal, at any time;

(b) without such leave, by supplementary notice served, not less than 14 days before the day on which the appeal is listed to be heard, upon each of the parties upon whom the notice to be amended was served.

(2) A party by whom a supplementary notice is served under this Rule shall, within two days after service of the notice, furnish four copies of the notice to the Registrar."

[19] If it is considered necessary to amend the Notice or the grounds of appeal, practitioners should ensure that the amendments are made in a manner that is consistent with the provisions of r 20.

[20] There remains one further preliminary matter that requires comment. In the written submissions filed on 9 February 2012 the Appellant identified material that had not been included in the Record. The Record had been certified by the Chief Registrar on 12 October 2011. Rules 18 and 18A deal with the requirements concerning the Appeal Record. Rule 18 (1) (a) expressly states that the primary responsibility for the preparation of the Record on appeal rests with the appellant. There are provisions made in r 18 for the Record to be corrected or amended, if necessary. It is far too late for the Appellant to complain about omissions from the Record in its submissions 15 days before and again on the morning of the appeal. There was no application made to the Court by the Appellant for the appeal hearing date to be vacated in order to remedy the deficiencies in the Record.

[21] Turning now to the grounds of appeal. At the outset I should indicate that I do not propose to consider grounds 4 and 5. The Appellant did not plead any relevant facts nor make any reference to any written law relating to either of those grounds in the Defence.

[22] It is ground 1 of the appeal grounds that is apparently directed at challenging the finding of liability against the Appellant. Ground 1 challenges the learned trial judge's conclusion that the Respondent was an innocent purchaser for value without notice constructive or otherwise of any competing interests. To have arrived at this conclusion the learned judge heard evidence and considered legal submissions. I am not sure whether a police constable or "*the police*" can reasonably be expected to embark immediately upon such an inquiry when in receipt of a report that a crime has been committed.

[23] The Police complaint form dated 29 June 1994 was the document that initially brought the matter to the attention of the Police. It shows that a complaint was made by Misa Lesuma to the Police at Taveuni Police Station. Misa Lesuma stated his occupation as co-director of Lesuma Holdings Ltd Taveuni. Misa Lesuma reported that between 12 June and 17 June 1994 his sportfishing boat "*Shadow*" was sold without his authority. The property was

described as a “speedboat – twin 60HP”. Joseph Ierna Jnr (boat captain) was described or named as the person wanted or suspected.

[24] Following the report, Misa Lesuma signed a statement dated 29 June 1994 which he made to the Police at Taveuni station. After outlining the background facts, Misa Lesuma stated:

“_ _ _ we have a fishing boat called the Shadow. _ _ _ . Total value of the boat is about \$40,000. The boat is about 10 years old but we have done a major renovations to uplift the look of this boat.

Whilst I was away in Melbourne Captain Ierna Junior sold our boat to Graham Bennet of Ra Divers _ _ _ . I have confirmed this from the watchman on the island. Captain Ierna has no authority to sell our boat as this is ours. I do not owe any money to Captain Ierna.”

[25] On 8 August 1994 Peni Lesuma also signed a written statement made at the Taveuni Police Station. He confirmed that he was the owner of the boat and that it was used in a business called Sport Fishing Taveuni. He also confirmed that “there were two owners, Misa Lesuma and myself” of the business and that Ierna was working as the captain of the boat. He then stated:

“After learning from my brother Misa about the missing boat I consulted immigration and they told me that Joseph fled the country for ever. Later I was told the boat has been transferred to Rakiraki from Taveuni.”

[26] Only then was a search warrant dated 10 August 1994 obtained by the Police from the Magistrates Court at Rakiraki. It was issued pursuant to s 103 of the Criminal Procedure Code Cap 21. The material satisfied the Magistrate that there were reasonable grounds for suspecting that certain property, namely “outboard with accessories” in respect of which an offence had been committed was in a certain place. The warrant then stated:

“You are hereby authorised forthwith with proper assistance to enter the said properly if necessary by force and there search for the property above mentioned and, if anything searched for be found, or any other things which there is reasonable cause to suspect to have been stolen or unlawfully obtained be found, to seize it and bring it before this Court to be dealt with according to law.”

