IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Action No. 225 of 1977

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Between

CHABILDAS and DEVIDAS sons of Gulabdas — Plaintiffs

and

RAGHUPAL SINGH s/o Nakshu Singh — Defendant

Dr. M.S. Sahu Khan, Counsel for the Plaintiffs
Mr. G.P. Shankar and Mr. S.R. Shankar, Counsel for the Defendant

JUDGMENT

This is an originating summons issued under section 169 of the Land Transfer Act 1971 wherein the plaintiff landlords seek possession from the defendant. The plaintiffs on 12th April 1977 acquired by transfer a building in Ba town comprising 3 shops on the ground floor and 2 residential flats on the first floor. The defendant occupies one of the shops, holding under a tenancy agreement dated 20th December 1969 from the plaintiffs' predecessor-in-title. That agreement enured for 7 years from 1st January 1970 and thus expired on 31st December 1976. The rent fixed by the tenancy agreement was $100 per month, but in September 1976 the defendant began to pay rent at $156 a month. He says that this occurred because his agreement contained an option for renewal for a further ten years from its expiry, and he gave notice orally to the plaintiffs' predecessor-in-title exercising the option and the plaintiffs' predecessor-in-title accepted this position. The defendant did not obtain anything in writing to effectuate his exercise of the option to which I have referred, and when the plaintiffs took over they treated the defendant as a monthly tenant. The plaintiffs' solicitors were also solicitors for the plaintiffs' predecessor-in-title and on 27th July 1976 they wrote to the defendant on behalf of the plaintiffs' predecessor-in-title advising him that he was thenceforward a monthly tenant, and that they intended to ask the Prices and Incomes Board for permission to increase his rent, and further that if the building were transferred, the new owners might not continue

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his tenancy. To that one might have expected that defendant would have replied that he had a ten-year extension. But he did not reply at all to that letter. On 18th November 1976 the plaintiffs' predecessor-in-title secured the consent of the Prices and Incomes Board to an increase of rent from $100 to $156 a month. Just how they were able to do this in the face of the tenancy agreement which did not expire until 31st December 1976 was not explained to me. At all events the defendant instead of seeking legal advice, protested to the Prices and Incomes Board, and received no satisfaction. On 31st March 1977 the defendant was advised that the plaintiffs had bought the building, and he was asked to pay his rent to them. He appears to have paid them at the rate of $156 a month. The next thing that happened was that by notice dated 23rd August 1977 the plaintiffs' solicitors gave the defendant notice to quit. The defendant admits that he has received that notice, but he claims that his tenancy agreement gives him an option of renewal which he has exercised.

The plaintiffs' claim is based upon the Land Transfer Act. They say they are the registered proprietors of a piece of land, which they purchased free from encumbrances. They say, moreover, that if the defendant has a lease for ten years reserved under his agreement of 20th December 1969, it will not prevail against the plaintiff unless it is registered under the Land Transfer Act 1971, and that since it was not so registered, it is void, and the defendant can claim no rights under it. He refers to sections 37, 39 and 40 of the Act and then to section 54. I set out those four sections.

" 37. No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.

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

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"(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 of this Act, 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.

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 any previous proprietor of such estate or interest is or was registered, or to 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.

54.-(1) When any land is intended to be leased or demised for a life or lives or for any term exceeding one year, the proprietor shall execute in duplicate a lease in the prescribed form which shall be registered in accordance with the provisions of this Act, and every such instrument shall, for description of land intended to be dealt with, refer to the instrument of title of the lessor, and shall give such description as may be necessary to identify the land, and shall contain an accurate statement of the land intended to be leased.

(2) A lease executed in the prescribed form may be registered notwithstanding that the term thereof is for one year or less, but any lease which shall have been granted for a term not exceeding one year shall be valid without registration:

Provided that no right or covenant to purchase the land contained in any lease shall be valid as against any subsequent purchaser of the reversion unless such lease be registered."

Dr. Sahu Khan was content to argue the matter on the basis that the option had been inferentially exercised see Gardiner v Blaxhill (1960) 2 AER 457. Mr. Shankar stated that the defendant was not urging the question of fraud, so that cases like Webb v Hooper (1953) NZLR 111 are not applicable.

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Mr. Shankar says that because this was an agreement to lease and not in proper form for registration it was not registerable, and he suggested that when a registered proprietor is not in possession, a purchaser from him is bound by the terms of any agreement made between the registered proprietor and the actual occupant of the land and he relies upon Miller v Minister of Mines (1963) 1 AER 109, 112 and Hunt v Luck (1902) 1 Ch 428. I can find no authority for the second of these propositions.

I think before I go any further I should express my view of the defendant's claim to have exercised his option of renewal. The option clause is as follows:

"3. The Lessor agrees with the Lessees as follows:-

(a) The Lessor shall give to the Lessees option of renewal of this lease for a term of 10 years upon the terms and conditions agreed between the parties hereto.

