

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

Civil Action No. HBC 12 of 2014

**BETWEEN :** **GULAM MOHAMMED HOLDINGS LIMITED** a limited liability company having its registered office at Nakasi, Fiji

**PLAINTIFF**

**AND :** **MOTORPART TRADERS LIMITED** of 144 Ratu Mara Road, Samabula, Suva

**DEFENDANT**

**BEFORE :** **Acting Master Thushara Rajasinghe**

**COUNSEL :** **Mr. O'Driscoll G.** for the Plaintiff  
**Mr. Valenitabua S.** for the Defendant

**Date of Hearing :** **3<sup>rd</sup> April, 2014**

**Date of Judgment :** **6<sup>th</sup> June, 2014**

**JUDGMENT**

**A. INTRODUCTION**

1. The Plaintiff instituted this action by way of this Summons for ejection dated 15<sup>th</sup> of January 2014 seeking an order for immediate vacant possession of the property situated at 144 Ratu Mara road, Samabula in Suva being part of that piece and parcel of land containing thirty seven perches and seven tenths of perch be the same a little more or less and situated in the tikina of Suva in the island of Viti Levu and being allotment 17, section 9, Samabula and comprised in Crown Lease No 1615 of which the Plaintiffs are the Registered proprietors.

2. Directions were given to the Defendant to file their affidavit in opposition on or before 20<sup>th</sup> of February and the Plaintiff to file their affidavit in reply seven days thereafter. The Summons was set down for hearing on 3<sup>rd</sup> of April 2014. The Plaintiffs informed the court on the date of the hearing, that they were severed with the Defendant's affidavit in opposition only on the 26<sup>th</sup> of March 2014 and had no time to serve their reply affidavit. Therefore the Plaintiffs sought permission to call the Company Secretary of the Plaintiff Mr. Mohammed Saheed as a witness to response the affidavit in opposition. The learned counsel for the Defendant had no objection, accordingly the permission was granted. Mr. Saheed then gave evidence and was cross examined by the counsel of the Defendant. Subsequently both counsel made their submissions. Having considered the Summons, respective affidavits and submission and the evidence of Mr. Saheed, I now proceed to pronounce my judgment as follows.

**B. BACKGROUND**

*Plaintiff's case,*

3. The Plaintiff claims that they are the registered proprietors of the property comprised in crown lease No 1615 and the Defendant is the tenant of them. The lease agreement was expired in 2012, however, the lease was extended without entering a new agreement until the notice to quit was issued by the Plaintiff. The Plaintiff claims that pursuant to section 89 of the Property Law Act the lease was extended upon the expiration of the lease agreement. The Plaintiff issued a notice to quit dated 8<sup>th</sup> of November 2013 and served the same to the Defendant personally. However, the Defendant failed to vacate the property as per the notice to quit.

*Defendant's Case.*

4. The Defendant vehemently opposed this Summons and their objections are founded on three main grounds, that;

- i. The Plaintiff has accepted the rent for the property after the notice to quit was issued, wherefore, the said notice to quit is not valid,
- ii. The Notice to quit was not properly served on the Defendant at their registered office,
- iii. The notice to quit is contrary to the subsequent alteration to the lease agreement proposed by the parties.

***Plaintiff's reply.***

5. Mr. Saheed in his cross examination admitted the collecting of rent, but specifically stated that they were collected as profit and not as the rent.

**C. THE LAW**

6. I now turn to briefly review the laws pertaining to the application under section 169 of the Land Transfer Act (hereinafter mentioned as "the Act").
7. Sections 169 to 172 of the Act have stipulated the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under section 169 of the Act to evict the person who is in possession of the land without a right to the possession.
8. Section 171 and 172 of the Act deal with the scope of the hearing and the burden of the parties. Section 171 states that ;

*"On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."*

9. Section 172 states that

*“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, mortgagee or lessor or he may make any order and impose any terms he may think fit;*

10. The scope of the hearing of the application under section 169 constitutes with two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor described under the section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant’s burden of prove of a right to the possession of the land has discussed in **Morris Hedstrom Limited-v-Liaquat Ali** CA No: 153/87 , where it was held that

*“Under Section 172 the person summonsed 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.”*

Accordingly, the defendant is only required to present some tangible evidence to establish a right of possession or the existence of an arguable case for such right to defeat the Plaintiff’s claim.

