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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL No. ABU 0010 1996S

BETWEEN

PUBLIC TRUSTEE OF FIJI

APPELLANT

AND

KRISHNA NAIR s/o EMBECHUN NAIR

RESPONDENT

Mr L Agbejule for the appellant  
Mr V Mishra for the respondent

Date and place of hearing : 25 February 1997, Suva  
Date of delivery of Judgment : 21 April 1997

JUDGMENT OF THE COURT

This appeal concerns an agreement between the parties to transfer a 27 acre farm, Crown Lease number 8757, with its cane contract, number 191, in Wailevu, Labasa. The sale was subsequently withdrawn by the appellant as vendor. The respondent, whose offer by tender had been accepted, sued for specific performance and damages. Following a hearing, Lyons J awarded the respondent a total of \$97,000.00 damages.

Much of the history of the transaction is not disputed. The grounds of appeal included a challenge to certain of the trial judge's findings of fact and his refusal to grant an adjournment to allow the appellant to call two witnesses. These were not pursued at the appeal and the hearing has proceeded on the facts as found by the trial judge.

Lease 8757 and cane contract 191 were owned by one Buturu, son of Bhagat Ram, who died intestate in about 1962. The appellant took over administration of the leasehold in December, 1983, and was sued in his capacity as administrator of Buturu's estate. It appears Buturu's wife, Shui Raji, died in 1965 and her son, Suruj Lal, claimed the land. Buturu's wife had received half of the land on his intestacy and that half had passed to Suruj Lal on her death although it seems



there had been no formal documentation. The balance of the land was declared bona vacantia. The judge accepted that the appellant, as the administrator of the estate, must have been aware of the interest of Suruj Lal in the land.

On 31st July 1985, Suruj Lal filed a claim in the Agricultural Tribunal against the appellant and the Director of Lands, as first and second defendants respectively, for a declaration of tenancy.

By a notice in the Fiji Times on 5th August 1985, the appellant sought tenders for the purchase of the lease and cane contract:

"FOR SALE

Offers are invited which should be addressed to the undersigned for the purchase of Crown Lease 8757 together with improvements thereon and cane contract No. 191 Wailevu Sector, owned by the Estate of Buturu father's name Bhagat Ram situated in Wailevu, Labasa.

Highest or any offer will not necessarily be accepted. Sale shall be subject to the consent of the Director of Lands.

Offers close August 12, 1985.

PUBLIC TRUSTEE OF FIJI."

On 7th August 1985, the respondent made a written offer of \$30,000.00.

On 14th February 1986, the appellant filed a defence to the claim in the Agricultural Tribunal.

It was stated in evidence by the respondent and accepted by the learned judge that, in about April 1986, the respondent met with a Mr D P Singh, the officer of the Public Trustee who had conduct of the sale. The meeting took place in the Labasa office of a local MP (now deceased). Mr Singh told him his tender was the highest and would be accepted and advised him to "get his money ready".

There was evidence at the trial that it was the policy of the Director of Lands to withhold consent to the transfer of a lease to any person who was already the registered owner of another lease. The trial judge found as a fact that the appellant would have been well aware of that policy.

At that time the respondent held a lease on a farm and, as a result of Mr Singh's advice, took steps to sell his land in order to have the money ready for the purchase of Buturu's land and to ensure he had no other lease when the consent of the Director of Lands was sought. His farm was sold in June 1986.

On 3rd December, 1986, the information given by Mr Singh was confirmed in a letter from him to the respondent accepting the offer of \$30,000.00:

"I refer to your offer of 7th August, 1985 to purchase Crown Lease No. 8757 and am pleased to inform you that it has been accepted in the sum of \$30,000.00.

Would you please deposit ten percent of the purchase price amounting to \$3,000.00 to enable me to prepare the



necessary transfer document.

The balance sum is to be paid within thirty (30) days from the date hereof."

The trial judge found that, on or about 16th December in Suva, the respondent paid \$3,000.00 to Mr Singh followed, before Christmas, by the balance of \$27,000.00. However, on 16th January 1987, Mr Singh wrote again to the respondent:

"RE; CROWN LEASE NO. 8757

I refer to your offer and my acceptance of 3rd December, 1986.

The case is still pending in Agricultural Tribunal which has now been fixed for hearing in April, 1987 and therefore sale cannot be proceeded with.

