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IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0015 of 2005S
(High Court Civil Action No.HBC184 of 2004S)

BETWEEN:

NATSUN PACIFIC LIMITED

Appellant

AND:

SURESH HANSJI
MINAKSHI BEN

Respondents

Coram: Scott, JA
Wood, JA
Ford, JA

Hearing: Tuesday, 8 November 2005, Suva

Counsel: Mrs. R. Sharma and Mr W. Hiuuare for the Appellant
Miss J. Abia for the Respondents

Date of Judgment: Friday, 11 November 2005, Suva

JUDGMENT OF THE COURT

[1] The appellant brings this appeal from the decision of Pulea J. of 15 November 2004, dismissing its summons in chambers, seeking an order for possession under s.169 of the Land Transfer Act Cap.131.

Background

[2] The appellant instituted the proceedings as registered proprietor of the relevant property, in reliance upon the notice to quit which it had served upon the respondents, and with which they had failed to comply.

[3] The question for determination was whether the respondents had shown cause to remain in possession of the property, in accordance with s.172 of the Act.

[4] Pulea J. having considered the affidavit evidence, and the written submissions of the parties, concluded:

> *"there are triable issues in the case which should be heard in open court and therefore this summary process is not appropriate. There are complex issues of fact and the defendants have shown cause to remain in possession."*

[5] The circumstances in which those issues arose were outlined in the affidavits. The appellant was the registered proprietor of the relevant property at N.G. Patel Road, Nausori comprised in Certificate of Title No.17207, having taken a transfer thereof on 25 February 2002, from the liquidator of the previous owner. The respondents, who were partners in Meenas Footwear shop, had been tenants of the previous owner (Jethasons Limited);

[6] On 9 May 2002, the appellant sent a letter to the respondents notifying them of the change of ownership, and the options that were available for their continued occupation of the premises. The letter provided:

> *"As you have enjoyed this occupancy and we would like you to continue to rent the shop you are occupying but due to a price we have paid each tenant will pay a small increment to facilitate the repayment programme... .."*

[7] The letter continued:

"The following options are available to you:

A. *Continue to rent the space at a monthly rental of $2,000 plus VAT payable before the 7th of each month.*

B. As discussed we have initially told you that the rental would be $2,500 plus VAT but after our discussion with Minakshi we agreed on $2,000 plus VAT rental for 12 months and $100 per month increment for the next 48 months.

C. Term of Lease will be for 5 years.

As you have been told the building will go through a face lift with new tiles in the front, painting and repairs to create a better image of the frontage. This will start early next month. The rental is due for payment now."

[8] On 6 September 2002, a notice to quit was served on the respondents requiring vacant possession within one month.

[9] On 4 October 2002, the respondents sent a reply noting that they were unable to vacate the property, adding:

"We have been tenants from approximately 5 years and have spent around $10,000.00 to renovate the same. I don't think there is a genuine plan for renovations on the property but a pretext means to remove me or increase the rentals.

I was initially paying $1,000.00 per month in rental and a increments of $550.00 was imposed from the last 6 months that is $1,650.00 per month without any PIB approval. Now the landlord is seeking a further $550.00 that is a increase to $2,200.00 per month. The message from the Landlord is clear that if I paid $2,200.00 I remained that means no renovations take place. If I don't agree then he uses a pretext means of renovations to remove me and gives it out to another tenant for a higher rental.

I suggest the landlord/myself/PIB with yourself make a amicable settlement on the same. The landlord has already breached the law by increasing the rent by huge amount without prior approval from PIB. If the building is going for a general renovation why only two tenants out of 5 are issued with notice to quit. It is only because the two are not agreeing to already extravagant increase on rentals.

I hope you understand my pledge for amicable settlement on this matter."