**D. ANALYSIS,**

11. Upon perusal of the respective affidavits filed by the parties and their respective submissions, I find that this Summons falls within the scope of section 169 (c) of the Act, where it states that “a lessor against a lessee or tenant where legal notice to quit has been given or the term of the lease has expired”.
12. The proprietorship of the Plaintiffs to this property and the existence of the lease were not disputed by the parties in their affidavits. In fact both parties admitted that the lease agreement entered by the parties in 2007 for a period of five years has expired. The Defendant has been occupying the property with the consent of the Plaintiffs as a tenant subsequent to the expiration of the agreement.
13. The first contention of the Defendant is that the notice to quit issued by the Plaintiffs is not valid since the Plaintiff has accepted rent after this notice to quit was issued. Learned counsel for the Defendant submitted that pursuant to section 100 (1) of the Property Law Act, the acceptance of rent subsequent to the notice to quit without expressly stating of “without prejudice to the notice” shall be a waiver of the right to enforce the notice or it may create or review a tenancy. Section 100 (1) of the Property Law Act states that:  
  
*“ After giving of notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy”*
14. Mr. Saheed, the witness of the Plaintiffs admitted in his cross examination that they have collected rent after the notice to quit was issued on 11<sup>th</sup> of November 2013 but not as rent but as profit.
15. The laws pertaining to the issue of acceptance of rent after the notice to quit was issued has comprehensively discussed in **Total (Fiji) Ltd v Khan ( 2010) FJHC 2006, HBC023.2008 ( 11 June 2010)**, where Master Tuilevuka ( as his lordship then was) has discussed some of the leading authorities and legal writings on this issue. I with much

gratitude to Justice Tuilevuka, reproduce what he observed in Total ( Fiji) Ltd v Khan (supra) as follow;

*"In Kumar v Prasad [2004] FJHC 219; HBC0061.2004 (30<sup>th</sup> June 2004), Mr. Justice Jiten Singh took the following approach:*

*"The receipt of the rent not having been produced, I am left to decide this matter on basis of common law"*

*In the above case, Singh J quoted the following passage from Clarke v Grant (1950) 1KB 104 at 105 where Lord Goddard laid down the common law position as follows:*

*" If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent waiver the forfeiture, the reason being that in the case of a forfeiture, the landlord has the option of saving whether or not he will treat the breach of covenant as a forfeiture. The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby recognize that the lease is continuing. With regard to the payment of rent after a notice to quit, however, that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown the parties intended that should be a new tenancy.*

*That has been the law ever since it was laid down by the court of King's Bench in Doe d. Cheny v. Batten (1) where LORD MANFIELD said (1 COWP. 245):*

*'The question therefore is, quo animo the rent was received, and what the real intention of both parties was?'*



*It is impossible to say that the parties in this case intended that there should be a new tenancy. The landlord always desired to get possession of the premises. That is why he gave his notice to quit. The mere mistake of his agent in accepting the money as rent which had accrued is no evidence that the landlord was agreeing to a anew tenancy.”*

.....  
*“Therefore when a landlord has brought a tenancy to an end by means of a notice to quit , a payment of rent after that date will only operate in favour of the tenant if it can shown that the parties intended that there should be a tenancy.....the question therefore is ,qui animo the rent was received ,and what the real intention of both parties was.”*

*That intention would be the intention at the time of the receipt of rent not at time of filing of this application. The Court would need to know what was said before and after rent was tendered and accepted to get at the real intention of parties.(my emphasis)*

*The Fiji Court of Appeal case of MaganlalRamabhai Patel v. Native Land Trust Board-ABU 40 of 1976[4] cited with authority the following passage from Central Estates(Belgravia)Ltd. V. Woolgar No. 2 (1972) 3 ALL ER 610:*

*“If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanded or receiving rent which can only be done consistently with the existence of a certain state of affairs, namely, the continuance of the lease or tenancy in operation, he cannot thereafter be heard to say that state of affairs did not then exist. If at the time of the act he had a right to elect whether to fortiet the lease or tenancy or to affirm it, his act will unequivocally demonstrate that he has decided to affirm it. He cannot contradict this by saving that his act was without prejudice to this right of election continuing or anything to that effect. In this respect his act speaks louder than his word, because the act is unequivocal; it can only be explained on the basis that he has exercised his right to elect. The motive or intention of the*

landlord, on the one hand, and the understanding of the tenant, on the other, are equally irrelevant to the quality of the act." (my emphasis)

