# IN THE COURT OF APPEAL, FIJI ISLANDS
## ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0049 OF 2003S
(High Court Civil Action No. HBC 27of 2003S)

BETWEEN:

JAGINDAR SINGH

*Appellant*

AND:

FIJI ADVENTISTS FARMERS COOPERATIVE SOCIETY LIMITED

*Respondent*

Coram: Sheppard, JA
Gallen, JA
Ellis, JA

Hearing: Wednesday, 17th March 2004, Suva

Counsel: Mr M Arjun and Mr G.P. Lala for the Appellant
Mr S. Chandra for the Respondent

Date of Judgment: Friday, 19th March 2004

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## JUDGMENT OF THE COURT

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The respondent in this appeal is the registered proprietor of lease 28/158. The appellant occupied that property by virtue of registered sub-lease No. 125859 which expired on the 1st of January 2000. On the 26th January 2002 the appellant was given notice to quit but remained in occupation of the land. The respondent initiated summary proceedings for possession of land brought pursuant to section 169(c) of the Land Transfer Act Cap. 131. That application came before the High Court and the Judge gave a decision making an order for possession in 28 days. That decision was given on 14 May 2003. The appellant now appeals against that decision.

The Judge noted that under the provisions of s.172 of the Land Transfer Act the onus is on the occupier to show a right to remain in occupation and he noted that 4 arguments had been put forward to on behalf of the appellant supporting his contention that no order should issue.

The first argument was that the sublease by virtue of which the appellant occupied the property, conferred on the appellant a right to renew. The Judge noted that no copy of the sublease had been exhibited and that no mention of a right to renew had been made in the respondent's affidavit in opposition. It was not accepted by counsel for the respondent that the appellant did have a right to renew. The Judge not surprisingly came to the conclusion that in the absence of any supporting evidence that that particular argument failed.

The second submission relied upon by the appellant was that the respondent by accepting payment of rent following expiry of the sublease had accepted its renewal. The Judge accepted from the material before him that the appellant had posted the rent to the respondent which had previously refused to accept it. Counsel confirmed to the Judge that the rent had been received but had been paid into a trust account. The Judge found as a matter of fact that there had been no unequivocal acceptance of rent by the respondent and accordingly he could not find that the appellant could succeed on that ground.

The third submission relied upon by the appellant was that because the land was native land that the Native Land Trust Board ought to have granted its permission to bring the proceedings by virtue of the requirements of s.12 of the Native Land Trust Act Cap. 134. As the Judge rightly pointed out that section had no application in the circumstances of this case.

Finally the appellant argued that the respondent lacked good faith and was seeking an exorbitant premium to renew the sublease. The Judge noted from the documentary evidence before him that the respondent had offered to the appellant a 75 year sublease of the property, the rental to be $500.00 per annum for the first 5 years, upon payment of a premium of the sum of $18,000.00. The Judge considered this

lacked good faith. We note in passing that the head lease expires in May 2009 so that the respondent is in no position to offer a sublease for 75 years but the offer may simply have been meant to convey that assuming the respondent was in a position to make a sublease available the extended term would be granted.

Before us the appellant relied on two issues only.

1. whether the appellant under clause 9 of the sublease was entitled to renewal of the sublease for at least a further term until expiration of the head lease and

2. whether if the trial Judge had been aware of the existence of clause 9 of the sublease, he would have made an order for vacant possession.

As we have already noted the sublease was not before the Judge and he appropriately commented that in its absence he was in no position to make any finding about a right of renewal. The sublease has been subsequently made available and was placed before us by virtue of an affidavit which identified it.

Clause 9 of the sublease is in the following terms:-

"Upon the expiration of the term hereby created the lessees shall have an option of renewal of this sublease for a further term as may be agreed upon and upon such covenants and conditions and at such a rental as may then be agreed upon between the parties subject to the lessor being granted a renewal of the head lease upon its expiry. "

The question immediately arises as to whether it is appropriate for us to take into account new material of this kind which was not before the Judge and which ought to have been. The general rule is that on an appeal new evidence can be relied upon only when its materiality has been established and the court is satisfied that it could not have been available as a result of reasonable diligence at the earlier hearing.

There must be considerable doubt as to whether the evidence in this case meets the second test. However for the purpose of disposition of the matter before us we are prepared to at least look at it.

The first problem which the appellant faces is that the sublease expired on the 1st January 2000 and there was no evidence before us that formal notice of an intention to exercise the option to renew has ever been given. That is not however decisive. The general rule is an option should be exercised in writing but this may be negatived by agreement of the parties. See Woodfall on Landlord and Tenant Vol. 1 para. 18.024. Counsel for the appellant in this case sought to rely upon the exchange of correspondence between the parties, but this was not explored before the Judge and we do not think there is sufficient material before us to reach any conclusion on it.

The second problem is the clause has no certainty as to terms. It is an agreement to agree and under ordinary contract law would be invalid for this reason. That is not necessarily however the case in respect of an option to renew a lease. The court will lean in favour of holding an option valid where in context the necessary certainty can be found. See Woodfall Vol. 1 para. 18.101 but this does not get over the basic concept that an agreement to agree is not enforceable where that certainty does not exist. During the course of argument counsel properly conceded that there was no method contemplated in the agreement itself of resolving any dispute between the parties such as reference to arbitration.

When the clause itself is looked at either alone or in context it plainly does not give rise to sufficient certainty to allow it to be enforced.

We consider that the Judge was right in the conclusion to which he came on the evidence before him.

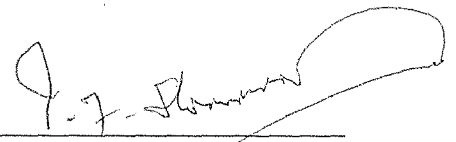
If the clause is unenforceable then the appellant has no better arguments than those already dismissed by the Judge with whose conclusions we agree.

We accordingly dismiss the appeal. The respondent is entitled to costs which we fix at $750 together with disbursements to be fixed by the Registrar.

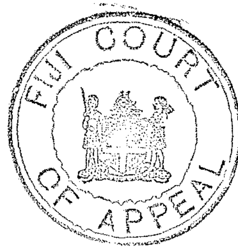
Outcome

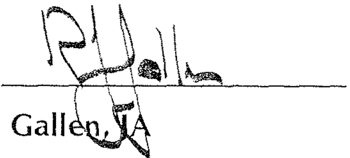
Appeal dismissed.

Costs of $750 to respondent with disbursements to be fixed by the Registrar.

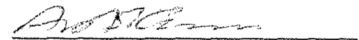


Sheppard, JA



Gallen, JA



Ellis, JA

Solicitors:

Messrs. Wm Scott Grahame and Company, Suva for the Appellants
Messrs. Maharaj Chandra and Associates, Suva for the Respondent

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