IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 35 of 1983

Between:

JAGOISHWAR PRASAD
s/o Ram Keshwar — Appellant

and

SHIU RAJI
d/o Sitla Prasad — Respondent

S.M. Koya for the Appellant
H.K. Nagin for the Respondent

Date of Hearing: 17th July, 1984
Delivery of Judgment: [illegible] July, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

This appeal is from a judgment of Madhoji J. delivered on 29th June, 1983 whereby he ordered the appellant to deliver up possession of certain lands and dismissed his counterclaim for specific performance of what was alleged to be a covenant for renewal in a lease and for compensation for improvements.

The lands were two adjoining parcels which are part of a freehold holding of 27½ acres in the district of Namata of which the respondent is the registered proprietor and to the exclusive possession for a term of years the appellant was entitled by virtue of transactions which we now describe.

He became lessee of one acre of the land by virtue of an assignment of a lease thereof to which the respondent duly consented. The lease was for a term of 21 years expiring on 31st December, 1979. It contained the following provision as its term :

> " The Landlord on the expiration of the said terms (sic) shall give to the tenant a further extension of 15 years at a rent subject to all conditions as shall then be agreed upon the parties hereto. "

The appellant's counterclaim for specific performance was in respect of this provision. He appealed against the refusal of the decree but such appeal was abandoned during the hearing before us.

As to the second parcel of land its unusual history is best introduced by reproducing paragraph 5 of respondent's statement of claim, which was admitted by the appellant. It reads :

> " That subsequent to the said 'Sale and Purchase Agreement' the plaintiff granted to the defendant a further piece of land comprising an area of about 4 chains adjoining 'the said land' and the defendant agreed to pay to the plaintiff a revised total yearly rental of $8.40. "

No doubt because of the admission to this averment there was no evidence adduced as to the matter. It seems clear that the parties have been content to treat this agreement - despite its several manifest deficiencies - as a regular variation of the terms of the lease of the adjoining acre of respondent's land, and, indeed, learned counsel before us so allowed. We accordingly propose to approach our consideration of the appeal on the footing that the terms and conditions of the agreement to lease of the first parcel apply to the second. We hold ourselves justified in so doing on the principle that the Court should act upon and give effect

to the convention the parties have adopted both before and during their litigation. In Amalgamated Investment and Property Co. Ltd. (In Liquidation) v. Texas Commerce International Bank Ltd. (1981) 3 All E.R. 577 at p.584 Lord Denning M.R. had this to say on the topic :

> " To use the phrase of Latham C.J. and Dixon J. in the Australian High Court in Grimot v. Great Boulder Pty Gold Mines Ltd. (1937) 59 C.L.R. the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between, and are bound by it. I care not whether it be put as an agreed variation of contract or a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. "

Dixon J. (as he then was) in the Great Boulder case (supra) at p.676 said that -

> "..... belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they knew to be contrary to the actual state of affairs. "

The first ground of appeal reads :

> " 1. THAT the Learned Trial Judge :
>
> (a) erred in holding that the Appellant had failed to pay rent in respect of the land in question for the years 1972, 1973 and 1974;
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> (b) erred in holding that the Respondent had validly re-entered the land for breach of covenant to pay rent;
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> (c) erred in not exercising his powers to give the Appellant relief against forfeiture. "

Ground (a) has to do solely with a question of fact. The learned Judge accepted the evidence of the respondent's husband who had earlier been her attorney and latterly her personal representative and he rejected

that of the appellant. It is manifest from the transcript that he had good reasons for so doing. Mr. Koya referred to evidence which showed that the respondent received rent at intervals of up to three years without an apparent demur and he submitted that the conduct of the respondent's attorney in acquiescing in the rent going so far into arrears was a relevant factor of which account should be taken. There is nothing to this submission. The reality is that the rental went into arrears when it was the appellant's obligation to pay it as and when stipulated for in the agreement to lease.

In Ground 1(b) issue is taken with the finding of the learned Judge that the respondent had lawfully re-entered the land for breach of covenant to pay rent.

The agreement provided :

> "9. It is hereby covenanted and expressly declared that if and whenever any rent shall be in arrears for 30 days (whether the same have been legally demanded or not) or if and whenever there shall be a non-observance of any of the covenants or conditions herein expressed or implied upon the part of the tenant or if and whenever the tenant shall be adjudged bankrupt or have a receiving order against him or compound with or execute an assignment for the benefit of his creditors or any execution shall be levied upon his goods or chattels then in and any of these events the Landlord may re-enter upon the demised land or any part thereof in the name of whole and take possession of the demised premises and thereupon this agreement shall determine but without prejudice to any of the rights or powers of the Landlord in respect of any rent or other moneys due to the Landlord. "

The issue of the respondent's writ was not preceded either by a formal re-entry upon the land or by any notice to the appellant. Mr. Koya referred us to the covenants implied in leases and agreements to lease and powers implied in lessors by virtue of sections 90 and 91 of the Property Law Act (Cap. 130) and to the requirement, at common law, that a demand must precede a claim to

re-enter for non-payment of rent.