[10] Although the respondents said, in their affidavit that an undated reply was sent to the letter of 9 May 2002, it was eventually agreed by both parties that it was more

likely that this undated letter was sent following discussions which took place after the 4 October letter. It stated:

> *"I Minakshi Ben, a partner of Meenas Footwear, have at last agreed with a settlement with Mr Natwar Sundarji, that renovations will be made in the shop as soon as possible, in regards we have agreed to pay a rental of $2,000 VAT inclusive for the month of January 2003 as been discussed, also discussed that the rental will remain a lease of 5 years."*

[11] A further notice to quit was issued on 10 March 2004, and served on 12 March 2004, requiring vacant possession within one month from the date of service. A letter was then sent by the solicitors for the respondents to the appellant's solicitors, making certain representations as to the hardship which would be suffered, if the respondents were required to give up possession, and inquiring as to the reason for the notice to quit. No claim was made to the existence of an agreement to lease. There was no reply to the letter.

[12] In an affidavit sworn by Minakshi Ben on 25 June 2004, she asserted that

> *"upon the plaintiff's receipt of (the letter of 4 October 2002), Mr Sundarji (the Managing Director of the appellant) agreed to have us remaining tenants of the property."*

[13] In the same affidavit she made reference to the damage to the respondents' stock and interruption to their business which had occurred as a result of the renovations which were carried out by the appellant in 2003, and to their purchase of replacement stock which, she asserted, had only occurred as a result of their understanding that they had a tenancy "for a longer term." Reference was made, additionally, to the renovations which the respondents had themselves made to the premises throughout the period they had been tenants.

[14] In an affidavit filed by the appellant in reply, Natwar Lal Sundarji deposed that, subsequent to the letter of 9 May 2002, the respondents *"only agreed to pay $2,050 and was considered thus to have a month-to-month tenancy."* Copies of receipts

for this amount for September and October 2004 endorsed "without prejudice to notice to quit" were annexed. Mr Sundarji also stated that the renovations carried out by the respondents had been unauthorized, and had occurred without the knowledge of the appellant or its Directors. He denied that a long term lease was granted to the respondents, and otherwise denied, in general terms, most of the matters raised in Minakshi Ben's affidavit.

[15] No evidence was placed before the court concerning the nature of any tenancy or lease that existed between the respondents and the previous registered proprietor of the property.

The Issues Arising on the Summons

[16] It was the appellant's case that the correspondence, and discussions between the parties, did not give rise to a binding lease or tenancy agreement, its letter of 9 May 2002 having been an offer proposing various options to the respondents should they wish to continue as tenants, and the undated letter, and the letter of 4 October 2002, having been counter offers, or alternatively invitations to treat, which were not accepted.

[17] Its case essentially was that, in the absence of any binding agreement arising from the correspondence and discussions, the payment of rent on a monthly basis, and its acceptance, gave rise to no more than a monthly tenancy that was terminable on one month's notice.

[18] It was the respondents' case that the correspondence, the discussions between the parties and their subsequent conduct, including the payment of a higher rent, and the carrying out of renovations, raised the inference that there was on foot an agreement for a 5 year lease, which they had been performing. Additionally, it was asserted that the appellant was estopped by its conduct from denying the existence of that agreement.

[19] Alternatively to their claim for a five years lease, they asserted that there was at least a yearly tenancy in existence. In the absence of any agreement as to the period required for a notice to quit, the giving of a notice of one month, it was contended, was invalid, citing in support the following passage in the <u>*Land Law of New Zealand*</u> First ed. 1977, Hinde, McMorland and Sim at pp 578-579:

> *"If an express agreement makes no provision for the length of notice required to determine the tenancy, it would seem that the common law applies, namely that the tenancy may be determined by not less than half a year's notice expiring at the end of the year of the tenancy."*

[20] That passage does need to be understood in the context in which it was made, namely that an express agreement is necessary to create a tenancy from year to year in New Zealand, since s.105 of the Property Law Act 1952 prevents such a tenancy from being created or implied simply by payment of rent.

