IN THE FIJI COURT OF APPEAL, FIJI ISLANDS AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU118 OF 2006

BETWEEN :	**PATTON & STORCK LIMITED**	*Appellant*
AND :	**CENTRAL RENTALS LIMITED**	*Respondent*

Coram : Byrne, J. A.
Mataitoga, J. A.
Scutt, J. A.

Counsel : H. Lateef for the Appellant
Ms A. Neelta for the Respondent

Date of Hearing: 10th April 2008
Date of Judgment: 24th April 2008

JUDGMENT OF THE COURT

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[1] This is an appeal from a judgment of the High Court of the 17th of November 2006.

[2] The brief facts are that the Appellant had a registered lease on the Respondent's land for 75 years commencing on the 1st of March 1999. One of the covenants was not to transfer or sublet without previous consent of the Lessor in writing.

[3] The Respondent became aware of a sub-lease to one Arun Mishra in 1993 and instructed its solicitors to serve a Notice to Quit on the Appellant. The Notice was dated the 20th of December 1993 and was served on the Appellant on the same date. It required the Appellant to give up vacant possession of the property on or before 31st January 1994 for breach of the following terms of the lease:

a) Subletting without first obtaining the Lessor's consent in writing and
b) Being in arrears of rent.

[4] The Respondent then made an application to the Registrar of Titles on the 12th of February 1994 for *"Re-entry pursuant to the Land Transfer Act 1971"* supported by a Declaration by one Ms Jamella Sherani of the same date. The Respondent then on the 14th of February 1994 informed the Appellant of its application for re-entry.

[5] On the 15th of February 1994 the Registrar cancelled the lease without giving the Appellant any opportunity to be heard. The Appellant commenced an action by Originating Summons dated 30th of March 1994 and on the 19th of January 1995 Fatiaki J. as he then was, made the following Orders:

i) **That the Registrar of Titles corrects the Register by cancelling the notification of re-entry on Lease No. 20187 on the relevant memorial to CT 6316.**

ii) **The Lessee to continue the enjoyment of the lease on payment of $480.00 being the arrears of rent.**

iii) **The Lessee pay compensation of $1,500.00 to the Lessor and Arun Mishra to vacate the premises within 1 month. Action No. HBC183 of 1994 be dismissed.**

[6] The Lessor appealed to the Fiji Court of Appeal which varied certain orders of the High Court as well as affirming some and, importantly in the light of this appeal, remitted HBC183/1994 to the High Court for determination.

[7] The present parties to this appeal and before Fatiaki J. and Coventry J. in the High Court are both successors to the original parties to the lease. In his Judgment in the High Court, Fatiaki J. referred to two clauses in the lease which were relevant to the proceedings before him. Clause 1 was a covenant against alienation and reads:

> *"(1) The Lessee will not transfer or sublet or part with the possession of the said premises or any part thereof without the previous consent in writing of the Lessor but so that such consent shall not be unreasonably, arbitrarily or vexatiously withheld".*

[8] It also contained an express *"proviso"* for re-entry and forfeiture by the Lessor for non-payment of rent or breach of covenant in the following terms:

> ***"(13) It is hereby agreed that if the said rent or any part thereof shall be in arrears for the space of seven days after any of the days whereon the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance of any of the Lessee's covenants herein contained then and in any of the cases it shall be lawful for the Lessor at any time thereafter to re-enter into and upon the said premises or any part thereof in the name of the whole and the same to have again and re-possess and enjoy as in his former estate without prejudice to the right of action of the Lessor in respect of any breach of the Lessee's covenants herein contained".***

[9] We shall refer to more of the Judgment of Fatiaki J. later but come now to the hearing before Coventry J. in the High Court on the 16th and the 17th of October 2006. He began his Judgment by saying in paragraph (2) that the Plaintiffs *(Respondents* here) said that Clause 13 of the Lease provides that if there is any breach or failure to observe any of the covenants of the Lease then the Lessor might at any time re-enter into the premises and regain possession thereof. One of the covenants stipulated that there could be no subletting without the consent in writing of the Lessor. He said that the Plaintiffs *(Respondents)* stated that there were unauthorized sublettings between 1991 and 1992 to people named Turaganivalu, from 1993 to 1994 to Mishra & Co., a firm of accountants and between 1991 and 1992 and from 1996 to 1997

for long-term car parking. He then referred to the fact that a Notice to Quit was dated and served on the 20th of December 1993 against the Appellant, giving 1 month to vacate the premises and stating as its reasons for repossession unauthorised subletting and failure to pay rent.

