

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 56 of 2022

BETWEEN : **MAHEN MAHARAJ** of Brown Street, Suva, in the Republic of Fiji,
Businessman.

PLAINTIFF

AND : **CHRISTOPHER COOKE t/a DOWNUNDER** having its principal place
of business situated at 54-65 Carnavan Street, Suva in the Republic of Fiji,
Businessman.

DEFENDANT

Counsel

Plaintiff : Ms Sharma. A

Defendant : Mr Rokodreu. V

Date of hearing : 02.09.2022

Date of Judgment: 02.11.2022

JUDGMENT

INTRODUCTION

1. Plaintiff is the last registered proprietor of Certificate of Title No 15236 on Lot 2 in DP No 2572 and Lot 4 on DP 2279 situated in Suva (the Land), instituted this action seeking eviction of Defendant. Defendant had occupied the land on lease agreement which had expired in 2014. At the time of institution of this action Defendant is in occupation of the Land on monthly tenancy. There is no dispute as to proprietorship of the Land or fraud alleged as to obtaining the title to the Land. Defendant has filed a Civil Action in HBC 185 of 2020 claiming a declaration that rental increase by Plaintiff was fraudulent and unreasonable. So the alleged fraud does not create any recognized exception to the infeasibility of the title. Defendant in HBC 185 of 2020 also alleged mortgage between Defendant and third party financial institution is illegal this again has no effect of the proprietorship of the Land. Defendant had also lodged a caveat on the title preventing it

being transferred, based on the improvements done on the property. A lodgment of caveat is not always a bar for eviction, as caveat only prevents registration on title based on caveatable interest. Eviction can be done and process for removal of caveat is not a right to possession in this action. All the actions taken by Defendant are not akin to right to possession on the Land. Plaintiff can evict Defendant in terms of Section 169 of Land Transfer Act 1971 as the Defendant had admitted monthly tenancy. Considering admitted facts on substantial renovation and permanent improvements to the Land and the nature of the business of Defendant is granted a reasonable time to vacate.

FACTS

2. Plaintiff is the last registered proprietor of the Land.
3. The land is currently occupied by an entity which operates a tavern with reduced capacity from its earlier position due to restrictions on its previous trade as a night club.
4. Defendant had moved in to the property pursuant to rental agreement between Plaintiff and Defendant dated 8.8.2008. This agreement was for six years.
5. After expiration of the said commercial property rental agreement parties continued with the tenancy on monthly tenancy. (see paragraph 9 of affidavit in answer by Defendant.)
6. Defendant is paying a rental of \$7,194 VIP monthly, at the moment and Plaintiff accepts that. This is a reduced sum from agreed monthly rental.
7. According to Defendant the agreed sum of monthly rental of \$21,800 VIP was under duress by Plaintiff.
8. Defendant stated that acceptance of rental of \$21,800 was agreed till a valuation was done.
9. Defendant states that the monthly rental of \$22,000 unilaterally demanded by Plaintiff is excessive and cannot be substantiated.
10. Defendant states that he can remain in the property based on civil action HBC 185 of 2020 filed. This was an action instituted seeking orders relating to the increase of rentals and also some orders relating to mortgage of the Land to a third party.
11. Defendant had done some renovations and alterations and construction of new fixtures attached to the Land on his own cost, and on that basis he had lodged a caveat for the Land.

