

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 293 of 2014

IN THE MATTER of an application under
Section 169 of the Land Transfer Act

BETWEEN : FTH PROPERTIES LIMITED a duly incorporated company having its registered office situate at 177 Victoria Parade, Suva and having its Head Office situate at 1 Industrial Road, Nadi Airport, Nadi, Fiji.

PLAINTIFF

AND : ARUN LATA trading as **CROX'S WINE & DINE** situated at 173 Victoria Parade, Suva, Fiji.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Mr. Nilesh Prasad for the Plaintiff.
Ms. Faktoufon on instructions of Mr. Bukarau for the Defendant.

Date of Hearing: 04th March, 2015

Date of Ruling: 17th April, 2015

JUDGMENT

INTRODUCTION

1. The Plaintiff filed an Originating Summons and sought for the following orders from this court-

- (a) That the Defendant to show cause as to why she, her employees and/or agents, business associates, family and invitees should not give up immediate vacant possession of the property situated at 173 Victoria Parade, Suva, Fiji comprised in the Certificate of Title No. 11971 being Lot 1 on DP 2815 of which the Plaintiff is the registered proprietor and which the Defendant, her employees and or agents, business associates, family and invitees now unlawfully occupying.
- (b) That the costs of this application be paid by the Defendant to the Plaintiff.
2. This application is supported by an affidavit of Dhinesh Lal Bala sworn and filed on 16th October, 2014.
 3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
 4. The Defendant was personally served with this application on 29th October, 2014 and an affidavit of service to this effect has been filed into court.
 5. The Counsel representing the Defendant was granted 14 days time to file and serve her affidavit in opposition and he failed to do so.
 6. Hereafter, the counsel sought further time on two further occasions to file his affidavit in opposition but still failed to do so.
 7. The case was adjourned for hearing on 04th March, 2015 and the counsel representing the Defendant failed to turn up to court, rather instructed another counsel to appear for him on limited instructions.

8. It is essential to mention that this case proceeded to hearing on an **undefended basis** (in the absence of the Defendant and her Counsel).
9. However, this court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss169, 171 and 172 of the Land Transfer Act* [Cap 131].

THE APPLICATION

10. The application filed by the Plaintiff is asking the Defendant to show cause why the Defendant, her employees and or agents, business associates, family and invitees should not hand over **immediate vacant possession** to the Plaintiff of the said property situated at 173 Victoria Parade, Suva, Fiji comprised in the Certificate of Title No. 11971 being Lot 1 on DP 2815 (hereinafter referred to as 'the property') of which the Plaintiff is the registered proprietor.
11. This application was supported by an affidavit sworn by Dhinesh Lal Bala in his capacity as Operations Manager of the Plaintiff Company.
12. He confirmed through his affidavit the following -
 - (i) *That he is familiar with the matters pertaining to this application.*
 - (ii) *That the Plaintiff is the registered proprietor of all that land and building situated at 173 Victoria Parade, Suva, Fiji comprised in the Certificate of Title No. 11971 being Lot 1 on DP 2815.*
 - (iii) *The Plaintiff entered into a Tenancy Agreement with the Defendant on 18th November, 2011 for a term of 6 years for monthly rental of \$2,608.70 plus VAT for the first two years; \$3,000 plus VAT for the second two years; and \$3,360 plus VAT for the last two years.*
 - (iv) *That the Defendant conducted a restaurant business from the Property including the sale of liquor on premises.*
 - (v) *That on or about late August, 2014, it came to their knowledge that the Defendant had parted with possession of the Property to one Linda Ah Kee without the prior written consent of the Plaintiff. During this period the said Ms. Kee operated the restaurant business.*

- (vi) That he obtained legal advice from his Solicitors and understood that the Defendant was in breach of Clause 3(n) of the said Agreement by parting with possession of the Property, which is a material breach of the Agreement.
- (vii) That by their letter dated 27th August, 2014 the Defendant's Solicitors have acknowledged the parting with possession of the Property.
- (viii) That he instructed his Solicitors to issue and serve Notice to Quit on the Defendant and he was informed and verily believe that such Notice was served on and received by the Defendant at Rambo Road, Nasinu on 01st September, 2014 at 3.15 p.m.
- (ix) That upon the expiry of one month, the Defendant has refused to vacate and deliver up possession of the Property despite service of the said Notice to Quit on her.
- (x) That he verily believes that the Defendant is occupying the property unlawfully and without any authority and that she, her employees and or agents, business associates, family and invitees are presently trespassing on the Property despite the said Notice to Quit.
- (xi) That he prays for an Order for immediate vacant possession of the Property now occupied by the Defendant, her employees and or agents, business associates, family and invitees.

