

Fifita v Fie'eiki (No.2)

10 Supreme Court, Nuku'alofa
Hampton CJ
C 788/95

7 & 14 December 1995

Land - mesne profits - assessment - loss of use - value
Mesne profits - land - loss of use - value - assessment

20 This civil claim was associated with the claim for possession of the same land (the case reported above). The plaintiff was out of possession of the land and unable to use it for some 4 months.

Held:

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1. Mesne profits are for damages suffered through being out of possession of the land and, if there is no actual damage by the trespass of the defendants (for that is what is being compensated for) then a plaintiff may recover (on mesne profits) the amount of the open market value of the premises for the period of occupation. Mesne profits are to compensate for the damage suffered by the wrongful interference with the right of the plaintiff to possession of the land.
 2. Here there had been no loss proved except for the rental the plaintiff had paid the holder of the land and an appropriate share of other moneys paid by the plaintiff to the holder (as a "premium" to obtain a 50 year lease).

Counsel for plaintiff : Mr Edwards

Counsel for defendants : Mr 'Etika

Judgment

On the 24th November 1995 I entered judgment in this matter for the Plaintiff, with the question of damages (for mesne profits relating to inability to use the land in question for the 4 months : August, September, October and November 1995) to be assessed.

By the 7th December the Plaintiff had had filed, on her behalf, two Affidavits by her husband in support of the claim that the mesne profits should be set at the rate of \$2000 per month.

Both Mr. Edwards and Mr. 'Etika attended before me on that date, when Mr. Edwards made submissions in support of the Plaintiff's claim, saying that over and above any ground rentals appropriately payable for the actual land in question the Court should take into account the Plaintiff's husband's loss (or anticipated loss) of business profits if his wife, as arranged, had allowed him to conduct his vehicle selling business from the land. I stress the "husband's loss" - and that in reality is what the 2 Affidavits and the many exhibits relate to (e.g. in the 2nd Affidavit the Plaintiff's husband says this : "12. If I had used the land and had 10 cars or trucks sold within this time I would receive over \$100,000 for the trucks alone. It would be equally true if I had sold any of the cars. I have estimated a very low loss of income of \$1000 a week, income as a direct result of the defendants' conduct"; and further e.g. in the 1st Affidavit this by the husband : "4. The value of the mesne profit that my wife is claiming should be calculated on the following formula:-

- (a) the rental value fixed by Government is \$700 p.a.
- (b) the \$50,000 should be amortise(d) over 50 year period.
- (c) loss of revenue of \$1000 a week.

"5. The commercial use of the land and the loss of 'he use should be the value of profit, plus 1/12 of the sum of \$700 and \$1000 per week. My wife and I would be satisfied that a mesne profit of \$2000 per month be allowed ...").

Nowhere am I told what share, if any, in these anticipated profits of the husband, the wife is to have; nor is there any mention of her being paid a rental by the husband for his use of the land.

Mesne profits are for damages suffered through the Plaintiff being out of possession of the land and, if there is no actual damage by the trespass of the Defendants (for that is what is being compensated for), then the Plaintiff may recover, as mesne profits, the amount of the open market value of the premises for the period of the Defendants' wrongful occupation. Mesne profits, in effect, are to compensate for the damages suffered by the wrongful interference with the right of the plaintiff to possession of the land.

It is important to remind myself of those principles in view of the way the Plaintiff's case was made by Mr. Edwards, on the 7th December.

On the 7th December, Mr 'Etika, having just been served with the 2nd Affidavit, wished to have further time to consider both the contents of the Affidavit and whether a valuation should be obtained by him for his clients.

The matter was adjourned for one week to enable him to do that. However, when the matter was called on the 14th only Mr. Edwards appeared and, after waiting some time, I advised Mr. Edwards that I would consider the matter solely on the basis of what had been put before me up until, and including on, the 7th December and give a short written judgment on damages, which is what I now do.

I return to the first Affidavit. In para 3 the husband says that "I am unable to assess the loss of revenue for not being able to assemble the vehicles and placing them on the

site for sale. I can only give an estimate for loss of a profit of approximately \$1000 per week". I have already commented on the husband's position as opposed to the Plaintiff's situation, which is the situation under scrutiny.

In addition, and in any event, I note that the Plaintiff's husband does not say anywhere, in either of his Affidavits, that he has not been able to assemble and sell these vehicles elsewhere.

100 Para. 5 of that first Affidavit (already set out above, in its relevant portion) reinforces my view. There has been proved by the Plaintiff no actual loss except for the rental paid, and a share of the other moneys paid, for the 4 month period the land was not able to be used.

That rental is the Government rental of \$700 p.a., which is confirmed by Exh. "A" to the 2nd Affidavit as being "the correct rent for the land" (this being an independent assessment of the "current market rent" of the land). That rental, monthly, would come to \$58.33.

I also take into account the payment of \$50,000 by, or on behalf of, the Plaintiff to Mrs. 'Ilavalu, owner of the land i.e. in effect a "premium" of \$1000 p.a. for the right to a 50 year lease of her land. On that basis that would come to \$83.33 a month.

110 I do recognise, and am prepared to accept, that \$50,000 raised and paid in a lump sum at the start of the 50 year term is in effect worth more than if it were spread and paid throughout the term. Although I have no direct evidence on that I am prepared to make some allowance for that additional cost of that "premium". Using my best assessment of the evidence overall I am prepared to allow a figure, to reflect that position, of \$30.00 a month.

I find here, then, that mesne profits should be assessed, in favour of the Plaintiff, in the sum of \$171.66 per month, for each of the 4 months in question i.e. judgment for the Plaintiff against the Defendants, jointly and severally, in a total sum of \$686.64; together with costs as taxed by the Registrar (if not earlier agreed)