ANALYSIS

12. Defendant had raised a preliminary issue that in this proceedings the tax authority FRCS were not added and needs to be a party. This is on the basis that there was a charge registered on the title. This is without any merits and refused as Defendant was unable to state any law that requires such a thing.
13. Registration of a charge is not a reason to add FRCS to eviction proceedings as this is an action for eviction only.
14. Similarly Defendant also contend that mortgagee registered on the title needs to be a party to this action. This is again not a legal requirement in terms of Section 169 of Land Transfer Act 1971.
15. It is an admitted fact that the last registered proprietor of the Land is Plaintiff and Defendant had entered to the Land as a tenant under an agreement which had expired in 2014.
16. Under Torrens system registration is everything, except for the exclusions contained in Land Transfer Act 1971.
17. In *Fels and another v Knowles and another* (1907) 26 NZLR 604 Stout C.J (dissenting judgment) at p 613 in the interpretation of the New Zealand Land Transfer Act, which is based on Torrens system, held follows:

‘If the words of a statute in their ordinary meaning are clear, effect must be given to them, however inequitable they may be, and however they may infringe private rights. But the meaning must be clear.’
18. The legislation is clear that once registration is proved by the Plaintiff the burden of proving a right to possession shift to Defendant in terms of Section 172 of Land Transfer Act 1971.

“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 the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.”

19. Admittedly, there is no lease agreement beyond 2014. So there is no possibility of payment of rental to remain in possession if the Plaintiff seeks to evict. So the issue of increase of rentals and its reasonability cannot create a right to possession to the Land.
20. The Land Transfer Act in NZ at that time was based on the same principles and provisions are analogous to Fiji’s legislation as both were based on Torrens system. The language contained in the Land Transfer Act 1971 and the provisions relating to indefeasibility of the title and the meaning is clear. The advent of Torrens system and need for such system was explained in *Fels and another v Knowles and another* (supra) in the joint majority judgment (delivered by Edwards J) at p 619 as follows:

‘In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty to title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model for which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land registration which now prevails in all the Australian Colonies and is now represented in this colony by “The Land Transfer Act 1885” and its amendments.’
21. The above brief history and the reason behind the Land Transfer Act in Australia and New Zealand is equally applicable to Fiji as the Land Transfer Act 1971. It is based on Torrens system and relevant sections were analogous to the Land Transfer Act in New Zealand and Australia. So, when the law contained in Land Transfer Act has to be applied and interpreted, keeping in mind the rationale behind the indefeasibility in title and the words in the said enactment is clear and unambiguous as to the rights of the last proprietor of property.

22. In *Fels and another v Knowles* and another (supra) further at p 620 the following appears:
‘The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.’
23. The Section 2 of the Land Transfer Act defines the word ‘instrument of title’ as follows:
“instrument of title” includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be.
24. In this action the title is freehold hence Plaintiff has infeasible title subject to small window to challenge on the basis of fraud in obtaining the title. There is no allegation of such a fraud.
25. There is no definition of fraud contained in the Land Transfer Act 1971, but again it must be interpreted in the light of the provisions contained in the said Act. The indefeasibility and its exceptions are dealt in Sections 39, 40 and 41 of the Land Transfer Act 1971.
26. Section 41 of the Land Transfer Act deals with fraudulent entries to the land registrar and it has no application to the present appeal. The section 40 of the Land Transfer Act deals with fraud, and this is an exception that one can find in the said Act, which vitiates the rights derived from the registration of the title. Sections 39, 40 and 41 of the Land Transfer Act 1971, states as follows:
“Estate of registered proprietor paramount, and his title guaranteed
39.-(1)Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except-
- (a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and
 - (b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

(2) Subject to the provisions of Part XIII, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.'

Purchaser not affected by notice

40. **Except in the case of fraud**, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Instrument etc, void for fraud

41. Any instrument of title or entry, alteration, removal or cancellation in the register **procured or made by fraud shall be void as against any person defrauded or sought to be defrauded** thereby and no party or privy to the fraud shall take any benefit therefrom." (emphasis added)

