

IN THE HIGH COURT OF FIJI AT SUVA

EVICITION PROCEEDINGS

Civil Action No. 106 of 2012

BETWEEN: Homelco Limited

Plaintiff

AND: Noleen Kumar

First defendant

AND: Basil Kumar

Second defendant

Appearances: Ms Bhavna Narayan for the plaintiff

The first defendant in person

Dates of hearing: 12<sup>th</sup> October, 2012

### **JUDGMENT**

1. The plaintiff files this application by way of originating summons in terms of section 169 of the Land Transfer Act, for an order of vacant possession against the defendants.
2. Vikesh Gokal, Director of the plaintiff company has filed affidavit in support on 19 April, 2012. The affidavit provides as follows:
  - 2.1 The plaintiff is the registered proprietor of the lands comprised in Crown Lease nos.1735 and 1767 situated at 7 and 9 Laucala Bay Road, Flagstaff, Suva respectively. Copies of the leases are attached.
  - 2.2 The defendants are in arrears of rent.
    - 2.2.1 The plaintiff had failed to execute distress for rent proceedings on the defendants on 27 March, 2012, since the defendants had declined to allow access to the bailiff.
    - 2.2.2 The plaintiff had previously served notices to vacate on the plaintiff.
    - 2.2.3 The defendants failed to vacate the premises.

- 2.2.4 The plaintiff commenced section 169 proceedings in Civil Action no. HBC 197 of 2011. The Master had made order for vacant possession. The defendants appealed against the order on the ground that the plaintiff had not obtained the consent of the Director of Lands, to institute legal proceedings. The plaintiff conceded to the appeal .
- 2.3 The plaintiff then obtained consent of the Director of Lands to institute these proceedings. A copy of the consent of the Director of Lands dated 13 February, 2012, is attached.
- 2.4 The defendants are in arrears of rental from 1 June, 2009, to 1 March, 2012. As at 19 April, 2012, the defendants owed the plaintiff, a sum of \$33,500.00 as outstanding rental, as set out in the statement attached.
- 2.5 The defendants have been occupying the said premises unlawfully and have refused to give vacant possession of the premises.
- 2.6 The plaintiff requires possession of the premises for its use .
3. The first defendant, in her affidavit in reply dated 9 October, 2012, states as follows:
- 3.1 The defendants have been tenants of the premises from January, 2008, to-date.
- 3.2 The defendants dispute the claims made by the plaintiff of outstanding monthly rental totalling \$33,500.00. In support, receipts of payments of rentals have been attached.
- 3.3 The consent granted by the Director of Lands does not state that consent has been given for eviction of tenants.
- 3.4 The plaintiff had executed an unlawful distress in January, by a non-licensed bailiff .
- 3.5 The defendants dispute that the plaintiffs require the premises, since they have several other properties “ *better and satisfactory to their standard of living*”.
- 3.6 She has substantially invested in the premises.

#### **4. The determination**

- 4.1 Section 169 of the Land Transfer Act provides that the following three categories of persons may summon any person in possession of land to appear before a Judge, to show cause why he should not give up possession of the land to the applicant, namely:

(a) *The last registered proprietor of a land ;*

(b) *A lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent.*

(c) *A lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired. (emphasis mine)*

4.2 The term “lessor” is defined in section 2 to mean “*the proprietor of the land leased*” and includes a “*sub-lessor*”. The plaintiff falls within this definition.

4.3 The procedure under section 169 is governed by section 172, which reads :

*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,... and 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.... (emphasis mine)*

4.4 The requirements of Section 172 were set out in *Morris Hedstrom v. Liaquat Ali* (Action No. 153/87 at page 2) as follows :

*“Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.” (emphasis mine)*

4.5 The issue for determination before the court is whether the defendants have shown cause and proved to the satisfaction of the court, a right of possession to the land.

- 4.6 The case for the plaintiff is that the defendants have been in arrears of rentals from 1 June, 2009, to 1 March, 2012. As at **19 April, 2012**, the defendants owed the plaintiff, a sum of \$33,500.00 as outstanding rentals.
- 4.7 The defendants have produced evidence of payments of rentals in a sum of \$ 12,650 for the period **November, 2009, to August, 2010**. In respect of this period too, the defendants are in arrears.
- 4.8 I find that the defendants are in arrears of rent for several months. The defendants are monthly tenants. There is no lease agreement. The plaintiff is entitled to institute these proceedings in terms of sub-section (b) of section 169.
- 4.9 I am satisfied that the Director of Lands has granted consent for these proceedings.
- 4.10 The first defendant's assertion in her affidavit in opposition, that she has substantially invested in the lands, is unsubstantiated.
- 4.11 The defendants have failed to shown an arguable defence or right to remain in possession.
- 4.12 In my judgment, the defendants have failed to show cause under Section 172 of the Land Transfer Act. The plaintiff succeeds in its application for immediate vacant possession of the lands.

**5. Order**

The defendants are ordered forthwith to give vacant possession of the lands to the plaintiff . The defendants shall pay the plaintiff costs summarily assessed in a sum of \$ 2500 within 21 days.

7<sup>th</sup> August , 2013

A.L.B.Brito-Mutunayagam

**Judge**