[10] The Appellants denied that the Respondent was entitled to possession of the premises arguing that the Notice to Quit acknowledged the ongoing existence of the lease and that the one months notice purportedly given effectively waived the breach of the Clause.

[11] The Judge then said that there was no evidence to suggest that the Respondent was aware of the earlier breaches until at or after the commencement of the action before him. In paragraph 25 he then asks this question:

> ***"Did the notice to quit constitute a waiver of the right to re-entry for breach of the sub-letting clause of the lease?"***
> He quoted part of the Judgment of Gresson J. in the High Court of New Zealand in Re-Register (A Bankrupt) 1958 NZLR 1050 at p1055 who stated:
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> > ***". . . It is not the Notice to Quit which of itself waives the forfeiture. It is rather evidence to show that the lessor has elected not to avoid the lease."***

[12] It is to be noted however that the Judge did not quote anything from the paragraph immediately before that in which the last quotation was taken or appears. There Gresson J. said:

> *"A right to re-enter under a lease is waived by the Lessor if, knowing the facts on which the right arises, he does something unequivocal which recognizes the continuance of the lease."*

[13] Both these passages were referred in the Appellant's submission to Coventry J. and in our Judgment what followed in his Judgment can be at least partly explained by the Judge's failure to appreciate the significance of the first passage from Gresson J. Fatiaki J. quoted both passages in his Judgment at p58 of the Court record but he also quoted an important passage appearing at p1054 of Gresson J.'s Judgment. This reads:

> *"The lease contained an express proviso for re-entry or forfeiture by the lessor on specified events, including non-payment of rent. Such proviso gave the lessor an option to exercise her right of determine the lease upon the cause of forfeiture arising. It did not by itself enable the lessee to treat the term as at an end, and the lease being not void but voidable only the lessor could avoid it. Notwithstanding the cause of forfeiture, therefore, the tenancy continued until the lessor did some act which showed her unequivocal intention to determine it ... at common law, a mere indication of intention to forfeit at the expiration of a month,*

which might or might not be implemented at the lessor's option, cannot determine the lease; and the notice to quit in the present case cannot be regarded as equivalent to re-entry or the commencement of an action for possession. Where the condition in the lease is that the landlord may re-enter, he must re-enter or he must do that which is in law equivalent to re-entry namely commence an action for the purpose of obtaining possession."

[14] Just before quoting this extract he commented that the right of re-entry in the lease in Re-Register was in almost identical terms to Clause 13 and where the lessor had sought to determine the lease by service of a month-long notice to quit of the lessee. He then continued on pages 59 and 60 of the record by quoting part of the Judgment of Myers J. in **McKinnon V. Portelli & Anor**. [1960] N.S.W.S.R. 343 who, in rejecting the Notice to Quit in that case, said at p.350:

"... to take the place of a writ of ejectment, that is, to be equivalent to entry, it (the notice to quit) must satisfy the conditions which made the action of ejectment an equivalent of entry. The action of ejectment was an equivalent because it unequivocally asserted a present right to possession on all grounds which might be available to the lessor and therefore on the ground of forfeiture. The cases to which I have, referred make it quite plain that it (the notice to quit) must not only assert

the right to possession, but must also assert that right on the ground of forfeiture.

The notice to quit in the present case fails to qualify in both respects. It does not claim an immediate right to possession, for it merely requires the plaintiff (lessee) to give up possession on a future day,. . . Nor does it equivocally or at all claim a right of possession on the ground of forfeiture.

Even if this notice to quit is capable of being read as indicating an intention to rely on the forfeiture clause, it is not enough. That intention must be clearly and unequivocally asserted and merely to say that a notice given in reliance of a statutory right (in this instance Section 89 of the Property Law Act) is capable of indicating an intention to rely on another right is to say it is equivocal. . . . To hold otherwise would mean that a notice to quit in accordance with the statute would effect a forfeiture irrespective of a lessor's intention."

[15] Then Fatiaki J. said:

"In the light of the above dicta I am firmly of the view that not only did the Defendant company's notice to quit in this case amount to a waiver of its right to forfeiture the lease but even if it did not so amount to an effective waiver, it was wholly incapable both in fact and in law of amounting to a

"re-entry into and upon the said premises" in terms of Clause 13 of the lease."