I regret the inconvenience caused and return herewith your bank cheque for \$30,000.00."

At this, the respondent came to Suva to see Mr Singh. He told him he had already sold his farm in order to be able to complete the purchase of Buturu's lease. The judge accepted the respondent's evidence that Mr Singh's response had been to tell him that the tender was postponed and would be proceeded with when the ALTA case was over, adding that he was confident of success in that case.

In April 1987, the respondent again saw Mr Singh and was advised the Agricultural Tribunal case was not yet complete.

On 12th August 1987, a solicitor wrote a (confused) letter to the appellant on the respondent's behalf:

"RE : KRISHNA NAIR (F/N EMBCHUN NAIR)  
CROWN LEASE NO.8757 REF NO.P.T.7/809

We act for the abovenamed who has accepted your offer of sale as set out in your letter of 3rd December, 1986 and in compliance therewith has paid the required deposit.

We now call upon you to do your part and to honour the contract."

That resulted in a reply from Mr Singh on 14th August 1987 in the following terms:

"RE: ESTATE OF BUTURU (F/N BHAGAT RAM)  
CROWN LEASE NO. 8757

I acknowledge receipt of your letter of 12th instant and regret that your client's offer was not accepted and deposit was returned to your client, Krishna Nair.

He was advised on several occasion the circumstances.

The sale has been withdrawn and may be readvertised in due



course."

The new and untrue claim that the respondent's offer had not been accepted by the appellant changed again, in the course of further correspondence during 1988, to a suggestion that the respondent had failed to comply with the conditions of the sale because he had not paid the deposit or the full sum within the time stipulated in the letter of 3rd December 1986. That defence was maintained throughout the proceedings but the judge rejected it as the appellant was "unable to present any supportive evidence of the allegation".

On 7th February 1990, the respondent filed a writ and statement of claim.

In June or July 1990 the appellant sold the remaining half of the land to Suruj Lal for \$14,300.00 provoking the respondent to register a caveat on 17th September 1990.

The pleadings were amended more than once to include the suggestion by the appellant described above and allegations by the respondent of fraud and collusion between the appellant and Suruj Lal. It is an unfortunate aspect of the case that the claim and defence as pleaded both differed markedly from the case presented by each side at the trial. However it is clear from the record neither side was taken by surprise by such changes and certainly the point was never taken.

The respondent claimed specific performance of the sale and damages for both the loss of income from lease 8757 and the cost of his accommodation since the sale of his farm. It is not necessary, in view of the way the trial proceeded, to go into further details of the pleadings.

The learned judge found the conduct of the appellant as a trustee amounted to wilful default, that there was a binding contract or agreement between the parties and that, under the principles of equitable estoppel, the appellant was estopped from denying the contract by invoking the terms of section 13 of the Crown Lands Act. He appears to have considered that specific performance could lie although he declined to order it in this case because of the time that had elapsed and the claim of Suruj Lal to the land. He awarded damages for breach of contract based principally on the income the respondent could reasonably have expected to receive had he obtained farm 8757 in January 1987.

The grounds of appeal that were pursued at the hearing were:

1. The learned judge erred in law and in fact in entertaining and hearing the action commenced by the Respondent when there was no prior consent of the Director of Lands within the meaning of Section 13(1) of the Crown Lands Act (Cap 132).
2. His Lordship erred in law and in fact in holding that for the Director of Lands' consent to litigation to be applicable as required by the provisions of Section 13(1) of the Crown Lands Act (Cap 132) the court must make an order dealing with land and that such consent could be obtained before litigation.



3. The learned judge erred in law and in fact in awarding damages for breach of contract in spite of holding that the Respondent has no action for damages (or specific performance) for breach of contract.

4. The learned judge erred in law and in fact holding that the Appellants are estopped in equity from raising Section 13(1) of the Crown Lands Act (Cap 132) and in applying the principles of promissory estoppel herein.

6. The learned judge erred in law and in fact in holding that the 1st Appellant's actions were so unconscionable when he omitted to take into account the fact that the Appellant took reasonable steps to notify the Respondent of the cancellation of the sale.

7. The learned judge erred in law and in fact in failing properly to consider the provisions of Sections 27 and 28 of the Public Trustee Act (Cap 64) when he held that the appellants were in wilful default and liable to pay damages to the Respondent.