[21] Pulea J. accepted that, pursuant to s.169 (a) of the Act, the appellant, as the last registered proprietor, was entitled to bring a summons for possession of the premises. This brought into play s.172 of the Act, which provides:

> *"172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the Judge a right to possession of the land, the Judge shall dismiss the summons with costs against the proprietor, mortgagee or lessee or he may make any order and impose any terms he may think fit."*

[22] In determining that the present was a case where the respondents had satisfied the requirements of s.172, Pulea J. made reference to <u>*Ram Narayan v. Ram Charan*</u> Civil Appeal No. 15/83 FCA where Gould VP observed:

> *".. ... .the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straight forward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."*

[23] Reference was also made to ***Shyam Lal v. Eric Martin Schultz*** 18 FLR 152 FCA where Gould VP similarly observed:

> *"... the procedure in chambers under s.169 is not appropriate where there are complicated questions of fact ... . to be investigated."*

[24] As earlier observed, Pulea J. reached the conclusion that complex issues of fact had been shown to exist, arising out of the competing submissions which had been identified, such that the s.169 procedure was not appropriate.

The Appeal

[25] Although five separate grounds of appeal were identified, they overlap, and involve contentions that there were errors in fact and law in the:

(a) finding that there were complicated issues of facts in relation to the nature of the respondents' tenancy with the result that they had shown cause for refusing to give possession of the land, and in

(b) failing to find that the respondents were only monthly tenants.

[26] It is to be observed that the issue of the respondents' entitlement to continued possession was not determined on any final basis, a matter which was not overlooked by Pulea J. who appropriately cited the observations of the Court in ***Vallabh Das Premji v. Vinod Lal, Nanki and Koki*** (Civil Appeal No. 70 of 1974 FCA) that dismissal of a summons under s.172 of the Act:

> *"is not to prejudice the right of a plaintiff to take any other proceedings to which he may be otherwise entitled."*

[27] The approach which is properly taken in relation to a s.169 chambers application was recently noted by Winter J. in ***Binay Chand and Praveen Chand v. Anjum Ali***

Civil Action No. HBC 116 of 2004, adopting the principle laid down in ***Haroko Prasad v. Abdul Hamid*** Civil Appeal No. ABU0059 of 2003 where their Lordships had said:

> *"As has been remarked in other cases, provisions of this kind are common in many common law countries. There is a substantial amount of authority dealing with them and with the principles which apply when the procedure of summary judgment is invoked. The all important question always is whether the Defendant can prove to satisfaction of the judge a right to the possession of the land. These words have been the subject of some judicial gloss both in Fiji and elsewhere. For present purposes it is sufficient to refer to a decision relied upon by the primary judge in Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87) where the Supreme Court said (at page 2) under section 172 the person summoned may show cause why he refused to give up possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Court added that was not to say that the final or incontrovertible proof of right to remain in possession must be adduced. What was required was that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."*

[28] The approach taken in these decisions accords with similar observations in ***Baiju v. Jai Kumar*** (1999) 45 FLR 77, ***Ambika Prasad v. Santa Wati and Bisun Deo*** Civil Appeal No. 38/95 – FCA 98/138 and ***Pravin Kumar v. Rajen Kumar*** Civil Appeal 58/95 – FCA Reps 96/56.

[29] Pulea J. did not overlook the test to be applied in determining whether the case was suitable for the summary procedure available under s.169 of the Act. It is of course necessary that there be more than a mere allegation of the existence of a competing claim, or of a defence to the registered proprietor's claim to possession. As was pointed out in ***Darshan Singh v. Puran Singh*** 233 FLR 63 at 67:

> *"There must... be some evidence in support of the allegation indicating the need for fuller investigation which would make section 169 procedure unsatisfactory."*

[30] The Property Law Act Cap. 130 provides:

