IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 248 of 2006

BETWEEN	:	KELTON INVESTMENTS LIMITED
		Plaintiff
AND	:	LAMI INVESTMENTS LIMITED
		Defendant
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr A. K. Singh for the Plaintiff Mr H. Nagin for the Defendant
Dates of Hearing	:	15 March, 4,5 6, and 11 April 2018
Date of Judgment	:	20 April 2018

JUDGMENT

1. The Plaintiff in its Statement of Claim says as follows:

(1) The Plaintiff is the registered proprietor of a piece of land on which is constructed a supermarket occupied by the Defendant.

(2) Circa 9 December 1998 the Defendant entered into a lease agreement (agreement) with the Plaintiff for a period of 5 years effective from 17 December 1998.

(3) Clause 3 of the agreement conferred 3 five year options to renew the lease provided:

(i) That 3 months prior to the expiry of the term a notice of intention to renew the lease is given by the lessee (Defendant) to the lessor (Plaintiff).

(ii) The lessee pays the rent on time and observes and performs the conditions on its part contained and implied in the agreement.

(4) Renewal subject to compliance with clause 3 of the agreement was to be granted by the Plaintiff on the same terms and conditions.

(5) The Defendant's solicitors wrote on 22 August 2003 giving notice to renew the lease.

(6) The Plaintiff through its solicitors notified the Defendant that it was not inclined to consider an extension due to the Defendant's failure to observe and perform certain requirements under the agreement.

(7) The Defendant continued to occupy the property as a monthly tenant.

(8) The Plaintiff did not grant a renewal of the lease to the Defendant as a result of the latter's breach of the agreement, principally clause 4 (j) and (k), by building mezzanine floors and fixtures without the consent of the Plaintiff and the consent of the Suva City Council (SCC).

(9) The Plaintiff gave notification to the Defendant to rectify the breach but the Defendant failed to do so.

(10) On 24 December 2004 the Plaintiff, through its solicitors sent the Defendant's solicitors a copy of the demolition notice received from the SCC.

(11) The Plaintiff has been receiving on a "without prejudice" basis, rent at the old rate of $11,000 per month plus VAT totaling $12,375 per month (p.m.) from September 2004.

(12) The Defendant is partially in arrears of rent from September 2004 to 31 May 2006 totalling $330,750.

(13) Wherefore the Plaintiff claims:

(i) An order for immediate vacant possession of the property known as Food For Less Supermarket.

(ii) $330,750 for the said arrears of rent.

(iii) Mesne Profits.

2. The Defendant in its Amended Defence and Counter-Claim says as follows:

(1) The Defendant having paid its rent on time and performed all the terms and conditions of the agreement was therefore entitled to renewal of the lease on the terms and conditions contained in the agreement.

(2) The Plaintiff wanted a rent higher than that stipulated in the agreement and advised renewal could be considered on increased rent.

(3) All improvements were done during the fit out period in accordance with clause 2(c) of the agreement and the Plaintiff's directors, employees etc were aware of these. The Plaintiff is therefore estopped from claiming that such improvements were in breach of the agreement. The Plaintiff did not raise any issue of breaches of the agreement during the initial term of the lease. The Defendant therefore pleads estopped, acquiescence, waiver, laches and relief against forfeiture.

(4) At a meeting held on 24 November 2003 between the Plaintiff's director James Ah Koy and Rudra Prasad of the Defendant. Mr Ah Koy suggested a monthly rent of around $25,000 to renew the lease which if agreed to by the Defendant would mean the Plaintiff would forgo (sic) all issues including that of the mezzanine floor construction. The Defendant did not agree to the increase in rent.

(5) There are 2 mezzanine floors both constructed by the Plaintiff itself and the Defendant only built a ceiling in the rafters at the rear mezzanine floor during the fit out period, with the full knowledge and consent of the Plaintiff.

(6) In its Counter-Claim, the Defendant claims:

(i) The Defendant exercised its option to renew the lease and was therefore entitled to renewal for 5 years from 17 December 2003.

(ii) The Plaintiff has breached clause 6(b) of the agreement providing for quiet enjoyment

(iii)The Plaintiff breached the agreement to provide 100 car parks by only providing 63 car parks.

(iv)Circa July 2015, the Plaintiff wrongly abolished the practice of 17 years of providing free parking for the Defendant's customers for 1 hour if they spent at least $10 at the supermarket. This and other restrictions substantially affected the Defendant's business.