8. The learned judge erred in law and in fact in awarding damages in the action which is excessive in the circumstances.

9. His Lordship erred in fact and in law in holding that there was conduct on the part of the appellant precluding the Respondent from mitigating his damages.

These can conveniently be considered under the four main topics they raise.

#### Consent Under Section 13(1)

There is no dispute that the lease in this case is a protected lease and subject, therefore, to the much litigated section 13(1) of the Crown Lands Act (Cap 132).

"13. Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."



The advertisement in the Fiji Times newspaper made it clear the consent of the Director of Lands would be needed. It was on the appellant as lessee to apply but, before he did so, he told the respondent that he would not proceed with the sale because of the pending case in the Agricultural Tribunal. The question that fell for determination by the court below was whether the agreement between the parties amounted to a dealing with the land and, therefore, required prior consent.

In the case of D B Waite (Overseas) Ltd v Wallath, 18 FLR 141, it was held that an agreement for the sale of land subject to section 13 was not a dealing in land. If it were, any attempt to agree a sale before submitting it to the Director for his consent would immediately be null and void. Marsack JA cited the case of Denning v Edwardes, (1961) AC 245, in which the Privy Council, dealing with a similar provision in the laws of Kenya whereby the Governor's consent was required for land transactions, said:

"Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective."

Applying that to the very similar wording of section 12 of the Native Land Trust Act, Marsack J continued:

"The preliminary agreement contains all the essential ingredients for the sale and purchase of land; and if it is to be regarded as completely effective from the time of signing it must be held to be a dealing in land and consequently, under section 12, unlawful, null and void. But it has been authoritatively decided that the preliminary agreement does not in itself convey an interest in land; and therefore, in my opinion, it must be that the preliminary agreement is inchoate in its character and would remain incomplete, and not fully effective, until the Board's consent has been given....The practical result of this would be that the appellant would be entitled to a return of his deposit. He would not be entitled to recover damages for breach of contract. In my view a right to damages for breach of contract could only arise under a contract which was complete and fully effective....As the preliminary agreement cannot, without losing its validity, give an interest in land to the purchaser, then it cannot....form the basis of an action for damages for its breach."

Lyons J correctly found that, in this case, only a preliminary agreement was reached and, as it did not amount to a dealing in land, did not require the prior consent of the Director. Thus lack of such consent did not render it null and void under section 13(1).

The appellant also suggests that the respondent needed the Director's



consent under section 13(1) to the proceedings in the court below. This case concerned an agreement to sell and damages arising out of the breach of such agreement. The court is not dealing with the lease and so no consent is required.

The way the trial judge decided the case did result in an order that would have amounted to a dealing with the lease. He dealt with section 13(1) by suggesting the court might, in such a case, order that consent be given retrospectively. In view of our finding we do not need to deal with that aspect of the case and it was not argued fully in the appeal.

### Equitable Estoppel

The learned judge then passed to a consideration of whether there was a remedy open to the respondent under the doctrine of equitable estoppel. Although the judge appeared to have some reservation as to how far the doctrine applies here, it is well established in the law of Fiji and, indeed, the wider scope of the doctrine as formulated in Australia and New Zealand in the last decade and a half has been accepted and applied by this Court. (See for example, Attorney General and Fiji Trade and Investment Board v Pacoil; Civil appeal number 14 of 1996). The appellant did not seek to argue otherwise. His complaint was that the learned judge was wrong to find estoppel on the facts of this case and, having done so, in the way he applied it.

In the present case, there is no pre-existing contractual relationship between the parties. The learned judge found there was a contract subject only to the requirement of the Director's consent under section 13 but we must disagree. All the parties had reached was an agreement to establish a contractual relationship.

However, since the decision of the High Court of Australia in Waltons Stores (Interstate) Ltd v Maher, (1987-8) 164 CLR 387, the restriction of estoppel to cases in which there was a pre-existing contractual relationship (as, for example, in Legione v Hately, (1982-3) 152 CLR 406) was removed and the remedy extended. Following an extensive review of the authorities, Mason CJ and Wilson J, at 406, considered it indicated that;

"....the doctrine extends to the enforcement of voluntary promises on the footing that a voluntary departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. Humphreys Estate, (1987) 1 AC 114, suggests this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party."