> *"S.89 (1) No tenancy from year to year is implied by the payment of rent.*
>
> *(2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly or yearly, or for any other recurring period may be terminated by either party giving to the other written notice as follows:*
>
> *(a) where the rent is payable yearly or for any recurring period exceeding one year, at least six months' notice expiring at the end of any year of the tenancy; or*
>
> *(b) where the rent is payable for any recurring period of less than one year, notice for at least a period equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not."*

[31] As a consequence, this being a case which was treated by the appellant as a monthly tenancy terminable on one months' notice, in order for the respondents to resist the s.169 summons they had to present some tangible evidence establishing a right to something more than a monthly tenancy or supporting an arguable case for such a right. Put another way they had to show something which was worthy of further investigation and which required the examination of witnesses.

[32] Pulea J. found that the evidence which they had placed before the Court effectively reached this threshold. For the appellant to succeed on the appeal, it must now show that there was an insufficient evidentiary basis for such a finding, or that there was a misdirection as to the test which had to be applied under s.172 of the Act.

[33] Clearly there was no misdirection in relation to that test. The appeal is accordingly narrowed to the question whether Justice Pulea's conclusion was properly open to her upon the available evidence, that is whether the evidence disclosed factual issues of a sufficient kind to require a hearing on the merits. It seems to us that several issues arose.

[34] The first issue is whether the case is one where the respondents can point to a written memorandum or note of a concluded agreement for a lease for five years, or for any other fixed term, of the kind which would comply with the requirements of s.59 of the Indemnity, Guarantee and Bailment Act Cap.232. In part that depends upon an issue as to whether the undated letter was sent before, or after, the 4 October letter, and any discussions which followed it.

[35] The letter of 9 May 2002 offered the respondents a five year lease, as an alternative to a monthly tenancy, upon terms requiring a rental of $2,000 per month plus Vat for the first twelve months, commencing immediately, followed by a base rent, in the same amount, increasing by $100 per month for each succeeding month for the balance of the term.

[36] That offer was obviously not accepted in its terms by the undated reply, which made reference to the parties having reached a settlement, whereunder renovations would be made to the premises, and whereby the rent was said to have been fixed at $2,000 Vat inclusive per month, commencing in January 2003. The term of the lease was said to be for 5 years, without any mention of any provision for an increment during that term.

[37] As previously mentioned, during the argument before us, each party accepted that it was more likely than not that this undated letter was not sent by way of a reply to the 9 May letter, but instead, followed discussions in response to the 4 October letter. While the evidence available did not permit of a resolution of that issue, such a timing would make sense in the light of the fact that reference was made to a settlement being agreed "at last," and to a January 2003 commencement date for the rental of $2,000 per month. Upon the face of the evidence before the Court, the appellant did not reply to this letter either accepting that it set out the terms of their agreement, or refuting it.

[38] It would also make sense in so far as the 4 October 2002 letter recorded the respondents' understanding that the appellant was now seeking an increase in the rental (which had apparently risen from $1,100 per month to $1,650 per month over the preceding six months), to an amount of $2,200 per month, and asking that there be "an amicable settlement." Had the undated letter recorded an agreement which had already been achieved, in response to the May letter, this letter would have made little sense.

[39] On the face of the evidence, there was no reply in writing to this letter. There was , however, an assertion by Minakshi Ben, in her affidavit which was placed in issue, that after its receipt there was agreement that the respondents "could remain as tenants."

[40] The evidence was silent as to the terms of any discussions that occurred between October 2002 and March 2004. It was however shown that, for September 2004 and October 2004, that is shortly before the hearing, rent was being paid, and accepted, in the sum of $2,050 per month. Receipts were issued for these months which were endorsed:

"without prejudice to the notice of quit,"

a reference presumably to the May 2004 notice.

[41] There was no evidence as to when rent began to be paid in this amount, or as to when the receipts were first endorsed in this manner.

[42] The case is one where clearly there was an issue between the parties, as to whether an agreement had been made to grant the respondents a five year lease. The respondents asserted that such an agreement had been reached, although without disclosing its terms; while the appellant denied that was so, and relied simply on the fact of the monthly payments, to assert that what existed was a tenancy from month to month.