27. So it is an exception to registered title of the Plaintiff, if fraud is committed against Defendant, in obtaining that title.
28. *Assets Co Ltd v Mere Roihi* (Consolidated Appeals) ([1905] AC 176) the principles contained in Sections 39, 40 and 41 of the Land Transport Act (in the said case analogous provisions in NZ Land Transfer Act were dealt, as opposed to indigenous people's rights to land in terms of the said Act) were described as 'unimpeacability' of the title. The same principles are most commonly described as 'indefeasibility' of title, too. In *Frazer v Walker and Others* [1967] 1 All ER 649 the word 'indefeasibility' was dealt by the Privy Council as regard to the analogous provisions contained in the Land Transfer Act of New Zealand and the earlier decision of *Assets Co Ltd v Mere Roihi* (Consolidated Appeals) ([1905] AC 176) was also considered in this later decision. In the said decision it was held that this concept of 'indefeasibility' is central to the system of registration found in the Land Transfer Act. In *Frazer v Walker and Others* (supra) at page 652 the following appears:

“It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

III. Those sections of the Land Transfer Act, 1952, which state the effect of the certificate of title. The principal section on this subject is s 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seized of or as taking estate or interest [sic] in the land therein described as seized or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another--a probative--aspect of "indefeasibility", none the less effective though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it on trust or to deliver it up through an action in personam.” (Emphasis is mine)

29. So, the indefeasibility of the title or unimpeachability of the title are the same principles that are contained in the Land Transfer Act 1971, that grants the impunity to the title of the land upon the registration of the instruments recognized in the Land Transfer Act 1971. The rights derived from the registration of such instruments are not absolute and the exceptions are fraud and mistake or error in terms of Sections 40 and 41 of the Land Transfer Act 1971. Defendant had not show any such exception in this case to remain in possession.
30. It is trite law that improvements done on the property alone will not give a right to possession but can seek damages in an appropriate civil action.
31. *Assets Co Ltd v Mere Roihi* (Consolidated Appeals) ([1905] AC 176) it was held that the fraud needs to be on the part of the registered owner whose right is to be impeached or to his or her agent in order to vitiate the title or the interest registered on the instrument.
32. It was held in *Assets Co Ltd v Mere Roihi* (supra) that mere fact that more vigilance or more investigation or further inquiries would have revealed certain facts unknown to the

registered proprietor would not prove be sufficient to consider as a fraud against such person. In Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 V.R 133 at 135-136 Winneke P held:

"It is true, as the trial judge in this case found, that the appellant, through its officers and solicitors, was in possession of information which, if they had acted with due diligence, might have alerted them to the existence of Kandy's fraud. But a want of due diligence, resulting in a failure to make further inquiry, would not itself be sufficient to defeat the indefeasibility of the appellant's title: Vassos v State Bank of South Australia [1993] VicRp 74; [1993] 2 V.R. 316 at 332-3."

33. So the alleged fraud by Plaintiff in obtaining a mortgage is not only irrelevant to the eviction procedure but also does not create any right to possession the Land.
34. According to the said judgment the threshold for willful blindness is high. In the circumstances there is no fraud against Defendant.
35. The improvements Defendant had done to the Land through expansion of floor area of the structure that existed, was after Plaintiff obtained the title for the Land. Hence its indefeasible.
36. Defendant had knowingly improved the Land for his business purpose and there is no evidence as to agreement as to removal of such permanent structures affixed to the land. In the affidavit in support Plaintiff is willing to allow the Defendant to take all improvements if he could restore status quo that remained. This again has not created a right to remain in possession of the Land.
37. The Defendant is not alleging any fraud against the Plaintiff as to how Plaintiff obtained title or anything relating to the title.
38. Even a mere allegation is not sufficient to disallow eviction in terms of Section 172 of the Land Transfer Act, as stated by Gates J (as his lordship then was) in Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005). In that case it was further held:

"A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy."
39. According to CJC 8 annexed to the affidavit in opposition there is an admission by Defendant that they had agreed to increase of rentals. This is contrary to what is stated in paragraph 9 of the affidavit in opposition. In that Defendant had stated that Plaintiff had agreed not to increase rents, but had conveniently omitted that the non-increase was for a period of 1.12.2017 to 31.12.2018. Rest of the period rental is \$20,000 VEP. In any event

Plaintiff does not want Defendant on its property as monthly tenancy is agreed by Defendant, can be evicted in this proceedings.