(v)The Plaintiff breached clause 6(g) of the agreement by not building a walkway.

(vi)The Plaintiff breached clause 4(s) circa March 2008 by leasing premises to another supermarket, Kai Viti Supermarket.

(7) Wherefore the Defendant prays for:

(i) A declaration that the Defendant has properly exercised its option to renew the lease and is entitled to renewal of the lease from 17 December 2003 for a term of 5 years.

(ii)A declaration that the lease is valid and subsisting.

(iii)A declaration that the Plaintiff's notice to quit dated 7 October 2004 is not valid.

(iv)Damages for breach of the agreement.

(iv) Damages for loss of business.

(v) Alternatively, relief against forfeiture.

3. The Plaintiff in its Reply to the Amended Statement of Defence and Defence to the Amended Counter-Claim says inter-alia as follows:

(1) The construction of the mezzanine floor was done without the knowledge and consent of the Plaintiff.

(2) At the meeting concerned Mr Ah Koy emphasized to Mr Prasad that the mezzanine floor had to be removed and the Apex wall repaired before the Plaintiff would consider allowing the Defendant to remain on the property. The Defendant would need to enter into a new lease agreement. The Defendant was by this time fully aware that the Plaintiff was not going to renew the lease.

(3) As the agreement had expired in December 2003 and not renewed, the Defendant was holding onto the property as a monthly tenant.

4. The Minutes of the Pre-Trial Conference on 3 August 2017 record, inter-alia, the following:

Issues In Dispute

(1) Whether the Defendant has been occupying the property as a monthly tenant after expiry of the first term of the lease on 17 December 2003 or is entitled to renewal of the lease.
(2) Whether the Defendant committed breaches of the agreement.
(3) Whether the Defendant constructed mezzanine floor or only a ceiling in the rafters.

(4) Whether there are only 2 mezzanine floors and both were constructed by the Plaintiff.

(5) Whether the construction was done by the Defendant during the fit our period with the full knowledge and consent of the Plaintiff or done subsequently without the prior written consent of the Plaintiff.

(6) Whether the Defendant was required to obtain the prior consent of the SCC.

5. The hearing commenced with the Plaintiff's first witness giving evidence. He was Vuliseve Tukuna (PW1), the director, engineering services, SCC. He said various applications submitted on behalf of the Defendant for the ceiling plan and the new mezzanine floor plans were not approved by the SCC. The SCC issued a pull down order in respect of the mezzanine floor but it was not pulled down.

6. Under cross-examination PW1 said there was an attic but it was not meant for storage. That is why the notice was served.

7. The next witness was Charles Chee (PW2) a building designer. He said the mezzanine floors that were in breach of the SCC Town Planning and Fire Regulations were not done by (Plaintiff) but by (Defendant's Chand).

8. Under cross-examination PW2 said he accepted there were 63 car parks not 100. The ramp was never built. The existing mezzanine floors will breach the SCC requirements.

9. The next witness was Bobby Vijay Anand (PW3) the projects engineer with the Plaintiff. He said he inspected the Defendant's premises on a number of occassions. The SCC sent a notice of illegal structure. He noted 2 levels of mezzanine which were not approved by the SCC who gave a notice for

demolition. There was no application by the Defendant for approval by the Plaintiff for the development.

10. Under cross-examination PW3 said it was a temporary structure not a permanent one. The SCC was complaining about the ceiling. The SCC letter deals with the ceiling.

11. The next witness was Anthony Eugene James Ah Koy (PW4), a director of the Plaintiff. The new structures were not consented to by the Plaintiff, and were only discovered at the end of the original lease. They did not renew the lease beyond 16 December 2003. On every occasion they have refused renewals. They have received the original lease payments to date, without prejudice. The Defendant did not pay the increased rents for the 1st and 2nd option periods. For the 3rd option period (2013-2018) no rent rate was agreed. The Defendant has paid $11,000 p.m. to date. The Plaintiff is claiming increased rent since 2003. The shortfall for the 1st option period is $1,100p.m. plus VAT. The shortfall for the 2nd option period is $2,310 plus VAT.

12. PW4 said they informed the Defendant they were not obliged to renew the lease due to breaches. They viewed the Defendant as a month to month tenant. The PIB rate is lower than the market rate. The breaches were the mezzanine floor and the refusal to pay the correct rent. The Defendant is a month to month tenant and it has not paid the monthly rent the Plaintiff asked it to pay.