In regard to the latter submission he referred us to Bullen & Leake and Jacob's on Precedents of Pleadings (12th Ed.) at pp. 596-7. The relevant passage, however, is immediately followed by a statement which shows that the requirement applies "unless the demand is expressly dispensed with by the terms of the lease". And, in this case, demand is dispensed with in paragraph 9 of the lease printed above.

With regard to the implied covenants and powers, it is provided by section 60 of the Property Law Act that ..... "unless otherwise expressed in this or such other Act, any ..... covenant or power may be negotiated, varied or extended in the instrument". We do not find it necessary to traverse the various implied covenants and powers and content ourselves by saying that such of them as are of possible relevance have been negatived or varied by paragraph 9 of the agreement to lease.

Section 105(1) of the Property Law Act provides :

> " A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -
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> (a) specifying the particular breach complained of; and
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> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
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> (c) in any case, requiring the lessee to make compensation in money for any breach .....".

The respondent in this case, by his action, proceeded to exercise the right of re-entry, on the one

hand, for breach of the covenant to pay the rent and, on the other, for breaches of covenants not to assign the whole or part of the demised land without prior consent of the respondent and for failure to keep the same clear of refuse, rubbish, weeds and unsightly undergrowth. In the end, his averments as to breach by non-payment of rent was sustained but the other averments of breach were rejected.

Subsection 9 of section 105 provides :

> " This section shall not, save as otherwise hereinafter mentioned, affect the law relating to re-entry or forfeiture or relief in case of non payment of rent. "

There is nothing "otherwise mentioned" touching upon the provisions of subsection 1 of the section. We accordingly hold that notice pursuant to that subsection was not required to precede the exercise of the right of re-entry. It was otherwise, of course, in respect of the other breaches of covenant. The causes of action based upon them, ultimately taken, were doomed to fail on the ground that subsection 1 had not been complied with. In the event, that point was not raised but they were rejected on the merits.

Mr. Nagin submitted that re-entry was validly effected and the lease determined by the service of the writ.

We uphold Mr. Nagin's submission. The matter is concluded by the authority - to which he referred us - Canas Pty. Co. Ltd. v. K.L. Television Ltd. (C.A.) 1970 1 Q.B. 433 and Jones v. Carter (1846) 15 M & W 718 which is referred to in the former case by Lord Denning M.R. as "a case of the highest authority". And, as we have already indicated, we are satisfied that there was no legal requirement to precede the enforcement of the right of re-entry by such action, with any notice or demand.

We accordingly find ourselves unable to uphold the submission.

Ground 1(c) can be quickly dealt with. The appellant did not apply for relief against forfeiture in the Court below and, not surprisingly, the learned Judge did not deal with the matter. There is accordingly no base for any submission that he erred in not granting such relief.

Ground 3 is as follows :

" THAT the Learned Trial Judge :

(a) erred in holding that the residential iron and timber building which the Appellant built at his own cost and during the currency of the said Tenancy Agreement formed part of the said land and that the Appellant was not entitled to remove the same;

(b) (in the alternative) erred in not holding that having held that the said residential building in law formed part of the said land, the Appellant was entitled in equity to an equitable charge or held as a first charge over the said land and the said residential building until the Respondent paid to the Appellant a just and fair compensation for the same. In the context the Learned Trial Judge merely said -

'As to the building constructed by the Defendant on the said land there being no provision for removal thereof or payment of compensation therefor in the said agreement to lease, it becomes part of the freehold and the defendant has no right to remove it or claim compensation for it. The Defendant's Counter-Claim is therefore dismissed.' "

Both these grounds have to do with the appellant's counterclaim and before we proceed to consider them we find it necessary to state precisely what the learned Judge was required to consider and to decide.

When the trial commenced the prayer of the counterclaim - apart from the usual prayers for further and other relief and costs - was for an order for specific performance which had its genesis in what purported to be an agreement to extend the terms of the lease. We interpolate that the learned Judge held that the provision was void for uncertainty and that the appeal against that finding (Ground 2) was abandoned.