[27] It would appear that the warrant was executed on 10 August 1994 by police from Rakiraki station at the premises of Ra Divers being the business conducted by the Respondent. A search list dated the same day listed 14 items seized by the police pursuant to the said list. A copy of the list was given to a person who apparently had authority to accept service.

[28] Although there is very little material in the appeal record on this aspect of the events, the Respondent claimed to have contacted the police some time prior to 10 August 1994 explaining that he had purchased the boat from a partner of the business for \$21,000.00. It would appear that similar claims were made by the Respondent at the time the warrant was being executed by the police.

[29] A letter dated 16 September 1994 from the Respondent’s Solicitors and addressed to the Commissioner of Police set out the basis of the Respondent’s claim to ownership of the boat. In the second paragraph of that letter it is stated:

“_ _ _ . Just prior to that date (10 August 1994) our client had received a call from one Misa Lesuma informing our client that the boat was stolen and although Joseph Ierna was a partner he had no right to sell the same.”

[30] Then in the second last paragraph the Solicitors state:

“You will appreciate that this is clearly a civil matter involving the powers of two partners/directors in business. The criminal process cannot be resorted to in this manner to obtain possession if indeed possession has been given to any third party by the Police.”

- 5 [31] In a letter dated 31 October 1994 addressed to the Respondent’s Solicitors the then Assistant Commissioner of Police (Crime) explained the Appellant’s position on the matter as follows:

“re: Seizure of 27 feet Boat – Ra Divers Fiji

- 10 *Further to my letter in this series dated 26th September 1994, please be advised that Police investigation so far revealed that Joseph Ierna was employed by the Sportfishing Taveuni as a captain of boat “Shadow” owned by said Sportfishing Taveuni.*

- 15 *Sportfishing Taveuni claims that Joseph Ierna was not a partner nor had shares in the said company. On 29/06/94 he left Taveuni with boat and did not return. Police found the said boat with its accessories with Graham Donald of Nananu-i-Ra and Joseph Ierna left the country after selling the said boat.*

The boat is with Sportfishing Taveuni.

The Police investigation is continuing.”

- 20 [32] On 13 January 1995 the Rakiraki police obtained a search warrant issued out of the Magistrates Court at Rakiraki in respect of documents relating to the transaction between the Respondent and Ierna held by the Westpac Bank.

[33] By letter dated 3 February 1995 the Respondent’s Solicitors wrote to the Appellant (the Commissioner of Police) stating in the last two paragraphs:

- 25 *“We are instructed to request your department to have the boat returned to our client as the boat was used for commercial purpose, our client’s loss of business is escalating. While the boat will be in the custody of your department, you can continue to pursue the investigation.*

- 30 *We hereby now demand the immediate return of the boat to our client. We are further instructed to institute legal proceedings in High Court against the department if the boat is not returned within 14 days from the date of this letter _ _ _.”*

[34] It would appear that default judgment was entered against Misa Lesuma on 2 May 1995. Although there is no copy of that judgment in the appeal record, there is a copy in the High Court file. The sealed orders of the Court state:

- 35 *“_ _ _ It is this day adjudged that the 2nd Defendant:*

(a) Do return the Boat with the improvements and/or its value at \$25,000.00.

(b) Do pay damages to be assessed before a Judge and costs, if not agreed, to be taxed.”

- 40 [35] In a letter dated 15 May 1995 the Respondent’s Solicitors wrote to the Attorney-General’s Chambers to complain about the issue. The second paragraph of that letter stated:

- 45 *“_ _ _ our client’s employees, servants or agents are there in Taveuni ready to take over the boat pursuant to the Judgment dated 2 May 1995. However, the Police Officers at Taveuni are interfering with the Court Order and not releasing the boat. A copy of the sealed Order is attached hereto.*

Please, can you advise the Police Officers at Taveuni Police Station to keep off the boat and not to interfere in the execution of Judgment or else they will be subjected to contempt of court.”