In the same case, at 428, Brennan J set out the matters that must be proved.



"In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act or avoid that detriment whether by fulfilling the assumption or expectation or otherwise."

Brennan J pointed out, as did Mason CJ and Wilson J, that it is the unconscionable conduct of the defendant that both attracts the jurisdiction of a court of equity and shapes the remedy. Similarly in the case of The Commonwealth v Verwayen, (1990) 170 CLR 394, at 440, Deane J explains that the doctrine of estoppel by conduct is founded upon good conscience but adds that the notion of unconscionability is better described than defined. He continues;

"As Lord Scarman pointed out in National Bank Plc v Morgan, (1985) AC 686, definition "is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case". The most that can be said is that "unconscionable" should be understood in the sense of referring to what one party "ought not, in conscience, as between the parties, to be allowed" to do.....the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a "real process of reasoning and judgment" in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case."

The appellant suggests that the conduct of the appellant was not unconscionable because he took reasonable steps to notify the respondent of the cancellation of the sale. We cannot accept that in the light of the judge's findings of fact.

The invitation for tenders in the newspaper clearly suggested that the appellant was willing and able to transfer the lease. The advice by Mr Singh in the office in Labasa that the respondent's tender was the highest and would be accepted followed by the exhortation to get his money ready made, as the judge found it was, against the appellant's knowledge that the respondent would not be allowed to take over the proffered lease without first divesting himself of his present leasehold, clearly induced the respondent to anticipate a legal relationship would exist between them. In reliance on that, the respondent sold his farm as the appellant knew he would.

Having accepted his tender and then realised the case in, the Agricultural Tribunal was still pending, the appellant advised the



sale could not be proceeded with. Yet there can be no doubt the appellant knew of the claim in the Agricultural Tribunal. It is apparent that the action was only filed in the Tribunal a few days before the advertisement appeared and may not have reached the appellant before instructions were given to insert that advertisement but the appellant must have known, well before that, of the claim of Suruj Lal to half the land and, one or two months before the April meeting in Labasa, the appellant had filed a defence to the claim. When the respondent came to Suva following the appellant's letter advising him the sale could not be proceeded with, Mr Singh told him the tender was postponed and would be proceeded with when the ALTA case was over. He further excited the respondent's expectations by expressing his confidence of success in the Tribunal. That does not amount to a reasonable attempt to advise the respondent of the true position.

The learned judge's findings of fact fulfilled the conditions set out by Brennan J in Waltons' case and he had little difficulty in finding the conduct of the appellant to be unconscionable. He was right, therefore, to find equitable estoppel arose.

The detrimental effect on the respondent is only too clear. The evidence showed him to be an industrious and successful farmer. Having got his money ready by selling his farm and home and whilst he was waiting in the continuing expectation of the transfer of the lease on Buturu's farm, the respondent had to live on his capital. The result was that it was eroded by the expenses of day to day living and temporary accommodation until it was insufficient to purchase another farm. From that point, in the absence of adequate employment, we are told the demands of family life have consumed the remainder.

#### The Remedy

The learned Judge made his finding of estoppel in the following terms;

"In my opinion the plaintiff has established the basis for an equitable estoppel in respect of the first defendant raising the provisions of Section 13(1) as a defence to the plaintiff's action. To my mind it would be inequitable and unjust to allow the first defendant so to do."

The effect of that would be to set aside clear and mandatory statutory provisions. The judge appears to have found support for such a course in the comments made by Deane J in Waltons' case (at 446) whilst dealing with the effect of section 54A of the Conveyancing Act of New South Wales. He then continued;

"In this context section 13(1) arguably applies to a preliminary agreement to which a further dealing has been added, such further dealing creating the "illegality and unenforceability." The estoppel operates to preclude the denial of enforceability. As Deane J observed "the estoppel outflanks the provisions of the statute".

As Brennan J said in Waltons' case; "The action to enforce an equity created by estoppel is not brought "upon any contract", for the equity arises out of the circumstances. This is not to say that there is an equity which precludes the application of the statute. It is to say that the statute has no application to the equity".



Brennan J explained the remedy in these terms (Waltons' case at 416);

"Equitable estoppel....does not operate by establishing an assumed state of affairs. Unlike an estoppel in pais, an equitable estoppel is a source of legal obligation. It is not enforced against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the source of a legal obligation arising on an actual state of affairs. An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or having abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel."

