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

Civil Appeal No. ABU 11 of 2006
(High Court Civil Action No. HBC 566 of 2004S)

BETWEEN:

PETER FOON

Appellants

AND:

MAHENDRA MAHARAJ
(a.k.a. Mahend Maharaj)

Respondent

Coram: **Ward, P**
Scott, JA
Wood, JA

Hearing: **15 November 2006**

Counsel: **N. Lajendra for the Appellant**
G. O'Driscoll for the Respondent

Judgment: **24 November 2006**

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal from an order for immediate vacant possession made against the Appellant by the High Court on 22 December 2005 under the provisions of Section 172 of the Land Transfer Act (Cap. 131)

[2] It was not disputed that all material times the Respondent has been the registered owner of the premises CT 15236 Lot 4 DP 2279 and Lot 2 DP 2572 known as 54 and 56 Carnavon Street Suva. The only question before the court was whether the Appellant had proved, to the Court's satisfaction, that he had a right to the possession of the property.

BACKGROUND

[3] In January 2000 the Respondent leased the premises to the Appellant for five years. Some parts of the premises were then subleased. In 2004 the premises consisted of a nightclub "The Barn", a tavern called "Shooters", a Chinese takeaway restaurant and a detached double storey residential dwelling.

[4] It appears that by this time the Appellant's health had begun to fail and therefore he decided to sell his business, the principal component of which was "the Barn".

[5] In due course the Appellant found a purchaser. The plan was that at the end of the Appellant's five year term the Respondent would grant him a further five years. The lease would then be assigned to the purchaser of the business. Clearly, for the plan to be carried out successfully it was first necessary to obtain a renewal of the lease.

[6] On 6 April 2004 the Respondent wrote to the Appellant as follows:

> "After talks between you and me on the current lease that exists for the above location I would like to re-assure you of the following:

(a) The said lease expires at the end of year 2004.

(b) The lease will be renewed for another five years.

(c) The terms and conditions for new lease we will discuss at a later date.

(d) In case of change in ownership the above lease will be transferred.

(e) As of now we have an existing lease and we will abide by its conditions.

I hope the above is of assurance and would like to highlight that I look forward continuing the good relation that has existed between us. For further info I am available. Thank you."

[7] In about September 2004 an agreement for the sale of the Barn business as a going concern was reached and drawn up. The purchaser was one Keni Dakuidreketi. At about the same time a "Deed of Understanding" was prepared. The four parties to the deed were the Respondent, the Barn Limited, Keni Dakuidreketi and Eleen Dayal who was apparently the sub-lesee of "Shooters".

[8] Neither the sale and purchase agreement nor the deed was ever executed. This was because the Appellant and the Respondent were unable to agree on the rent which was to be paid by the Appellant to the Respondent during the course of the new five year term. Letters were exchanged in August, October and November 2004 and further talks took place. No agreement was

however reached. An offer by the Appellant to refer the matter to the Prices and Incomes Board was rejected by the Respondent. Finally, on 11 November 2004, the Respondent advised the Appellant that the lease would not be renewed. The Appellant was given a notice to vacate the premises by 31 December 2004.

PROCEEDINGS IN THE HIGH COURT

[9] On 31 December 2004 the Appellant commenced proceedings in the High Court. He claimed that the Respondent was in breach of an agreement which he and the Appellant had reached to renew the lease for a further term of five years. He principally relied on the letter of 6 April in support of his contention. He sought specific performance of the agreement and an order that the rent payable during the renewed term be assessed by the Prices and Incomes Board.

[10] In addition to filing a Defence to the action commenced by the Appellant, the Respondent also initiated his own proceedings under the provisions of Section 169 of the Land Transfer Act. We were not told why this somewhat unusual step was taken. In April 2005 an application for the consolidation of the action with the Section 169 application was filed and an order for that consolidation was made at about the same time.

[11] In September 2005 an application was made for the trial of a preliminary issue, namely whether the letter of 6 April 2004 constituted a binding agreement between the parties.