[16] We agree and ask ourselves whether, if Coventry J. had referred to the passages we have just quoted from Fatiaki J. and Myers J. he would have reached a different conclusion. We believe he may well have, but if he did not, then in our opinion he would have erred.

[17] In the Appellant's submissions to Coventry J. at p102 of the Court Record, paragraph 3.05 the Appellant refers to a New Zealand case of **Town -v- Stevens & Ors** [1899] 17 NZLR 828, a case which had a similar provision of re-entry as in the instant case, Williams J. said:

"The lease provides that on a breach of any covenant it shall be lawful for the lessor, or any person duly authorized by him, to re-enter into and upon the demised lands, and thereby determine the lease. The lease, therefore, has to be determined by re-entry. It could not be determined by a mere notice to quit, nor could it be determined by "demand of possession".

[18] Further, in **Town -v- Stevens & Ors** (ibid), Williams J. went on to say how re-entry can be effected at p831:

"Now, this lease was not, and could not be, determined in that way (i.e. by legal notice to quit or by demand for possession), because in the terms

of the lease it must be determined by re-entry. Of course, an action for ejectment would be equivalent to re-entry; but no action of ejectment has been, nor can be brought, under this section".

[19] The Appellant submitted to Coventry J. that, likewise in this case no action for ejectment could be brought under Section 169 of the Land Transfer Act. We agree.

[20] The curious thing to our minds is that apart from the very brief passage from Gresson J. in Re-Register (supra) the Learned Judge, for reasons which we find inexplicable, did not refer to the other cases which were cited to him by the present Appellant. In our judgment, in ignoring them, he fell into error.

[21] It is next submitted by the Appellant that the Learned Trial Judge placed much emphasis on the fact that the Respondent, after serving the notice to quit, accepted no further rent and that the notice is clear that it is being given for breach of the covenant not to sublet and non-payment of rent. In our opinion the Learned Judge failed to appreciate that for a breach of any covenant and/or non-payment of rent, the lessor's remedy is clearly stated in Clause 13 of the lease, namely to re-enter into possession. This can effectively be done in two ways:

i) To physically re-enter into the premises and take possession or

ii) To issue a Writ of Ejectment.

To give a notice to quit in fact affirms the lease.

[22] In our Judgment, and as Fatiaki J. found in the earlier proceedings, the notice to quit in this case cannot be regarded as equivalent to re-entry or the commencement of an action for possession. Furthermore both the Originating Summons and later the Statement of Claim filed in this case were based upon the notice to quit and thus are also not equivalent to re-entry or a valid action for possession under the terms of the lease.

[23] The Respondent submits that because the Appellant has now vacated the premises the court is now asked to consider only an academic question in relation to which the Appellant has no special connection. It is said that because the Appellant has parted with possession of the land the issue no longer lives. We are aware that Courts have held that declaratory relief should not be granted where the declarations would produce no foreseeable consequence for the parties. **Gardner -v- Dairy Industry Authority of New South Wales** [1977] 52 ALJR 180 at 188; **Church of Scientology -v- Woodward** [1982] 154 CLR 25 at 62; **Ainsworth -v- Criminal Justice Commission** [1992] 175 CLR 564 at 581-2.

[24] The Appellant submits, and we agree, that although it has vacated the premises after the Learned Trial Judge had granted a stay of his Judgment upon terms which the Appellant could not afford, and therefore had no other alternative but to vacate, the lease still has six years to run. Furthermore, the action in the High Court is also not complete yet as evidence on the Respondent's monetary claim is yet to be heard and, as counsel informed the Court, the Appellant will inter-alia counter-claim damages for the remainder of the lease and for return of the moneys deposited into Court.

[25] For the above reasons we consider the Respondent waived its right to claim immediate possession as it did not do this when it had every chance to do so by way of re-entry into the property but instead merely issued a notice to quit, thereby recognising the continuance of the lease.

[26] In our Judgment therefore, the appeal must succeed and the Respondent must be ordered to pay the Appellant's costs which should be fixed at $1,500.00.

Byrne, J. A.

Mataitoga, J. A.

Scutt J. A.

Solicitors:

Lateef & Lateef for the Appellant
Messrs Sherani & Co. for the Respondent