

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0001 OF 1994S

(High Court Civil Action No. 512 of 1993)

(Consolidated with Civil Action No. 362 of 1993)

BETWEEN

EMBLEM INVESTMENTS LIMITED

APPELLANT

-and-

ATLAS TRADING COMPANY LIMITED

RESPONDENT

Mr H. Lateef for the Appellant
Mr H.K. Nagin for the Respondent

<u>Date and Place of Hearing</u>	:	7th November, 1994, Suva
<u>Date of Delivery of Judgment</u>	:	11th November, 1994

JUDGMENT

This is an appeal against a judgment of Scott J. delivered on 3 December 1993.

The appellant was seeking possession of premises on the ground floor of the building known as Govindji Building at 63 Marks Street, Suva being part of C.T.9984. In turn the respondent was seeking a declaration that it was entitled to stay in possession of the premises.

The premises were previously owned by N.G. Holdings Ltd. and the respondent obtained a ten year lease in respect of the ground floor from 1 June 1986. It was a condition of the lease that there be no reimbursement to the respondent on the expiry of the

lease in respect of renovations done to the front of the building and extension of the windows on the frontage to be done by the plaintiff at his own expense. The respondent prepared plans and carried out the necessary works at the expense of about \$40,000 in 1986. Unfortunately the lease was not registered nor was any charge or caveat lodged to protect the respondent's interest.

On or about the 23 December 1992 after negotiations which began in August 1992, the appellant purchased the property from N.G. Holdings Ltd. It is accepted that the appellant knew at that time that the lease existed between N.G. Holdings Ltd. and the respondent. The property was sold subject to the existing tenancy. The appellant also knew about the expenditure of \$40,000.

On 8 January 1993 Solicitors for the appellant wrote to the Respondent advising the Respondent of the sale and saying:

"The new landlord will in due course make himself known to you so that relationship can continue without hitch".

One could hardly describe the subsequent relationship as being "without hitch".

About the end of January, the appellant issued a notice to quit requiring the respondent to deliver vacant possession on or before the 31st of March 1993. The last paragraph of that letter read :-

"Further our client is aware that you had a Leasing Agreement with the previous owner N.G. Holdings Limited but we wish to point out our client needs the premises for its own use. To assist you if you think the lease is binding on our client, we refer you or your solicitors to a Fiji Court of Appeal case which states that our client is legally able to claim possession. Refer Raghupal Singh v Chabildas & Devidas 42/1978."

Raghupal's case dealt with an option to renew for a further term of 10 years after the original term of the lease had expired. The purchaser was not aware of this option and only became aware of the option when the purchaser instituted action to evict the tenant. It was agreed that the case be decided on the basis that there was no fraud involved. The Fiji Court of Appeal cited the Privy Council case of Frazer -v- Walker [1967] A.C.567 and said that in the light of that authoritative pronouncement of law it was clear that in the absence of fraud the appellant could not assert the interest claimed as against the respondents who took a registered title on which that interest was not noted.

The question that had to be determined in the case before us therefore, was whether there was any fraud. Appellant's counsel said that his client's conduct "if it can be criticised was at its highest more unconscionable conduct" - a somewhat nice distinction. The respondent and the learned trial judge relied on Merrie -v- Mckay (1897) 16 NZLR 124. At page 127 Prendergast C.J. said:-

"The defendant here seeks to set up that the 189th section of the Land Transfer Act enables him to defy the plaintiff, and to claim the land discharged from the agreement. It is contended for the defendant that all that is charged against him is knowledge of the existence of an unregistered interest, which knowledge, by the terms of section 189, shall not of itself be imputed as fraud.

From the statement of facts it is manifest that there is much more knowledge here than that of the existence of an unregistered interest - there is knowledge of possession under the agreement, and of the outlay of money under it. It may be true that he was told by his vendor that the agreement was not binding-not worth the paper it was written on; but if he was so told, which is doubtful, it seems certain that the only reason given for its invalidity was the fact that it had not been registered."

and further down on page 127 and 128 he said :

"If the defendant acquired the title intending to carry out the agreement with the Plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights, under the agreement. If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered title. Whichever view is accepted, he must be held to hold the land subject to the plaintiff's rights under the agreement, and must perform the contract entered into by the plaintiff's vendors."

Merrie's case was followed in Webb v Hooper [1953] NZLR 111 and Wamiha Sawmilling Company Limited v Waiona Timber Company Ltd [1923] NZLR 1137 at 1169.

Section 39 of the Land Transfer Act (Fiji)(Cap 131) provides

that the registered proprietor of the land shall except in the case of fraud hold the sale subject to such encumbrances as may be notified on the volume of the register. Section 40 (which is in the same terms as Section 189 of the New Zealand Act) provides that knowledge of any trust or unregistered interest shall not "of itself" be imputed as fraud. As in the cases we have referred to however there is much more to the appellant's knowledge than mere knowledge of an unregistered interest. The appellant knew there was possession under the agreement and that money had been outlaid pursuant to it. Either the appellant purchased the land intending to rely on the fact that the lease was not registered or subsequently decided to take advantage of the fact that the lease was not registered to obtain possession. On that basis the learned trial judge held that the appellant had acted fraudulently and was not protected by section 40. We agree. Mr Lateef submitted that the fraud had to be prior to registration of the transfer to the appellant. . On the authorities referred to, where the fraud is against an unregistered lessee, it does not matter whether the fraud is before or after registration of the lessor as proprietor. The appeal is dismissed.

The respondent is entitled to costs to be taxed by the Registrar in the absence of agreement.

In the light of that decision we do not need to determine the application on behalf of the respondent to file further evidence. That evidence was simply as to the acceptance of

further rent by the appellant after the judgment. The same sort of submission had been made previously by the respondent in relation to rent accepted after the notice to quit had been served. The learned trial judge held that it was unnecessary to decide that point although on the basis of a number of cases relating to estoppel he referred to he indicated that there was support for the respondent's argument .

Decision

Appeal dismissed.

Appellant to pay respondent's costs to be taxed by the Registrar if not agreed.

M. Tikaram

.....
(Sir Moti Tikaram)
President Fiji Court of Appeal

I. R. Thompson

.....
(Mr Justice Ian R. Thompson)
Judge of Appeal

P. Hillyer J

.....
(Mr Justice Peter Hillyer)
Judge of Appeal