*Woodfall's Law of Landlord and tenant – 25<sup>th</sup> Edition by Lionel A. Blundell pronounces the common law in the following words:*

*"By acceptance of rent. Acceptance by the landlord of rent due after the expiration of a notice may be evidence upon which the court will infer the creation of a new tenancy .However, in each case the question is, quo animo the rent is received, and what is the real intention of the parties \_ (p). No such inference can be drawn if the rent fell due before the expiration of the notice (q)*

*Even after the expiration of the notice ,where rent is usually paid at a bankers" if the banker, without any special authority, receive rent accruing after such expiration, the notice is not thereby waived(r); so if the money be not paid or received as rent, but as a satisfaction for the injury done by the tenant in continuing on the premises as a trespasser, it will not have such an operation (S).A demand of rent accruing subsequently to the expiration of a notice to quit is not necessarily a waiver of the notice, but is a question of intention which ought to be left to the jury(t); but a demand and acceptance of one day's more rent than was due has been treated as a waiver in law (u). When, after the termination of a service occupancy under which the servant had been paying 15s., a week for the premises he occupied, the employer accepted two more such payments of 15s., but there was no evidence of any real intention to create a new tenancy, it was held that no tenancy was created (x).So also where the rent was received by the agent who mistakenly thought that it was payable in arrear and not advance (y)." (my emphasis)*

*In Halsbury's Laws of England3<sup>rd</sup> edition p. 671 para.1396 the learned authors say:"A landlord does not waiver the forfeiture by merely standing by and seeing it incurred... there must be some positive act of waiver."*



16. The Plaintiffs did not refuse that they have accepted the rent, but contended that it was for profit and not for rent. However, there is no any express notification of such by the Plaintiff. As it was held in “Central Estates (Belgravia Ltd v Woolgar (1972) 3 All ER 610, the Plaintiff by their action of collecting rent manifested to the tenant that their act was done consistently with the continuance of the lease. It is more apparent though the Plaintiffs claim that they collected rent as means of profit, it was not mentioned in the notice to quit as required by section 100 (2) of the Property Law Act. At this point, I draw my attention to consider the intention of the Plaintiffs. When a landlord has brought a tenancy to an end by giving of a notice to quit and yet collect rent after the notice will only consider for the tenants favour if the court is satisfied that the parties intended to create or revive the tenancy by such act.
17. Mr. Saheed testified in his evidence that he served the notice to quit personally at the Defendant’s office and he then personally talked to the director of the Defendant. The director of the Defendant had asked him six months’ time to vacate the property which he did not agree. However, when he visited him again on 11<sup>th</sup> of December 2013, the Director has asked him again for a month to vacate the property, which he agreed. When I consider this evidence of Mr. Saheed together with his admission of collecting of rent after serving the notice to quit, allows me to form a strong inference of the intention of the Plaintiffs. In the absence of any concrete evidence to substantiate their claim that the rent was collected as profit and not as rent, I am inclined to conclude that the Plaintiff had no intention to bring the tenancy to an end after serving the notice to quit and their action of collecting of rent and agreeing for the extension of further time to the Defendant confirmed such conclusion.
18. Wherefore, I hold that the Plaintiffs have waived their right to enforce the notice to quit issued to the Defendant on the 8<sup>th</sup> of November 2013 by collecting of rent and by their subsequent conduct. Accordingly, I further hold that there is no proper legal notice to quite issued to the tenant and no proper termination of the lease pursuant to section 169 ( c) of the Land Transfer Act and to section 89 of the Property Law Act. I accordingly make following orders that;

- i. The Plaintiffs' summons for ejection dated 15<sup>th</sup> of January 2014 is hereby refused and dismissed,
- ii. The Defendant is awarded \$ 1000 cost assessed summarily,

Dated at Suva this 06<sup>th</sup> day of June, 2014



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**R.D.R. Thushara Rajasinghe**  
**Acting Master of High Court, Suva**