At 423 he warns;

"The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon.

If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed."

With respect to the learned trial judge, it was his failure to keep that object in mind that led him into error on the effect of his finding of equitable estoppel. His decision that the appellant is estopped from raising section 13(1) led him inevitably to the position in which he considered that specific performance of the contract for sale of the lease was a course open to him. Having considered the normal principles that relate to specific performance, he did not order it but we cannot accept that such a remedy could have been open to him. The courts have been anxious to avoid equity being used as a means of enforcing contractual terms that would not be enforceable in an action for breach of contract.

The effect of his ruling would be that the appellant could not raise lack of the Director's prior consent and could thus be ordered to transfer the farm to the respondent. Yet it is clear that entitlement to at least the half of the farm Suruj Lal inherited from his mother and, arguably the whole farm, lay in another person. Even if such consent was sought, it is obvious the Director would refuse it and so, by section 13(1), such a transfer would then be null and void.

Equity does not give the court power to ignore or over-ride a clear statutory provision. In the passage of his judgment quoted above the learned judge, with respect, takes the suggestion by Deane J that the estoppel outflanks the provisions of the statute out of context.



Deane J was dealing there with the requirement of section 54A that proceedings brought on a contract for the sale or disposition of land need to be evidenced in writing. On the particular facts of that case, if there was an absence of writing it arose from the conduct of the party estopped.

After deciding not to order specific performance in the present case, the judge went on to award damages. Ground three suggests that the damages were awarded for breach of contract even though the judge had already ruled there was no contract. We consider there is substance in that suggestion.

Having concluded that the estoppel precluded the appellant from denying the contract under the provisions of section 13(1), the judge based his assessment of damages on the loss arising from the failure of that contract; awarding them "for breach of contract". That approach is clearly incorrect.

There is no dispute by the appellant that damages per se may be an appropriate remedy in cases of equitable estoppel. Damages were generally regarded as a remedy available at common law only but, especially since the fusion of law and equity last century, there has been a growing acceptance in some jurisdictions that monetary compensation by way of damages may be awarded when it was not possible or appropriate to grant more traditional equitable relief. This process was accelerated by Lord Diplock's forthright account of the consequences of that fusion in United Scientific Holdings Ltd v Burnley Borough Council, (1978) AC 904, acknowledged by the New Zealand Court of Appeal as justifying an award of damages as a remedy for breach of an equitable obligation when this was called for to meet the needs of the case, with a corresponding ability to make allowance for the plaintiff's own contribution to his loss - see for example, Day v Mead, (1987) 2 NZLR 443, Attorney General v Wellington Newspapers Ltd, (1988) 1 NZLR 129, 173, and Aquaculture Corporation v N.Z. Green Mussel Co Ltd, (1990) 3 NZLR 299. The reasoning in these and similar decisions is consistent with that in some of the judgments in the Australian High Court cases cited above. In Canson Enterprises Ltd v Boughton and Co, (1991) 85 DLR (4th) 129, four judges of the Canadian Supreme Court approved the approach of the New Zealand Court in Day v Mead to the general availability of damages as an equitable remedy. La Forest J (with whom the other three agreed) stated, at 153, that;

"Whether the Courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, seems not particularly important when the same policy objective is sought."

For these reasons we are satisfied that an award of damages may be made and is the appropriate remedy for the respondent in this case.

What, then, is the basis on which the remedy is assessed?

In Verwayen's case, at 411, Mason CJ said;

"Equity was concerned, not to make good the assumption, but to do what was necessary to prevent the suffering of detriment. To do more would sit uncomfortably with a general principle whose underlying foundation was the concept of unconscionability."



And at 413;

"....there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied on an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance on the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption."

In the same case Brennan J, at 428, points out that Waltons v Maher established that equitable estoppel yields a remedy to prevent unconscionable conduct by a party who seeks to resile from a promise on which the other party has acted to his detriment.

"The remedy is to effect what Scarman LJ called "the minimum equity to do justice" in Crabb v Arun District Council, (1976) Ch 179,...The remedy is not designed to enforce the promise although, in some situations (of which Waltons v Mather affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise."