- 50 [36] In a subsequent letter dated 23 May 1995 from the Respondent’s Solicitors to the Commissioner of Police, the Solicitors explained that a court order had been obtained against Misa Lesuma. It explained that the Respondent had

attempted to recover the boat at Taveuni but had been prevented from doing so by the Police at Taveuni. The letter also referred to the correspondence addressed to the Attorney-General's Chambers and to a subsequent telephone conversation between the two offices. It continued:

5 *"However as discussed on the phone _ _ _ we advised our client to go back and seize the boat as the order of the Court stands until set aside.*

10 *Subsequently, on this understanding and/or arrangement our client went back to get the boat. However, this time the boat disappeared. Our Mr Narayan after this event spoke to Station Officer at Taveuni Police Station regarding this. He informed Mr Narayan that the Police do not know anything about the boat and will not be assisting our client at all _ _ _."*

[37] If I were to stop at this point an argument could be made for saying that the Police should have enabled the Respondent to take possession of the boat pursuant to the Court order. However a perusal of the High Court file and the court documents contained therein provides some explanation for the reluctance of the Police to allow the boat to be restored to the Respondent.

[38] On 19 May 1995 the second defendant (Misa Lesuma) filed a notice of motion seeking orders (1) that the default judgment to set aside and (2) that the orders made on 2 May 1995 be stayed pending the hearing of the application. There were affidavits sworn by both Peni Lesuma and Misa Lesuma filed in support of the application. The application came before Sadal J on 26 May 1995. The learned judge fixed the hearing for 9 June 1995 and granted a stay of the default judgment until that date. Further stays were subsequently granted by Sadal J until the 8 September 1995.

[39] In the meantime the Respondent filed on 21 July 1995 a summons seeking an order that:

30 *"The Plaintiff be given custody and/or possession of the boat known as "The Shadow" and all accessories to it (the subject matter of this action) for the purposes of preservation until the final hearing and determination of this action."*

[40] The application was listed for mention on 4 August 1995 and subsequently fixed for hearing also on 8 September 1995.

[41] In the meantime the Magistrates Court at Labasa on 6 September 1995 made an order to the effect that:

35 *"_ _ _ fishing vessel "Shadow" be returned to the Respondent Graham Burnett for the purposes of preservation pending finalisation of Police investigation and further until the final hearing and determination of Lautoka High Court Civil Action No 87 of 1995. The said vessel is to be handed over to the Respondent at Taveuni Police Station."*

[42] It turns out that this order was in fact obtained by the Police in Labasa.

[43] It immediately becomes apparent that paragraphs 15 and 16 of the learned Judge's judgment were not entirely accurate. The last sentence in paragraph 15 states:

45 *"On the 2 May 1995 the High Court at Lautoka in these present proceedings issued an order against the second defendant apparently a default judgment directing that he do return the boat with improvements and/or its value at \$25,000.00."*

[44] Then paragraph 16 states:

50 *"Nothing happened. Eventually an order was made in the Magistrates Court and in August 1995 the Plaintiff obtained possession of the boat."*

[45] The learned judge made no reference to the stay granted in respect of the default judgment entered on 2 May 1995. Furthermore the boat was returned to the Respondent in September 1995 pursuant to a court order obtained on the application of the Police themselves. A passing reference to this fact is made in paragraph 22. The date is still incorrect.

[46] To complete the factual background it is necessary to refer to the Orders made by Lyons J in the High Court at Lautoka on 12 January 1996. It was ordered that:

10 *“The application to set aside Default Judgment be dismissed and the Second Defendant do pay the Plaintiff’s costs of this application – – and that the Order of the Magistrates Court at Labasa be further supplemented with an order that the Plaintiff be allowed to use the vessel for the purpose of his business and maintain it or repair if necessary, insure it, generally care for it and mitigate his damages.”*

15 [47] The first set of allegations against the Appellant are set out in paragraph 5 of the Statement of Claim. It is alleged that the Appellant (1) on about 10 August 1994 unlawfully seized the boat from the Respondent and (2) subsequently gave possession to the Second Defendant.

