

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 116 of 2024

**IN THE MATTER** of an application under section 169 of part XXIV of the Land Transfer Act, 1971 for an Order for immediate vacant possession.

**BETWEEN:** **RODERICK GORDON JEPSEN, LEO BACKHOUSE SMITH aka LEO BARRY SMITH and WAYNE WONG** as trustees of **DEFENCE CLUB**

**PLAINTIFF**

**AND:** **DINESH KUMAR MANI trading as DAKS KARWASH & DETAILING** of lot 10 Gordon Street, Suva.

**DEFENDANT**

**Before:** Mr. Justice Deepthi Amaratunga

**Counsel:** Mr Maharaj B.J for the Plaintiff  
Ms. Singh N for the Defendant

**Dates of Hearing:** 13.02. 2024

**Date of Judgment:** 24.02. 2025

## **JUDGMENT**

### **INTRODUCTION**

[1] Plaintiff filed this action for eviction of Defendant from a commercial property after issuance of eviction notice. In terms of the lease agreement entered for three years, either party could terminate it with one month notice. At the same time it allowed parties to extend the initial lease after expiration of three years for fourteen years subject to new lease rental being agreed.

- [2] Time period for lease agreement expired without parties agreeing for new lease rentals in order to extend it for further fourteen years, despite Defendant indicating its desire to extend it.
- [3] So tenancy continued as monthly tenancy after expiration of three years from 1.3.2018 and Plaintiff issued notice to vacate Defendant by 17.2.2024. Defendant did not vacate the premises and action in terms of Section 169 of Land Transfer Act 1972 instituted.
- [4] Plaintiff was granted vacant possession by judgment handed down on 13.11.2024 but sufficient time granted for Plaintiff to re locate its business till 28.2.2025.
- [5] Defendant had appealed against the said decision and filed Notice of Motion on 5.2.2025 seeking stay of execution of judgment until determination of the appeal by Court of Appeal.
- [6] Plaintiff who had obtained judgment after due process is entitled to fruits of judgment. Plaintiff waited for one year from the service of notice for vacant possession and should not be further deprived enjoyment of vacant possession. Plaintiff had also entered in to another commercial lease with third party.

## **FACTS**

- [7] Plaintiffs are the trustees of an association which owns a prime commercial property at corner of Hercules Street and Foster Street Suva City more fully described in Certificates of Title 3259 and 3260 (Jointly referred in this judgment as The Land). Defendant entered in to a lease agreement on 1.3.2018 for a period of three years for a monthly rental of \$1500 and VAT for the 'Premises' shown in Schedule 1 of the lease agreement.
- [8] In terms of Clause 13 'either party may terminate this lease agreement by giving 30 days' notice in writing.
- [9] Special Conditions of the said lease agreement were contained in Schedule 2 and accordingly Defendant was obliged to clear and level the land and also obtain amenities such as water and drainage which require development of the Land in order to operate a carwash and detailing business.
- [10] It is safe to presume that initial rental of \$1500 for three years had factored the sunk cost involve in the establishment of carwash facility on an undeveloped land such as creating the land and leveling and also water supply to the Land

and proper drainage as the land is situated facing two main streets of Suva City.

- [11] Said lease agreement contains a clause for renewal of lease for further fourteen years subject to **'new lease rental agreed upon'**. Plaintiff was informed by Defendant or its agent its desire to renewal and indicated Plaintiff that it is agreeable for reasonable increase in rental at renewal, without specifying time period or interval for increase. There was no renewal of lease as new rental was not agreed between parties.
- [12] On 16.1.2024 Plaintiff was issued Notice to vacate on or before 17.2.2023.
- [13] Defendant in its letter to Plaintiff on 31.01.2024 stated that parties were negotiating about the new rental and estopped from denying this position. This indicate no renewal of lease after expiration of initial three year period.
- [14] Before this Defendant requested renewal but that letter was silent about new lease rental to be agreed between parties which is a prerequisite for extension for fourteen year time period.
- [15] This letter for extension without new rental being proposed, was not responded by Plaintiff and according to Defendant's affidavit in opposition parties were negotiating for new rental, while Defendant continued payment of rental agreed for three year term expired. Parties were aware of the risks involved as well as advantages in such continuation of tenancy without written contract.

## **JURISDICTION**

- [16] Defendant had relied on Order 45 rule 10 of High Court Rules of 1988 which states
- 'Matters occurring after judgment: stay of execution, etc. (O.45, r.10)
10. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.
- [17] Accordingly this court is conferred with jurisdiction to stay of execution of its own judgment, this is on the 'ground of matters which have occurred since the date of the judgment'. Defendant had appealed against the judgment for eviction. The grounds on which appeal was made are dealt later in this judgment.