In this case, the detriment suffered by the respondent was the loss caused by the failure to proceed with the sale after he had sold his farm. The action of offering the lease for tender and accepting the respondent's offer was in itself unconscionable but the continued suggestion to the respondent that he would still be able to proceed on his tender aggravated the situation. We do not think we are being unduly harsh on the respondent if we suggest that the step of selling his farm before he had anything in writing was more than a little precipitate but he was a farmer, not represented by a lawyer. He was being told what to do by an officer in the Public Trustee's office. Whether he had been precipitate or not to dispose of his farm, the acceptance of the tender was, in fact, confirmed in writing and Mr Singh's subsequent conduct effectively kept alive the respondent's expectation that the sale would still proceed on his tender.

The ninth ground of appeal challenges the judge's finding that the respondent could not have mitigated his loss because of the conduct of the appellant. He found this conduct continued for nine years and awarded damages for the whole of that period. The way in which we have decided this case means we need only to consider a much shorter period.

In the face of his hope that the sale would proceed, it was understandable that the respondent took no immediate steps to invest his money or to find an alternative farm to buy. The learned judge found that he was entitled to continue to wait for the result of the tribunal hearing. We disagree because the letter of 14th August 1987 changed the position fundamentally. For the first time, there was no reference simply to a postponement of the tender. That letter stated that the sale "may be readvertised in due course". At that point it became clear that the respondent could no longer hope that his offer



would be accepted without further competition. It is noteworthy that the letter was in reply to a letter sent on the respondents behalf by a solicitor. With the benefit by then of legal advice, the respondent should have appreciated the true position.

We consider that the period over which the respondent suffered detriment as a result of the appellant's conduct was from the sale of his farm in June, 1986 following the oral advice of Mr Singh in Labasa, until he received the letter of 14th August. The detriment arose from the fact that he was induced to part with his farm and his home and, as long as he was being encouraged to hope that the transaction was still viable, his failure to take any steps to seek an alternative farm.

The judge suggested the appellant kept the respondent "hanging on" with the promise that once the ALTA proceedings had been dealt with the land may be readvertised. He considered this to be a period of at least 2 - 3 years during which the respondent had to live on the proceeds from the sale of his farm and that it could reasonably be expected that he would have dissipated some of these funds in living expenses alone. He said:

"As the evidence fell, it is reasonable to gather that the full impossibility of the plaintiff ever purchasing Buturu's farm did not become apparent (until) well into the course of this litigation and possibly not until the court record of the Agricultural Tribunal became available at trial."

The question, of course, was not when realisation dawned that the purchase was impossible but when the respondent should reasonably have realised the sale would no longer take place on the terms of the original agreement. The appellant's conduct had been unconscionable but that did not and could not be considered to have continued indefinitely. Once the warning was given that, if it took place at all, the sale would be readvertised, ie put out again to free competition, the respondent had no further reason to assume the sale must be to him.

The judge based his award on the expected return the respondent would have received from Buturu's farm, a figure of \$12,000 pa, and, using the same rather open-ended approach, calculated it for a period of nine years.

That approach was wrong as counsel for both parties now concede. Any detriment, as we have already stated, arose from the loss of income from the farm the respondent sold on being told his was the successful tender.

What is the minimum equity to avoid the consequences of the appellant's conduct over the period we have suggested? As we have stated, we consider it should be the loss of income of the farm he was induced to sell together with the extra living costs he had to incur whilst he was still hoping his tender would be accepted. Having said that, there is very little evidence on which to base any calculation of damages. The learned trial judge had the same problem;

"I am not presented with any reliable evidence to enable me to calculate damages with precision so I propose to make a global award."



This case has been a long time coming to a conclusion and we feel the respondent should not be held out of his money any longer than necessary so we shall adopt the same approach. It is an unfortunate feature of far too many cases that come before this court that the statement of claim and the evidence called pay scant regard to the financial calculations that will be a necessary corollary of success. It is said that, all too often, damages are the poor relation of liability. Such a position not only reflects badly on counsel preparing the case but makes the task of the judge far more difficult. Too often we see cases where the judge in an attempt to give a just result despite the inadequacies of the case before him has to resort to making a "global award".

If counsel prepared their cases more thoroughly, this would not be necessary and justice would inevitably be the better for it. Perhaps, if judges were a little less accommodating when confronted with inadequate information, the standard of case preparation would improve.