40. Any issue based on arrears of rents cannot create a right to possession as admittedly Defendant remains on monthly tenancy. So the agreement as to amount of payment is not an issue that can create a right to remain in the Land.
41. Plaintiff issued a notice to vacate the premises on 27.10.2021, within one month and Defendant had not done so.
42. Defendant is estopped from denying tenancy and he had admitted monthly tenancy hence can be evicted after a month notice which Plaintiff had given.
43. As Defendant had not vacated the present proceedings were instituted. Before that Plaintiff had instituted a civil action HBC 185 of 2020 against alleged unreasonable increase of rental for the premises. As I stated earlier that action cannot prevent landlord from exercising his rights under Land Transfer Act 1971.
44. Defendant admitted it had paid a monthly rental of \$21,800 VIP for more than a year but this was according to them under duress.
45. Affidavit in opposition has not shown a right to possession in terms of Section 172 of Land Transfer Act 1971.
46. According to Text Hinde McMorland & Sim Land Law in New Zealand (LexisNexis NZ Limited) Chapter 6 -:Landholder's Rights

“5 THE EXTENT OF THE LANDHOLDER'S RIGHTS: FIXTURES

Broadly, a fixture is anything, once a chattel or personal property, that has become so attached to land as to form in law part of the land and to have become real property.¹ The principle is expressed in the maxim *quicquid plantatur solo, solo cedit* — whatever is affixed to the soil, belongs to the soil.² It is very difficult to say with precision what constitutes an annexation sufficient for this purpose,³ but the practical consequence of a chattel becoming a fixture is that property in the

¹ *Hulme v Brigham* [1943] KB 152 at 154, [1943] 1 All ER 204 at 207 per Birkett J; Cheshire and Burn, (18th ed) pp 8–9; Megarry and Wade (8th ed), paras 23-001–23-004. For full discussion, see Garrow and Fenton (vol 1), ch 3.

² *Haley* [1998] Conv 137 at 144 states: “The founding maxim *quicquid plantatur solo, solo cedit* retains little practical importance in contemporary law and its invocation is, moreover, misleading”.

³ *Holland v Hodgson* (1872) LR 7 CP 328 at 334 per Blackburn J.

chattel will, by operation of law, pass from the owner of the chattel to the owner of the land.⁴

47. The improvements done by the Defendant to the Land are to extend the floor area and renovate it. They are of permanent nature but had done so on monthly tenancy. There was no evidence of Defendant seeking longer term lease or any agreement with the landlord to remove the improvements done.
48. These are all business decisions done relating to commercial property. It was not disputed that even before Plaintiff leased the premises to Defendant it was used for same commercial purpose by another party.
49. Defendant had improved the existed structure and had increased floor area. This could be to mutual benefit of the parties and Defendant had taken the risk associated with eviction as there was no long term lease.
50. Hinde McMorland & Sim Land Law in New Zealand (LexisNexis NZ Limited) further stated

An object which is brought on to land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.

Thus, buildings and permanent structures erected on land, and items that are an integral part of the land or structure, are normally “part and parcel” of the land itself. Chattels and items of a removable nature, but which have been affixed to the land or buildings are “fixtures” and are also treated as part of the land itself. Lord Lloyd’s threefold classification was adopted by Rebecca Ellis J in *Body Corporate 95035 v Chang*, where it was held that a verandah which was attached to a city building and which projected over the street was “properly to be regarded as real property and part of the land to which it is effectively attached; the verandah can therefore be said to be ‘affixed’ to the relevant freehold(s)”.(foot noted deleted)