## **THE PRINCIPLES TO BE APPLIED**

- [18] (A) The Court of Appeal of Fiji in *Native Land Trust Board v Shanti Lal* [3] had set out the law on stay pending appeal. His Lordship Chief Justice Gates in the said Court of Appeal case stated that a Court considering a stay should take into account the following questions:
- (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory.
  - (b) Whether the successful party will be injuriously affected by the stay.
  - (c) The bona fides of the applicants as to the prosecution of the appeal.
  - (d) The effect on third parties.
  - (e) The novelty and importance of questions involved.
  - (f) The public interests in the proceeding.
  - (g) The overall balance of convenience and the status quo.

## **WILL THE APPEAL BE RENDERED NUGATORY**

- [19] Plaintiff is seeking to exercise, rights over a freehold land through the trustees of unincorporated body. The title is indefeasible and Defendant entered in to possession accepting that it belonged to unincorporated body. Defendant entered to the premises on the condition that it will be developed to a commercial venture of car wash. So by eviction of Defendant there is room to be rendered nugatory, but this is not the sole criterion.
- [20] This ground is not determinative. Landlord can evict the Defendant after notice. In this instance of one moth was given.

## **Bona fides of the application**

- [21] Defendant is entitled to due process of law and accordingly an appeal was made to Court of Appeal. There is a right of appeal and this does not entail stay of judgment as this process can be abused in order to continue with commercial business for further time period. Defendant failed to pay costs ordered.
- [22] Application for stay of the execution of judgment filed on 5.2.2025 this was nearly after two months. This begs a question as to bona fide of Defendant who

conducts a commercial venture on the land and it is his gain for every day he stays while Plaintiff want to evict the tenant in order to get a new tenant.

[23] The terms parties agreed allowed tenancy be terminated by one moth notice even during existence of lease. Despite having an appeal, Defendant cannot insist on stay of execution in order to conduct its business to gain profit.

[24] Defendant is granted time to relocate and while there is a right of appeal and bona fide of stay of execution of the judgment is a indirect deprivation of Defendant's indefeasible title and freedom to select the tenant on such terms as they agree. This is party autonomy in entering in to contracts.

### **Effect on third parties**

[25] Defendant had already entered in to commercial contract with a third party to lease the land where Plaintiff is occupying. This party had to wait nearly one year to start its commercial venture on the land.

### **Novelty and importance of questions involved**

[26] There are no novel questions of law and law on indefeasible tile is well settled.

[27] Grounds of the proposed appeal are considered briefly they do not raise novel issues or point of law not decided.

### **Defendant's Grounds of appeal**

- i. The Learned Judge erred at paragraph 26 that "it is admitted that at least one party named as Plaintiff is a trustee and his name is registered on the title. So, in my mind that is sufficient to institute his action by way of originating summons as long as there is no dispute trusteeship. That the action was instituted by a single registered trustee despite the existence of three other registered trustees for the Plaintiff origination and the absence of a constitution to determine the locus standi and authority if an individual trustee is questionable. Therefore, the learned Judge erred in law and in fact when he failed to consider the rationale set out that when multiple trustees exist, any action taken on behalf of the trust typically requires the authority of al trustees unless the trust deed specifies otherwise. The absence of a constitution or clear guidelines regarding the authority of individual trustees lead to questions about the validity of actions taken by a single trustee.
- ii. The Learned Judge failed to consider the legal principle that trustees are required to act jointly unless explicitly authorized otherwise by a trust deed or constitution. In the absence of such authoritarian or

evidence, then action brought by a single trustee is procedurally defective.

- iii. The Learned Judge erred in fact and in law deciding the matter without requiring evidence of the Plaintiff's/Respondents organization's internal governance framework or constitution to establish the legal standing and capacity of the Plaintiffs/Respondents to initiate the action.

### **Comment**

[28] Above three grounds are regarding Plaintiff's right to institute this action. It is settled ground that, one trustee can institute an action. Defendant should show a right to remain in commercial property after eviction notice issued. Defendant had failed to do so.

[29] This is a self-defeating argument as the lease agreement was not signed by all the trustees.

Appeal Grounds,

- iv The Learned Judge erred in fact and in law when the Judge held that the Defendant's fixtures and improvements made to the leased land were to remain on the property without compensation. These improvements were a condition of the lease and significantly enhanced the property's value, benefiting the Plaintiffs/Respondents at the Defendant's/Appellants expense.
- v The Learned Judge erred in fact and in law when the Judge failed to apply the equitable principle that a tenant who makes substantial improvements to leased property in reliance on the lease should not be left uncompensated upon eviction. The refusal to allow the Defendant/Appellants to remove the fixtures or order constitutes unjust in favour of the Plaintiffs/Respondents.

### **Comment**

[30] Permanent fixtures on the property cannot be removed as they have become part of the property and the law on that is settled and was discussed in the judgment in paragraphs 69 to 81 and unjust enrichment and inducement discussed from paragraphs 82 to 93.