During the course of his evidence in chief the plaintiff said :

> " I am therefore claiming for money I spent in the property. I claim I must be compensated for money I spent on the house. I spent $15,000 on it. I also ask for damages if lease is not extended ..... ".

His counsel thereupon applied for and was granted amendments to the prayer of the counterclaim; first, the addition of words which resulted in the existing sub-paragraph (1) reading :

> " (1) Order for specific performance that the lease agreement dated 29th July, 1958 be renewed or extended for fifteen years as from 1st day of January, 1980. "

And then :

> " (2) Damages in lieu thereof and/or
> (3) Compensation in the sum of $15,000
> (4) Such further or other relief as this Hon. Court sees fit
> (5) Costs "

The counterclaim contained no averments upon which a declaration that appellant was entitled to remove the building from the land or a claim either for compensation for improvements or a payment in satisfaction of an equity could be based. And when the prayer was amended

there was no application to include any such averments. Accordingly, the learned Judge was not required to consider whether the appellant was entitled to equitable relief to be satisfied by way of charge or otherwise, and, not surprisingly, there is no reference in his judgment to such. Having rejected the prayer for specific performance of the covenant as to extension of term and damages he - despite the lacks in the pleadings and absence of evidence as to value - went to consider the claim for compensation. He dealt with it very briefly. He said :

> " As to the building constructed by the defendant on the said land, there being no provision for removal thereof or payment of compensation therefor on the agreement to lease, it becomes part of the freehold and the defendant has no right to remove it or claim compensaticn for it. "

We observe first, that there being no claim that the appellant was entitled to remove the building, the finding that appellant was not entitled to remove the buildings was not necessary and forms no effective part of the judgment. Accordingly, we are of the opinion, that an appeal against that finding does not lie.

With regard to Ground 3(b) we have already observed that the averments in the counterclaim did not presage and the prayer did not include a claim for equitable relief. Certainly, the Judge did not refer to it. In our view the claim for compensation did not encompass it. However, out of deference to Mr. Koya's argument we shall briefly consider the question. It was submitted that the appellant erected the building in 1974 on the faith of the provision for renewal (which has now been held to be of no avail to him); that although the appellant had committed breaches of covenant, the respondent stood by and allowed the building to proceed without demur or intervention and that on the authority of Unity Joint Stock Mutual Banking Association v. King

(1858) 25 Beav 72, he was entitled to relief in equity. In that case, King informally permitted two sons to use and occupy a granary and the land on which it was erected. The sons erected other buildings on the land and compensated the father with the goods equal to the value of the granary and expended moneys in the erection of the other buildings. He intended at some future time to make over the property to the sons but did not do so and he made them no promise so to do. Romilly M.R. gave relief in equity by way of a charge for the amount that they had laid out.

The nature of the equity was not discussed in the judgment. It has received its classic formulation in the dissenting speech of Lord Kingsdown in Ramsden v. Dyson L.R. 1 H.L. 129, 170. (The point of dissent was not on the law but the facts). He said :

> " The rule of law applicable to the case seems to me to be thus: If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing under an expectation created or encouraged by the landlord ..... that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection from him, lays out money on the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

For a modern application of the principle and a discussion on the above passage see Crabb v. Arun District Council (1975) 3 W.L.R. 847 at 859 per Scarman L.J.

The facts of the present case do not bring it within the ambit of the equity applied in the Unity Joint Stock case (supra) or the enunciation of it by Lord Kingsdown Here the relationship of the parties was governed by contract and there was no question of the laying out of money on the faith of any promise or any expectation which fell outside the contract (modified by the convention which the parties

adopted).

Ground 4 is in the following terms :

" THAT the learned Trial Judge :-

(a) erred in not holding that the piece of land containing about four (4) chains adjoining one (1) acre of the land which was the subject-matter of the lease dated 29th July, 1958 did not form part of the said lease and that therefore the question of re-entry insofar as the 4 chains of the land is concerned did not arise and could not affect the same.

(b) erred in not describing the boundary of the one (1) acre of land which was the subject-matter of the said lease which was described as 'the said land' by the respondent/plaintiff in her pleadings and in respect of which His Lordship the trial Judge made an order for possession.

(c) erred in not holding or ascertaining whether the building constructed by the appellant was situated wholly on the said four (4) chains of land or on the said one (1) acre of land or partly on each of the lands aforesaid. "

These grounds were but faintly pressed upon us. We think that they must be rejected because the conclusion we have already reached that covenants in the agreement to lease apply to the four chains parcel by reason of the conventional basis upon which the parties conducted their affairs.

In the result the appeal fails. It is dismissed with costs to the respondent.

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Judge of Appeal

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Judge of Appeal

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