20 [48] These allegations require this Court to examine the duty and the powers of the police in such circumstances. The starting point is s 17 of the Police Act Cap 85 which, so far as relevant, states:

“(1) Every police officer shall exercise such powers and perform such duties as are by law conferred or imposed upon a police officer – –

(2) – –

25 *(3) It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority – –.* “

[49] The provisions that were in force at that time concerning search warrants were ss 103-107 of the Criminal Procedure Code Cap 21 (the Code) (since repealed and replaced by the Criminal Procedure Decree 2009).

30 [50] Section 103 of the Code stated:

35 *“Where it is proved on oath to – – a justice of the Peace that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any – – place, – – the justice of the peace may by warrant (called a search warrant) authorise police – – to search – – the place (which shall be named or described in the warrant) of any such thing and, if anything searched for be found, or any other thing which there is reasonable cause to suspect to have been stolen or unlawfully obtained be found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law.”*

40 [51] The complaint made first by Misa Lesuma and then by Peni Lesuma was that Joseph Ierna had taken the boat, sold it and disappeared with the proceeds. The police were entitled to seek a search warrant on the basis that there was reasonable suspicion that an offence had been committed. The boat was the subject of the suspected offence. Furthermore, as the learned Judge noted at page 45 of his judgment:

“It is arguable that he (Misa Lesuma) was at that time the owner since he was part owner of the sport fishing business.”

50 [52] Even if the boat was owned by Misa’s brother it was used by the business. The boat could not be registered in a firm name as a partnership is not a legal person and as such cannot be “an owner.”

[53] The warrant on its face was regular and I am satisfied that it was a valid search warrant. The warrant was issued in respect of property described as “outboard with accessories.” The place of execution was described. Although the name of the boat was not specified I am satisfied that the police had sufficient information from the complainants to identify the boat that was the subject of the warrant. There is also a general power of seizure in the warrant in respect of any other thing which is reasonably suspected of having been stolen or unlawfully obtained.

10 [54] I have concluded that the seizure of the board on 10 August 1994 by police pursuant to a validly issued search warrant was not unlawful.

[55] The disposal of property which has come into police possession in connection with their investigation of a suspected offence was covered by s 106 (1) of the Code which stated:

15 *“(1) When any such thing is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.”*

20 [56] The section clearly imposes an obligation on the police to take care to preserve the property seized until at the earliest the conclusion of the investigation. So far as the liability of the Appellant was concerned, ownership was not a matter upon which it was necessary for a determination to be made. It was not for the police to determine the complex question of ownership. That would ultimately be a matter for a court. The obligation of the police was to take care to ensure the preservation of the seized boat until either the investigation was completed or until the legal proceedings had concluded. Section 106 (3) stated that if the seized goods were to be returned, the court gives directions for the return in accordance with the section. Under s 106 (i) it would be open to the police to retain the goods themselves or to place them with some other person. However the obligation remained with the police to ensure that the boat was preserved. Therefore, although it may have been open to the police to place the boat with Misa Lesuma it was not open to the police to transfer the statutory obligation imposed on the police under s 106 (1) of the Code on to Misa Lesuma.

30 [57] On the evidence it is apparent that the boat was not preserved in the same condition when ultimately returned to the Respondent. It may be assumed that when the police obtained the order from the Labasa Magistrates Court in September 1995 they did so because they had then completed their investigations. Regardless of whether the boat had remained in the possession of the police or had been placed with Misa Lesuma, the obligation to take care for its preservation remained with the police until that date.

40 [58] As a result I am satisfied that on the evidence that was before the learned Judge the Appellant was negligent and breached its duty imposed by statute to take sufficient care to ensure that the boat was preserved.