(b) That the Lessees paying the rental hereinbefore reserved and observing the stipulations herein on his part contained shall peaceable enjoy the said premises without any interruption or interference by the Lessor or any person on his behalf subject however to the covenants on the part of the Lessees herein contained."

I think that the words 'The lessor shall give' at the beginning of the option clause must be read as if they were 'the lessor gives', for the option is a present promise to grant a future benefit to the lessee. No writing is apparently necessary. It would appear that the option can be exercised informally, as indeed the defendant claims to have exercised it.

So that I would construe the option clause as meaning that the lessee is entitled without notice if he wants it to claim a ten-year extension on the same terms, including the same rent, as in the present tenancy. I do not think that it can be construed as granting a perpetual lease, as was suggested by Dr. Sahu Khan. However I next look to see what has actually happened. The defendant saysthat somewhere towards the end of 1975 he spoke to the plaintiffs' predecessor-in-title by telephone to Canada and told him that he exercised his option and the landlord agreed. Then he says that he began to pay the increased rent of $156 in September 1976. I find that last statement difficult to reconcile with the next sentence of his affidavit. He says ". . . . by another letter dated 18th November 1976 the said D.K. Patel (the plaintiffs' predecessor-in-title) again informed me to pay the increased rental from 1st September, 1976."

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That letter notified defendant that the Prices and Incomes Board had approved the increase of his rent, although I would observe in parenthesis that I find it difficult to see how the Prices and Incomes Board could have approved of an increase of rent if they had been informed of the tenancy agreement with its fixed rent up to 31st December, 1976. Defendant wrote to the Prices and Incomes Board who confirmed the increase of rent which the defendant then paid, and went on paying until he was given notice to quit on 23rd August 1977. At that stage defendant consulted solicitors and those solicitors wrote to the plaintiffs' solicitors on 15th September asking that defendant be allowed to remain in possession until other accommodation was found. But that letter makes no mention of defendant's claim to have exercised his option to renew. All of this leads me to conclude that the defendant's claim to have exercised his option is unfounded. Although the letter of 27th July 1976 written on behalf of the plaintiffs would appear to be a unilateral variation of the tenancy agreement between the defendant and the plaintiffs' predecessors in title, and therefore invalid, I think that the defendant's actions subsequent to 31st December 1976 lead to no other conclusion than that he was holding over as a monthly tenant, and I would so hold: see Adler v Blackman (1952) 2 AER 945. I would hold that the monthly tenancy under which the defendant held after 31st December 1976 was duly terminated by the notice dated 23rd August 1977. Lest I am wrong on this, I proceed to consider the position on the basis that there was indeed an exercise of the option and that defendant had a new tenancy for ten years but unregistered or protected by a caveat. To begin with there was a perfectly good agreement to lease between the plaintiffs' predecessors in title and the defendant, and the defendant had gone into possession under that agreement. Specific performance could have been ordered in favour of the lessee. But he did nothing to protect his agreement to lease, and when the plaintiffs took their transfer they became registered proprietors on a clear and unencumbered title. I do not think that they can be disturbed. They are protected by the clear words of section 40.

Mr. Shankar relies upon the cases of Miller v Minister of Mines (1963) 1 AER 109, 112 and Hunt v Luck (1902) 1 Ch 428. His argument is that because the agreement to lease was not in registrable form it was therefore not a registrable interest. It is true that, as the Privy Council said in Miller v Minister of Mines, an instrument to attract the

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protection of the Land Transfer Act has to be both registrable and registered. In that case the document in question was not registered nor was it registrable because it dealt with an interest not capable of registration. In this case, however, although the instrument was not registered, it was registrable, because although not in proper form, it did refer to an interest which was capable of being converted into a legal interest. In Staples & Company v Corby (1900) 19 NZLR 517, the Chief Justice of New Zealand (Sir Robert Stout) pointed out at page 536 that although 'interest' was not defined in the Land Transfer Act, the term was intended to refer to legal interest or an equitable interest capable of being made legal, and that was the kind of interest a caveat was intended to protect and not an equitable interest per se. That is also the case in Fiji. But the interest conferred by the mining licence in Miller v Minister of Mines was not such an interest. It follows that Miller v Minister of Mines does not help the defendant nor does Hunt v Luck. In my view the defendant's equitable interest can be converted into a legal interest by the preparation of the proper document. Moreover defendant's interest could have been protected by caveat for section 106 of the Land Transfer Act 1971 entitles a person beneficially entitled to lodge a caveat, and the defendant was certainly beneficially entitled to an interest in land, but unless so protected the interest cannot be a burden on the title of the registered proprietor.

Mr. Shankar did, however, make one submission which I should mention. He suggested that Miller v Minister of Mines was authority for saying that if the registered proprietor does not give a lease in registrable form, but gives an informal lease, he has to suffer the consequences, as has his transferee. I am quite unable to deduce that conclusion from any of the statements made in the judgments in that case, and it would seem to me to be quite contrary to the principles of Torrens registration and, indeed, to section 39(1) of the Land Transfer Act 1971. When I look at that section I find that counsel agree that there is here no question of fraud. There is no claim under a prior instrument of title registered under the Act. There is no question of wrong description. There is no suggestion of any reservations, exceptions, conditions or powers contained in the original grant. Prima facie that section would appear to operate against the defendant's contentions.