THE LAW

13. The application is filed in terms of s 169 of the Land Transfer Act [Cap 131] which provides as follows:

"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:

- (a) *the last registered proprietor of the 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) *lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*

14. The procedure under s.169 is governed by sections 171 and 172 of the Land Transfer Act (Cap 131) respectively which stipulates as follows:-

"s.171. 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."

s.172. If a 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."

(Underlined is mine for emphasis)

15. It is for the defendant to 'show cause' why he refuses to give vacant possession of the residential leasehold property to the Plaintiff as sought for by the Plaintiff.
16. The procedure under s.169 is most appropriate here. In the case of *Ram Narayan v Moti Ram (Civ. App. No. 16/83)* Gould J.P. said-

"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."

17. As far as the requirements in terms of section 172 are concerned, the Supreme Court in the case of *Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)* said as follows and it is pertinent:

"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."

18. The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (Action No. 44 of 1981 - judgment 2.4.82)* where the court said:

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require. There is accordingly nothing in section 172

which requires an automatic order for possession unless "cause" is immediately shown. (emphasis added)

19. In *Premji v Lal* [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975) the Court of Appeal said:

'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) this court said -

20. Under *Section 172 of the Act* the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.
21. Reference is made to the case authorities of *Caldwell v. Mongston* (1907) 3 F.L.R. 58 and *Perrier Watson v. Venkat Swami* (Civil Action 9 of 1967 - unreported) wherein the Supreme Court held *'that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.'*

DETERMINATION OF THE ISSUE

22. The question for this court to determine is whether the Plaintiff is entitled to the possession of the property situate at 173 Victoria Parade, Suva comprised in Certificate of Title No. 11971 being Lot 1 on DP 2815 of which the Plaintiff is the registered proprietor of in terms of *s169 of the Land Transfer Act [Cap 131]*?
23. The Defendant was served with the Plaintiff's application seeking vacant possession on 29th October, 2014.
24. Mr. Bukarau, appeared for the Defendant on 18th November, 2014 and sought for 14 days' time to file his affidavit in opposition to which the court acceded to and adjourned the case to 10th December, 2014.
25. On 10th December, 2014 Counsel representing the Defendant once again sought time to file his affidavit in opposition, and he was granted 14 days to do so and the case then adjourned to 04th March, 2015 for hearing and determination.
26. On 04th March, 2015 another counsel on the instructions of Mr. Bukarau appears and sought for the hearing date to be vacated on the grounds that Mr. Bukarau was sick.
27. The application to vacate this hearing was strongly objected to by the Plaintiff who stated that this matter has been adjourned time and again since 16th October, 2014 and this is the third occasion when the counsel has failed to file and serve an affidavit in opposition to the Plaintiff's application.
28. The court ruled against any further adjournments and proceeded with the hearing of this case.

29. The Plaintiff filed written submissions and addressed this court on the law and other facts relating to this case and relied on the affidavit in support of Dhinesh Lal Bala.
30. Upon perusal of the affidavit in support filed on behalf of the Plaintiff, reference is made to annexure 'A' therein. This annexure refers to the *Certificate of Title No. 11971* and confirms that the *Plaintiff is the proprietor* of the same.
31. I have also cited the *Tenancy Agreement* entered into by the Plaintiff (Landlord) with Defendant (Tenant) dated *18th November, 2011*. Paragraph 1 of the Agreement states as follows-

'The tenancy agreement shall be for a period of [6] Six years with effect from the 01st day of December, 2011 and ending on the 30th day of November, 2017 with an option to renew it for a further period of [6] Six years subject to the right of renewal hereafter contained in clause 7 hereof (herein called 'the said term').

(Underline is mine for emphasis).