Appeal Grounds,

- vi The Learned Judge erred in law and in fact when he failed to consider that the leased land was bare and undeveloped at the commencement of the tenancy and that the Defendant's/Appellants investments in clearing, leveling, and providing drainage were essential to making the property usable. These investments were not gratuitous but mandated by the lease agreement to benefit the Plaintiff/Respondent.
  
- vii The Learned Judge erred in fact and in law when he misapplied the legal principle of *quicquid plantatur solo, solo cedit* by failing to distinguish between fixtures made voluntarily by a tenant and those made under the lease's terms. The Defendant's/Appellants improvements, valued at \$80,000, were required under the lease and should have been excluded from the general application of this principle without appropriate compensation.

**Comment**

[31] The improvements on the land does not allow Defendant to remain in possession on commercial property eternity. If the improvements are outside lease agreement where they are obliged to do the remedy is not a right to remain but to seek compensation.

Appeal Ground,

- viii The Learned Judge erred in law and in fact when he failed to take into account that the judgment fails both procedurally, due to questions surrounding the Plaintiff's locus standi, and substantively, by disregarding the Defendant's/Appellants equitable rights arising from their investments in the property.

**Comment**

[32] One registered trustee had instituted the action and this is repletion of grounds 1-3 and again equitable interest stated in grounds 4 and 5 and repetition of the same.

Appeal Ground

- ix The Learned Judge failed to acknowledge the Plaintiff's unconscionable behaviour in relation to the Defendant's substantial investments in the leased property and the agreed mechanisms for lease renewal. The Plaintiff acted in bad faith by seeking to deprive the

Defendant of the benefit of his investments through actions that undermined the agreed terms of the lease. The lease agreement, drafted by the Plaintiff's/Respondents representatives, required the Defendant to provide a notice of intention to renew three months prior to the lease's expiration. This mechanism stipulated that a 14-year lease term would commence after rental negotiations. The Defendant complied with this requirement by duly requesting renewal, and the Plaintiff, by accepting the current rental without indicating an increase, implied that the renewal process had been initiated. However, the Plaintiff subsequently issued a termination notice and disregarded the renewal mechanism entirely, effectively breaching the terms of the agreement.

### **Comment**

[33] There was no finding of unconscionable conduct by Plaintiff by this court on evidence before this court and such a finding is contrary to law. In contrast that the behaviour of Defendant is an abuse of process as waiting till 5.2.2015 to file this application for stay and conducting his business and not taking measures to vacate the premises. If he wants to remain in the premises why didn't he do so soon after an appeal was filed. It is unconscionable to argue that lease was renewed for fourteen years on the same rental on commercial rent!

### **The Public interest in the proceedings**

[34] This matter involves indefeasibility of title of landlord and commercial rental and improvements on the land under lease. There is no public interest on such issues as law is settled on equitable interest.

[35] Balance of convenience needs to weigh the commercial contract and party autonomy in the light of indefeasibility. The law on such issues are settled and parties enter in to commercial arrangements such settled issues. Overall balance of convenience lies with Plaintiff considering the terms of the contract between parties. A tenant cannot remain in premises on the basis of convenience to them to remain without a right to remain on such property. Plaintiff needs to satisfy the requirement in terms of Section 172 of Land Transfer Act 1971. Plaintiff had waited for more than a year to obtain its possession. Fruits of the judgment should not be deprived unless there are good reasons. So the balance of convenience lies with the Plaintiff. Defendant is granted sufficient time to relocate its business. Defendant cannot remain in the same premises, though this may be more convenient for its business. Plaintiff can decide the rentals and tenants. Defendant cannot



remain on the premises when Plaintiff refuses to accept Defendant as tenant. Plaintiff had already entered another commercial lease and it is their right.


### **CONCLUSION**

[36] Defendant failed to establish a right to remain on the commercial property where it conducts a car wash. Plaintiff was granted time for relocation in order to minimize the disruption to its business having considered circumstances. Defendant's argument that Plaintiff had extended the lease for fourteen years when there is a condition precedent to agree on a new rental cannot be accepted. Similarly when there is provision to terminate lease with one month notice by either party, Defendant was aware of the risks of the commercial venture and law on permanent fixtures are clear. Such fixtures does not grant a tenant a right to remain on land and it is inequitable to allow so. Application for stay is refused.

### **FINAL ORDERS**

- a. Application for stay of the judgment is refused;
- b. .The cost of this application summarily assessed at \$2,000 to be paid within 21 days.



  
.....  
Deepthi Amaratunga  
Judge

**At Suva** this 24<sup>th</sup> February, 2025.

### **Solicitors**

Reddy Nandan Lawyers  
Nambiar Lawyers