That view is supported by the decided cases. There are a number of them: Kirkpatrick and Barclay v Hutchison (1904) 23 NZLR 755: Fels v Knowles (1906) 26 NZLR 604: Boyd v Mayor of Wellington (1944)

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43 NZLR 1174; Maori Trustee v Kahuroa (1956) 75 NZLR 713: Frazer v Walker (1967) 1 AC 569: Sutton v O'Kane (1973) 2 NZLR 304. I will refer only to three. The first is Fels v Knowles (1906) 26 NZLR 604. There the defendants were trustees under a will and registered proprietors by transmission under the Land Transfer Act of a certain block of land in the city of Wellington. In 1891 they granted to one H., under whose will the plaintiffs were appointed trustees, a lease of this land for fourteen years, in which was inserted an option to purchase the demised property for £6,000. H. knew that the lessors granted the lease as trustees under a will, but neither he nor his solicitors knew or inquired whether the will gave the trustees power to include in the lease an option to purchase. In 1905, seven months before the expiry of the lease, notice was given to the lessors of the lessees' intention to exercise this right to purchase, but the lessors refused to transfer, on the ground that they had no power to grant a lease containing an option to purchase, and that if they did transfer, they would be guilty of a breach of trust. The New Zealand Court of Appeal (with the Chief Justice dissenting) held that the defendants were bound by the option to purchase because the lease being registered under the provisions of the Land Transfer Act, the plaintiffs had by virtue of the provisions of that Act acquired an indefeasible statutory right, notwithstanding that the granting by the defendants of the right to purchase might have been a breach of trust. The principle is laid down in the majority judgment as follows: "The cardinal principle of the Land Transfer Acts is that the register is everything, and that except in cases of actual frad on the part of the person dealing with the registered property, such person, upon registration of the title under which he takes from the registered property has an indefeasible title against all the world." Secondly there is Maori Trustee v Kahuroa (1956) 75 NZLR 713. There the Maori Trustee in 1950 leased to the defendant a piece of land for 21 years, but the lease was never registered. The defendant fell behind with his rent, and the plaintiff purported to re-enter upon the land. Thereafter the land was leased to one C, and that lease was duly registered before the action was begun. Cooke J at page 721 says "The pleadings contain no allegation of fraud on the part of the registered lessee, and counsel admitted at the hearing that such a point was therefore not open to him. In my opinion the position thus is that the registered lessee has the protection afforded to a registered proprietor by sections 62 and 182 of the Land Transfer Act 1952." Section 62 corresponds with our section 39 which I have already set out with one difference that the exception (b) refers to easements and not to wrong description. Section 182 corresponds with/our section 40. The third case is Sutton

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v O'Kane (1973) 2 NZLR 304. That case involved a dispute about the existence of a right of way. W. subdivided a property at the corner of Brown and Rattray Streets in the City of Dunedin into two lots, each of which had a frontage to Rattray Street but only one of which (lot 2) had a frontage to Brown Street. Because access to Rattray Street from lot 1 was difficult, a right of way was shown (delineated over lot 2 and marked "Right of Way") on the deposited plan which was intended to give access from lot 1 to Brown Street across the rear portion of lot 2, and a memorial was noted against the title to lot 2 as follows:

"Subject to the Dunedin City Council's conditions of consent to the grant or reserving of a right of way however as are endorsed on deposited plan 11192." However no grant of easement was ever executed. When Lot 2 was transferred to Sutton the documents made no mention of the right of way, although Sutton was made aware of its existence orally. When O'Kane purchased lot 1 he did not lodge any caveat to protect his alleged right of way. It was held that the intention of the parties as shewn by the documents was that an easement of right of way would be granted to the plaintiff (O'Kane) and that as the transactions between those parties were for valuable consideration and partly performed, an equitable easement of right of way was created. It was held, however, that that equitable easement could not prevail against the defendants (Sutton) in the absence of any memorial on the title or any caveat, see in particular the judgment of Richmond J at pages 336-352. This matter was adverted to in Fiji in Bhajanlal v Somaraju Action 7 of 1974 in the judgment delivered on 1st July 1976. All of these cases show that the title of the registered proprietor will prevail over an unregistered instrument and therefore there will be an order that the defendant do give immediate possession to the plaintiffs of all that the shop premises occupied by the defendant being part of the land situated in the town of Ba and known as lot 3 D.P. 2283 and the whole of the land comprised and described in Certificate of Title 9800, and the defendant will also pay the plaintiffs' costs to be taxed or agreed.

LAUTOKA,
29th May, 1978.

(sgd.) K.A. Stuart
JUDGE