[12] On 11 November 2005 the High Court ruled that it did not. After setting out the contents of the letter in full, the judge said:

> "Paragraph (b) states that the lease will be renewed. It would appear that on the basis of this assurance the Plaintiff made agreements with other persons. However paragraph (c) states that the terms and conditions of the new lease "we will discuss at a later date". Apart from the fact of the renewal of the lease and the length of renewal, five years, nothing else is certain. There is a statement of willingness to renew the lease for five years and transfer in case of ownership. However, as far as premium, rent and all other clauses normally associated with a lease there is no mention. *It might be that this document together with other documents might constitute a binding agreement*. However it cannot be said that this document on its own can constitute a binding agreement. The only thing that is certain is the length of the new lease." (emphasis added)

[13] Even though the preliminary issue was answered in the negative and even though the action and the Section 169 proceedings had been consolidated, the delivery of the November 2005 ruling did not bring the Section 169 proceedings to an end. They were heard in December 2005 and judgment was delivered in the same month. The judge said:

> "I have reconsidered my ruling of 11 November and considered all the affidavits in the general progress of

these cases. Even now on the face of all the affidavits before me I cannot find an enforceable contract giving to [the Appellant] a further lease of these premises."

The judge then made the immediate order for possession in favour the Respondent.

GROUNDS OF APPEAL

[14] The first ground of appeal was that the Judge had erred in law and in fact in holding that there was no enforceable contract between the parties when:

> "In an earlier ruling in the same matter with the same documentary evidence before him the learned judge had held that there might be a binding agreement for extension of lease."

[15] In our view this ground of appeal is wholly without merit. In the first place, there are at least two affidavits in the record which post-date 11 November and were therefore additional to the materials considered by the judge on that date. In the second place, as has been noted in paragraph [12] above, the judge did not say that:

> "there might be a binding agreement for extension of the lease."

He said:

> "It might be that the document together with later documents might constitute a binding agreement.

However it cannot be said that the document on its own can constitute a binding agreement."

[16] It is plain to us that what the judge actually said is quite different from what is alleged in the first ground of appeal. It is also clear to us that the judge was entirely correct in the conclusion which he reached. No agreement between the parties was ever concluded for the simple reason that they could not agree on one of the basic terms of any further lease, namely the amount of rent to be paid. This ground of appeal fails.

[17] The second ground of appeal was only briefly argued. Mr. Lajendra suggested, as he had in the High Court, that oral evidence of conversations between the Appellant and Mr. Keni Dakuidreketi would have helped to decide whether the Appellant and the Respondent had reached a concluded agreement. In our view, merely to state the proposal is to expose its central weakness: it was what was, or was not agreed between the Appellant and the Respondent which was decisive, not what was said to a third party. Furthermore, the established practice in Section 169 proceedings is to begin with affidavit evidence. Had these affidavits revealed some relevant discrepancy in the evidence relied on then that may have been an argument for oral evidence to be called. No such discrepancies were however revealed and therefore there was no reason for oral evidence to be adduced. The second ground of appeal fails.

[18] The final ground of appeal was that the judge erred in making an order for party and party costs. Technically, the judge's order was mistaken. Following the High Court (Amendment) Rules

1998 (LN 72/98) party and party costs no longer exist in Fiji. Costs are now awarded either on the standard basis or, exceptionally, on an indemnity basis. The principles governing the award of costs on the latter basis was explained by this court in Police Service Commission v. Beniamino Naiveli [ABU 52/95 – FCA B/V 96/302]. In the event, counsel agreed that this Court could, in the absence of any quantified award by the judge, resolve the matter. Mr. O'Driscoll asked for a total of $3,000.00 costs for both consolidated actions and Mr. Lajendra agreed.

RESULT

1. Appeal dismissed.
2. Respondent's cost in the High Court fixed at $3,000.
3. Respondent's cost of this appeal assessed at $500.

Ward P

FIJI COURT OF APPEAL

Scott J.A.

Wood J.A.

Solicitors

R. Patel & Co., for the Appellant
Messrs O'Driscoll & Seruvatu, Lawyers, for the Respondent