45 [59] The question whether the Respondent was an innocent purchaser for value without notice constructive or otherwise of any competing interest is a difficulty of law which was a matter for a court and not the police to determine. To some extent the question of ownership had been resolved when the Respondent obtained his default judgment against Misa Lesuma. On 2 May 1995 the Court had ordered the return of the boat to the Respondent. The only issues for the court that remained after the return of the boat were (1) the question of liability, if any, of the Appellant and (2) the assessment of damages. As notice had not been

served on Misa Lesuma as required by O 37 r 2, that assessment would apply only to the Appellant, if liability was established.

[60] I have already indicated that the Appellant was liable for the damages as a result of its negligence in failing to take reasonable care for the boat's preservation whilst on-going investigations continued.

[61] For different reason, I have concluded that the Appellant was negligent and is liable for the damage to the boat. In so far as ground 1 challenges the finding on liability, it is rejected.

[62] Turning to the question of damages. The Respondent alleged in paragraph 8 of the Statement of Claim that he had "*suffered much inconvenience, mental anguish, loss and damage.*" In particular the Respondent claimed (a) loss of the said boat valued at \$25,000.00, (b) loss of business at a rate of \$2000.00 per week from the date of seizure which continues to escalate and (c) deprivation and personal enjoyment of the said boat. Item (a) was listed in the relief sought and items (b) and (c) were presumably sought as "*Damages.*"

[63] The writ was issued on 30 March 1995. The boat was returned, albeit damaged, in September 1995. After the return of the boat, the nature of the Respondent's loss and damage had substantially altered. Since the boat had been returned, the claim for the return of the boat or its value lapsed. As the learned judge noted in paragraph 4 of his judgment there had been no amendment made or sought to be made to the Statement of Claim prior to the commencement of the trial on 9 December 2008, some 13 years later. No explanation for this failure appears to have been given to the learned Judge. Instead the judge stated that the Respondent relied on his original pleadings to recover different and further damages for the cost of restoring the boat when it was seized.

[64] The learned judge noted that the Respondent had paid for the repairs. He then continued at page 9:

"I am enabled to award him the costs of these repairs as general damages upto \$25,000.00 under this head."

[65] He then proceeded to award \$4000.00 for travel expenses to Taveuni to recover the boat, \$4000.00 for repairs to the boat itself, \$400.00 for motor repairs, \$600.00 (AUD) for motor repairs and \$2000.00(AUD) for missing equipment. The learned Judge then concluded by saying at page 10:

"After assessing these claims of loss I assess general damages under this head at Fiji dollars \$15,000.00. This includes general proven loss and a sum of general compensation for items such as proved inconvenience and hardship which to some degree the above list of expenditure does represent."

[66] The learned judge then considered the claim for "*Damages*" in paragraphs 31 to 33 of his judgment. That material has been quoted earlier in this judgment.

[67] Somewhat surprisingly the only challenge to the judgment on damages is set out in ground six of the grounds appeal which states:

"That the Learned Trial Judge erred in law and in fact in awarding damages in the sum of \$85,000.00 for loss of reputation and loss of business to the Plaintiff/Respondent."

[68] It is appropriate to state what is generally accepted to be the distinction between special damages and general damages. Special damages relate to past monetary loss calculated at the date of trial whilst general damages relate to all other items of damage whether monetary or non-monetary. In this case special

damages should be taken as referring to past expenses and past loss of earnings as at the date of trial whilst general damages should be taken as a reference to anticipated future loss as at the date of the trial and damages for any other past, present or future non-monetary damage or loss. Clearly by 2008 there was no claim for future loss of earnings.

[69] As a result items numbered 1 to 5 in paragraph 29 of the judgment are all items of special damage. As at the date of trial they were claimed as past monetary loss or damage calculable as at the date of trial.

[70] In his Statement of Claim the Respondent was required to give particulars of his special damages. It is not usually necessary to give particulars of general damages.

[71] The position was clearly stated by Diplock LJ in *Ilkiw v Samuels* [1963] 1 WLR 991 at 1006:

“Special damages, in the sense of a monetary loss which the Plaintiff has sustained up to the date of trial, must be pleaded and particularised. — — — In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years – that you can recover in an action only special damage which has been pleaded, and, of course, proved.”