⁴“The conveyance will pass all fixtures without mention, because they are part of the land and pass with it”: Megarry and Wade (7th ed, 2008), para 8.045, cited in *Body Corporate 95035 v Chang* [2011] 3 NZLR 132 CaseBase document for this case, (2011) 12 NZCPR 947 at [52] per Rebecca Ellis J, noted (2011) 14 BCB 167 (Gibbons). See also *Bigwood* (2002) 8 NZBLQ 290 at 290–291 and *Halliday v Bank of New Zealand* [2012] NZHC 3099 CaseBase document for this case, [2013] 1 NZLR 279 CaseBase document for this case, (2012) 13 NZCPR 736 at [40] per Mallon J, noted (2013) 15 BCB 150 (McMorland); (2013) 87 ALJ 651 (Jiang). Under s 23(e)(i) of the Personal Property Securities Act 1999, that Act does not apply to an interest created or provided for by the creation or transfer of an interest in land. For a discussion of fixtures under the Personal Property Securities Act 1999, see *Baas* (2001) 18 NZULR 403; *Toomey* (2010) 12 Otago LR 369. This passage was approved in *Cockrell v Ward* [2013] NZHC 2368 at [25] and [38] per Doogue AJ.

51. From the above quote from the text and also on admitted facts improvements done were to the structure of the building that had increased the area of the building. These renovations cannot be considered as chattles on application of principles of law.

“Whether an item has become part of the land or not is ascertained by applying the classic tests:

(1)The degree of annexation; and

(2)The purpose of annexation.”⁵

52. In this case the degree of annexation is such that even the mortgagee has considered the improvements as part and parcel of the Land. According to Rental Assessment report submitted by Defendant, all the improvements remaining on the land were done by Defendant. If so it is clear that all the building has become part of the Land and cannot be considered separately in law. This fact is not denied.

53. The purpose of the improvement are also permanent in nature as annexation was done for commercial purpose to increase the floor area. This may be due to the events that required larger floor area to increase the revenue of the business, to benefit business.

54. It is clear from the evidence before me that the improvements done were part and parcel of the Land. As there they have become part of the Land Defendant’s only recourse is to seek compensation for improvements. This can be done by way of proper civil action, but this clearly does not give Defendant a right to possession in terms of Section 172 of Land Transfer Act 1971.

55. If the Defendant had so far had not obtained a valuation of the improvements that can be done within a reasonable time period. Defendant stated that the value of improvements are over \$800,000 but no such valuation submitted. A current and immediate valuation can be obtained for the benefit of both parties, within a reasonable time.

56. As Plaintiff admits the improvements on the Land done by Defendant the assessment and extent of improvements can be assessed in a proper action, but that is a separate issue, from eviction.

CONCLUSION

57. Plaintiff being the landowner who has indefeasible title is entitled to have permanent improvements on the Land to himself and Defendant cannot insist on removal of that as it had become part and parcel of the land.

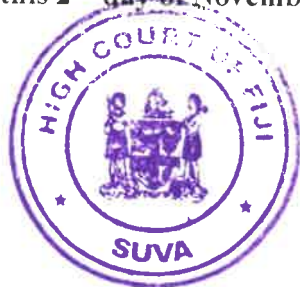
⁵ THE EXTENT OF THE LANDHOLDER’S RIGHTS: FIXTURES

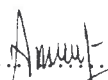
58. Hence Defendant is ordered to vacate from the land without removable of building on the Land. Since he had done improvements to the land parties are given time to obtain a comprehensive assessment of the improvements before the eviction. It is reasonable to grant some time for that as well as to other circumstances of this case before eviction. Considering circumstances of the case Defendant is granted four months to vacate the premises and also no cost ordered.

FINAL ORDERS

- a. Plaintiff is granted vacant possession of the land.
- b. Considering circumstances of the case eviction is not to be enforced for four months. (i.e till 2.3.2023)
- c. No cost awarded considering circumstances of the case namely improvements on it.

Dated at Suva this 2nd day of November, 2022.




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Justice Deepthi Amaratunga
High Court, Suva