13. Under cross-examination, PW4 said the Defendant through its lawyers exercised their option. The Plaintiff exercised their right as landlord to charge month to month rent. The lease provides for a fit out period of 6 weeks prior to the commencement of the lease. The fit out does not relate to construction but only to fitting fridges etc. The Defendant was not paying the agreed rents under the expired lease. The Plaintiff did not ask the Defendant to pay the correct rate.

The Plaintiff wanted $25,000 rent and for the Defendant to remove the mezzanine because it affected their public liability insurance. The rent of $11,000p.m. has been paid since December 1998 till April 2018.

14. PW4 continued the Plaintiff did not want to renew the lease because of the insurance problems. The Plaintiff was not in breach of the agreement before 16 December 2003. The Plaintiff had no need to discuss a discount as it considered the lease had expired. No action was filed against the Plaintiff. He denied the Plaintiff constructed the 2 mezzanines. They reported to the SCC as they were legally obligated to.

15. In re-examination PW4 said the Plaintiff never applied to the SCC for the mezzanines 3 and 4 which were constructed by the Defendant. With that the Plaintiff closed its case and the Defendant opened its case.

16. It's first witness was Rudra Prasad (DW1) who said he was the managing director of the Food For Less Supermarket. He said the Plaintiff built the rear mezzanine and the front mezzanine. He said up to July 2015 the Plaintiff provided 2 car parks for the exclusive use of the supermarket. The Plaintiff breached the agreement at the end of 2007 when it leased to another supermarket. The Defendant exercised all 3 options in timely manner. He said mezzanine 4 was built by the Defendant during the fit out period. The Plaintiff never gave consent.

17. During cross-examination, DW1 said he paid rent at the rate for the original period of the lease ($11,000) from December 1998 to the present date. He said the SCC approval is required before execution of such works, in general. He did not get the Plaintiff's consent.

18. The second witness was Abhinesh Ashish Chand (DW2), a graduate engineer. He said he did not go to the premises in 1998. He did not know anything about the plans in 1998. He first saw them in 2005. He tendered the SCC letter of 4 February 2005 as Exhibit D7.

19. During cross-examination DW2 said they did not certify anything for insurance purposes. They did not get approval from the SCC.

20. The next witness was Vijeet Saawan Subrail (DW3). He is a qualified accountant. He said they picked the figures from the annual financials. For a lease expiring in December 2018 $2,274,586.80 is a conservative figure.

21. During cross-examination DW3 said the figures were based on the unaudited figures submitted to the Revenue. With that the Defendant closed its case.

22. The oral submissions then began. The Plaintiff's counsel said the notices were given within time. The Plaintiff declined to grant an extension because of the alterations done without the prior written consent of the Plaintiff. Counsel said "will" in clause 3(a) of the agreement meant "shall", but the conditions were not complied with by the Defendant.

23. The Defendant also needed to ensure it did nothing against the SCC Rules nor against the insurance. The Defendant therefore could not seek an automatic renewal of the lease. The measure of damages is the market rental value. The Defendant is a trespasser since the end of the 1st lease i.e. 2004, and if the Court found that this was so, the Court should give immediate vacant possession plus 30 days or else in December 2018. With regard to the Defendant's Counter-Claim, it's breach and illegality still remains.

24. The Defendant's Counsel then submitted. He said the Defendant did not get the consent of the Plaintiff nor the approval of the SCC because it was removable. Some discount should be given, the amount of which is to be decided by the Court. The Plaintiff is in breach by not granting an extension in December 2003. Estoppel operates in favour of the Defendant and it is entitled to stay till December 2018.

25. The Plaintiff's Counsel in his reply said that because the breaches were not rectified, even the 1st option could not be granted. The absence of approval from the SCC meant the Plaintiff could not acquiesce..

26. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I shall now deliver my decision. The facts of the matter are contained within a small compass. So I shall start with the lease agreement made the 9th day of December 1998. Clause 3(a) provides if the Defendant shall during the said term pay the rent and observe and perform the conditions on its part and shall give at least 3 calendar months notice before the expiration of the agreement then the Plaintiff will grant 3 options for a renewal tenancy.