[43] As we have observed, an issue thus arises as to whether, in the circumstances outlined, the undated letter constituted a written note or memorandum of an agreement reached after the 4 October letter, which although not the subject of any written reply, should be understood as having been acknowledged by the subsequent acceptance of rent, and the issue of receipts.

[44] In the absence of a written note or memorandum of an agreement for a five year lease, the respondents would need to establish an arguable case, either of estoppel, or of part performance, of the kind considered in ***Steadman v. Steadman*** (1976) AC 536; ***Boutique Balmoral Ltd. v. Retail Holdings Ltd***. (1976) 2 NZLR 222; or ***Ram Nadan v. Shiu Datt*** (Fiji Court of Appeal 21 April 1984), if they were to satisfy the s.172 threshold. The respondents do rely on these decision, and that reliance gives rise to some additional issues of fact and law.

[45] Clearly, some agreement was reached between the parties, having regard to the fact that the respondents were allowed to remain in possession for almost 2 years between the purchase and the second notice to quit, and for 18 months between the first and second notices to quit, and to the further fact that there was a substantial increase in rental, from that which had been payable when the appellant acquired the property.

[46] Precisely what the terms of that agreement were remained in issue. Additionally, an issue existed as to whether the appellant had known of, and acquiesced in the repairs and renovations which the respondents had made, and as to whether they had been carried out, and the increased rental paid, pursuant to whatever agreement or understanding had been made, that is in the execution of it and not simply in anticipation of its coming into being (see ***Boutique Balmoral Ltd. v. Retail Holdings Limited***).

[47] If the rental was not paid, or the renovations were not carried out in part performance of that agreement, then a question would exist as to whether those

events would have given rise, in the circumstance of this case, to an estoppel, or simply to a right to compensation for the renovations, to be brought in a separate action.

[48] If the case could be brought within the category of promissory or equitable estoppel considered in ***Waltons Stores (Interstate) Limited v. Maher*** (1988) 164 CLR 387, which would depend upon the appellant having allowed the respondents to pay an increased rent and to carry out renovations, knowing that they were acting on the basis of a false assumption as to the existence of a binding agreement, then this part of their case would be made good.

[49] Otherwise, it would seem that any claim to compensation for that work would simply give rise to a separate cause of action for a monetary payment, but not a basis for asserting a right to any form of tenancy: ***Ram Chand &. Others v. Hari Prasad*** (Civil Appeal No. 21 of 2002).

[50] The issues thus raised, it seems to us, called for further evidence and investigation, involving the potential cross examination of the deponents of the affidavits which were filed. In summary, those issues concern:

(a) When was the undated letter sent?

(b) Did the undated letter constitute a note or memorandum of a concluded agreement sufficient to comply with the Indemnity, Guarantee and Bailment Act?

(c) If not, was an oral agreement reached in the terms of the undated letter, which was then partly performed by the respondents?

(d) Did the appellant acquiesce in the renovations or payments made by the respondents in circumstance giving rise to a promissory estoppel?

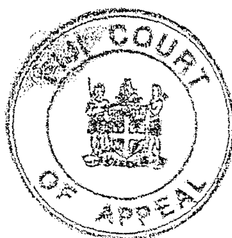
[51] While it may be that Pulea J. could have made orders other than one dismissing the summons, including for example conducting a further hearing in open Court, or

giving additional directions to more precisely define the issues, that involved, essentially, a discretionary exercise of judgment.

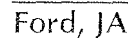
[52] While it cannot be said that the respondents have a water tight case, enough was shown in our view, to support the decision which was reached, namely that the matter was not suitable for summary disposition under s.169 of the Act.

[53] We dismiss the appeal and order the appellant to pay the respondents' costs to be taxed.

Scott, JA



Wood, JA



Ford, JA

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