32. It is noted that the Tenancy Agreement is yet to expire and will in fact expire on *30th November, 2017*. Further, if there is any breach by the Defendant (Tenant) of any conditions and covenants contained in this agreement, then the option to renew the Tenancy Agreement will fail.
33. Paragraph 3 [n] of the Tenancy Agreement states-

The Tenant hereby agrees with the Landlord as follows-

'Not to transfer or assign this lease or sublet or otherwise part with the possession of the said premises or any part thereof without the prior written consent of the Landlord which consent shall not be unreasonably or arbitrarily withheld.'

34. The question here is whether the Tenant has transferred or assigned this lease or sublet or in any other way parted with possession of the said premises?

The Plaintiff's Counsel gave the Notice to Quit and wrote to the Defendant's counsel on 01st September, 2014 informing him of his client's knowledge that '*the Defendant has parted with possession of the property to one Linda Ah Kee without any prior written consent of the Plaintiff... and this is a material breach of the Agreement and hereby terminates the Agreement... and notify you to vacate the property no later than one (1) month..*'

In Reply the Defendant's counsel wrote back and stated- '*Our client recently entered into a partnership agreement over the operation of the said wine and dine facility and their partners have usurped her business operations including cash flow from around 1st week of July 2014.*'

Clause 7 of the Agreement states-

'RENEWAL- If the Tenant shall give to the Landlord three (3) calendar months' notice in writing prior to the expiration of the term herein created the Tenant's desire to renew this Agreement for a further term of six (6) year term and if there shall not at the time of such notice be any existing breach or non- observance of any of the agreements covenants or conditions herein contained and on the part of the Tenant to be observed or performed the Landlord shall grant to the Tenant a renewal of this Agreement for a further period of six (6) years from the date of the expiry of the period hereby created at a rental to be agreed upon by and between the parties herein subject to same terms and conditions as aforesaid'.

(Underline is mine for emphasis)

35. Paragraph 3 (n) does not include any clause or provision as to what happens if the Tenant breaches this clause. There is no **termination provision either for breach or upon notice** included in the Tenancy Agreement.

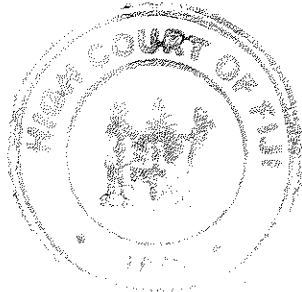
36. However, the Tenancy Agreement should be read as one document in its entirety together with the provisions therein. After all, the Defendant agreed to all the conditions contained in the Tenancy Agreement in particular **paragraph 3(n)** therein, and eventually executed the Agreement accordingly. If the Defendant has failed to adhere to any of the conditions set out therein in the agreement, then he has breached the condition in particular paragraph 3(n).
37. The plaintiff has brought this action after it came to the Plaintiff's knowledge that the Defendant has parted with possession of the property to one Linda Ah Kee without the prior written consent of the Plaintiff and that the business on the property is presently run by Ms. Kee. To this effect the Plaintiff states that Defendant's lawyers wrote back on 27th August, 2014 confirming that the Defendant recently entered into a partnership agreement over the operation of the said Wine & Dine facility.
38. There is evidence before this court of the **partnership agreement** entered upon between the Defendant and Ms. Kee. The correspondence in response to the Plaintiff counsel's letter written by the Defendant's lawyer, Muskits Law and signed by Tevita V. Q. Bukarau as the principal lawyer representing the Defendant in this case confirms that the Defendant **entered into a partnership agreement over the operation of the said Wine & Dine facility.**
39. The defendant has failed to show any cause as to why she, her employees and/or agents, business associates, family and invitees should not give vacant possession of the said property as mentioned hereinabove.
40. For the aforesaid rationale, I find that the Defendant did not take any prior consent of the Plaintiff before entering into the said partnership agreement with one Linda Ah Kee and therefore has breached the terms of the Tenancy Agreement stated at paragraph 3(n).

41. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession to the Plaintiff of the property situate at 173 Victoria Parade, Suva, Fiji comprised in Certificate of Title No. 11971 being Lot 1 on DP 2825 of which the Plaintiff is the registered proprietor and which the Defendant, her employees and/or agents, business associates, family and invitees now unlawfully occupy.
- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 18th May, 2015.
- C. Cost is summarily assessed at \$500 against the Defendant.

Dated at Suva this 17th day of April, 2015



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VISHWA DATT SHARMA
Acting Master of High Court, Suva