[72] As I have already observed, once the boat was restored to the Respondent, his claim for its return or its value lapsed. The other items awarded were not pleaded. Submissions are not pleadings. The Statement of Claim should have been amended and an up to date schedule of special damages should have been filed and served prior to the commencement of the trial. There is no specific claim for special damages.

[73] Despite this, and for reasons best known to the Appellant, the award of \$15,000.00 for what the learned Judge has unfortunately and erroneously referred to as general damages has not been challenged. It must stand. In passing I note that the figure of \$15,000.00 does include a small amount for inconvenience and hardship (see paragraph 30 of the judgment). This is non-monetary damage and does fall into the realm of general damages.

[74] The award of \$85,000.00 is also awarded as general damages. The sum of \$85,000.00 was awarded as a loss of business and income for a period of more than two years. The loss suffered was special damage entitling the Respondent to special damages. The only pleading in relation to a claim for loss of business was set out in sub-paragraph (b) to paragraph 9 which referred to loss of business at a rate of \$2000.00 per week from the date of seizure which continues to escalate. As a claim for past loss of income, this is, in my judgement, insufficiently pleaded to the extent that the amount claimed and the method by which that amount was calculated were not pleaded by way of either an amendment to the claim or by way of a notice filed and served prior to the trial. The trial judge accepted that the pleading was insufficient as a claim for special damages.

[75] The learned judge has awarded past loss of earnings as general damages. Put in another way the learned judge has classified what he has termed as general damages an amount in respect of the Respondent’s past loss of earnings by way of cancelled business and lost bookings. In my judgment, in so doing, the judge has made an error of law. They are not general damages. They are monetary claims for past loss as at the date of trial. (See *Ilkiw v Samuels* (supra) per Diplock LJ at 1007). As a result I would allow ground 6 of the grounds of appeal.

[76] In view of the reasons given for my conclusions on the question of liability, it is not necessary to discuss grounds 2 and 3 of the appeal.

[77] Although the Appellant has raised the question of mitigation in the submissions, mitigation was not pleaded in the Defence. Furthermore the issue appears not to have been raised at the trial nor has reference been made to the issue by the learned Judge.

- 5 [78] In the submissions filed by the Respondent, there appears to be a claim for the award of interest. The judge declined to award interest as it had not been pleaded. Although there is no Respondent's Notice or cross appeal raising the issue, I shall briefly refer to the decision of this Court in *Tacirua Transport Co Ltd v Virend Chand* [1995] 41 FLR 44. This Court at 48 stated:

10 *"This provision (s 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27) must, however, be regarded as subject to the general provision that a claim for interest as for any other relief, must first be pleaded. This was a matter considered by this Court in Usha Kiran v Attorney-General of Fiji (Civil Appeal No 25 of 1989 delivered 23 March 1990). In that case the Court noted the English rule*
15 *under which it is mandatory to plead specifically any claim for interest. The Court observed that there was no comparable rule in Fiji but, following the reasoning in the English Supreme Court Practice ("White Book" – 1991 edition para 18/8/10) considered that interest, if sought, be specifically pleaded. That judgment was followed and applied in Attorney-General of Fiji v Waisale Naicegulevu (civil appeal No 22 of 1989 delivered on 18 May 1990). We see no reason for departing from what is now the*
20 *established practice of this Court."*

[79] That decision has been applied by this Court from time to time since 1995 and is still the position in Fiji.

- 25 [80] In conclusion I would allow the appeal in part and vary the award of damages down to \$15,000.00. Since the Appellant was not successful on the question of liability I would order that each party pay its own costs.

[81] **Chitrasiri JA.** I agree with the reasons, findings and proposed orders of Calanchini AP.

- 30 [82] **Kotigalage JA.** I agree with the reasons and proposed orders of Calanchini AP.

Orders of the Court

- 35 1. The appeal against liability is dismissed.
2. The appeal against part of the quantum is allowed.
3. The order of the Court below is varied by reducing the amount awarded by way of damages to \$15,000.00.
4. Parties are to pay their own costs.

40 *Appeal partly allowed.*

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