However, as we have said, the respondent has had to wait an inordinate length of time through no fault of his own and we do not wish to prolong that.

There was undisputed evidence before the court that the respondent was a very good farmer. Chandra Pillay told how the respondent had managed to harvest 500 tons of cane from his farm. Clearly that was an unusually high yield but we are willing to accept that, if he did it once, a farmer of the respondent's ability and industry could do it again. The judge below accepted that the price at the relevant time was \$35-45 per tonne and calculated on the higher figure. From that must be deducted the costs of cutting and transport to the mill. Mr Pillay gave a figure of \$8 per tonne for each of those operations in relation to Buturu's farm. As the evidence was that the respondent's farm lay only about three quarters of a mile away, we will proceed on the costs being the same leaving a nett return from the cane of \$24 per tonne. That gives an annual return of \$12,000. Averaging that as a monthly figure for the year and multiplying it by the period covered, ie June 1986 to August 1987, gives a total of \$15,000.

The trial judge reduced the total by 10% to take into account other exigencies. However he dealt with the claim for interest by saying: "I consider any interest component on this award is built in by making the 10% less than I would have." Whilst we sympathise with the judge's difficulties, we consider that is too speculative. How much was he considering was the cost of the exigencies he lists? As the claim was for 10% interest, had he reached a figure of 20%? If so it would have been better for the parties if he had stated it. He was, of course, awarding damages for the whole period until judgment; the same period interest would have accrued. We have substantially reduced the period for which damages are due and so it would be unjust if we failed to award interest for the longer period during which this case has been before the courts. We consider the best we can do is to reduce the estimated receipts from his cane farm by 10% and allow the claim for interest at 10% from the time the claim was filed.

The only expenses that were itemised by the respondent in his evidence were \$20 per month for the storage of his farming equipment



and \$120 per month for accommodation; a total over the same period of \$2,100.

### Liability of the Public Trustee

The seventh ground of appeal deals with the learned judge's finding that the appellant as Public trustee is liable.

The learned judge stated the rule that a personal representative is not personally liable when acting as trustee for an estate unless his conduct amounts to wilful default. He looked to Re Vickery, Vickery and Stephens, (1931) 1 Ch 572 for a definition of the term. That case involved default by a solicitor acting as agent for the trustee but the principle is the same. Maugham J, at 583, said;

"The Court of Appeal held.... that a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not. I accept with respect what Warrington LJ said - namely, that in the case of trustees there are definite and precise rules of law as to what a trustee may or may not do in the execution of his trust, and that a trustee in general is not excused in relation to a loss occasioned by a breach of trust merely because he honestly believed that he was justified in doing the act in question."

He continued, at 584, by describing wilful default;

"as implying.... either a consciousness of negligence or breach of duty, or a recklessness in the performance of a duty."

Section 27(1) of the Public Trustee Act (Cap 64), which deals with the liability of the Consolidated Fund to make good sums for which the Public Trustee may be liable, recognises that his liability is the same as that of a private trustee. It provides an exemption from liability:

"....where the liability is one to which neither the Public Trustee nor any of his officers or agents could by the exercise of reasonable diligence have averted...."

The judge found that the conduct of the appellant through its officer, Mr Singh, was plainly a case at least of recklessness in the performance of his duties and amounted, therefore to wilful default. The exercise of the most rudimentary diligence before placing the farm on the market would have averted the whole chain of events that have led to this action. The judge was right to find the appellant liable.

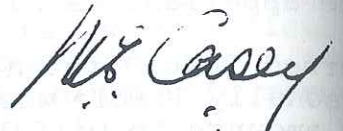
Thus our award is;

15,000 less 10%	= 13,500
plus	2,100

Total = \$15,600 with interest at 10% from 29 January 1990.



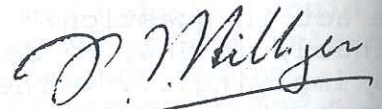
As each party has achieved a measure of success in the appeal, we do not make any order for costs but the award of costs to the plaintiff in the High Court will stand.



Rt Hon Sir Maurice Casey  
Judge of Appeal



Mr Justice Gordon Ward  
Judge of Appeal



Mr Justice Peter Hillyer  
Judge of Appeal