27. I pause to note that the words used, "shall" and "will" mean the same thing. The Oxford Advanced Dictionary of Current English defines "shall" as "obligation". So if the Defendant performs all its obligations then the Plaintiff is obliged to renew the term of the lease. There is no dispute that the Defendant gave the requisite notice in time. The dispute is whether the Defendant had performed the conditions imposed on it. In response to the Defendant's solicitors' letter of 22 August 2003, the Plaintiff's solicitors by their letter of 2 October 2003 made it clear that the Defendant had failed to observe and perform certain (conditions) and "for this reason our client is not inclined to consider an extension of your client's tenancy on the property".

28. From the evidence before this Court, it was clear that the Plaintiff was contending that the Defendant had during the currency of the original period of the lease breached clause 4(k) (ii) and (iii) which respectively prohibit the Defendant without the prior written consent of the Plaintiff making alterations in or to the premises, and doing anything that may conflict with any insurance policy or the regulations or by-laws of any public authority. As these are in the evidence reproduced in the earlier part of this judgment I do not need to repeat them here. In any event they are to be found in the Plaintiff's letter of 18 November 2003 to the Defendant wherein it is stated that the Defendant has "built a series of mezzanine floors and fixtures in our building without:

1. The Landlord's consent and approval

3. The Suva City Council's approval of your plans and specifications.

These are all breaches of our lease with you".

And in the Defendant's letter to the Plaintiff dated 27 November 2003 which stated inter-alia, "the mezzanine floor structure that we built at our cost more than 3 years ago".

29. In my opinion this proves conclusively that it was the Defendant which built the mezzanine circa 2000 (during the lease) and not during the fit out period in 1998. Thus the issue has to be resolved in favour of the Plaintiff. The Plaintiff was not obliged to grant a renewal because the Defendant was not entitled to be granted a renewal because of its own admitted breach of the agreement.

30. The upshot is the lease has expired by effuxion of time, and the Defendant is staying on as a monthly tenant. (see para 8 of the Statement of Claim). Proviso (f) of the agreement provides that if "the Lessee continue to occupy the premises beyond the expiration of the said term with the consent of the lessor it shall do so as a monthly tenant at a monthly rent equal to one month's proportion of such tenancy being determinable at the will of either the lessor or lessee by one month's notice in writing expiring on any day of the month". This is further

substantiated by the evidence from both sides that the rent is being paid and received on a monthly basis. Finally the correspondence from the Plaintiff to the Defendant show clearly that the Defendant is occupying the premises with the Plaintiff's consent. For instance the Plaintiff's letter of 29 January 2004 only demands that the Defendant dismantles the illegal mezzanine. Then the Plaintiff letter of 6 January 2008 (4 years after the lease expired) confirms "the premises you are renting from ourselves on a monthly basis". Therefore on the evidence I do not find that the Defendant is a trespasser on the premises. Consequently I do not hold that it is liable to pay mesne profits which is damages for the illegal/wrongful occupation of the premises. Mesne profits are usually considered to be the equivalent of the fair market rent for the premises. As I have found the Defendant is not a trespasser there is therefore no call for me to assess the quantum of mesne profits that it would otherwise be liable to pay. Indeed by clause 2(a) the rental for the first 5 years shall be $11,000 per month plus VAT. This is the rent being paid by the Defendant to date. Adding the words "without prejudice" are therefore devoid of any legal effect. Also there can be no claim by the Plaintiff for arrears (short payment) of rent.

31. So much for the Plaintiff's claim. I now turn to the Defendant's Counter-Claim for declarations and damages. For the reasons that I have not allowed the Plaintiff's claim, I also do not allow the Counter-Claim. The lease was not renewed and this the Plaintiff was entitled to do. Thus there can be no damages for breach of the Agreement and no damages for loss of business. If indeed the Defendant were suffering any loss of business it should have speedily vacated the premises when the lease was not renewed, with one month's notice, which it did not do. Further the Defendant cannot make any alleged counter-claims which from the evidence, both documentary and oral, only arose many years after the expiry of the original lease. Finally in the light of the order I am going to make, relief from forfeiture is redundant.

32. In the result I make the following orders:

(1) The Plaintiff's claim [except (i)] is dismissed.

(2) The Plaintiff's claim in (i) is allowed and the Defendant is ordered to quit and deliver vacant possession of the premises known as Food For Less Supermarket, Rodwell Road, Suva to the Plaintiff on or by 31 May 2018.

(3) The Defendant's Counter-Claim is dismissed.

(4) In the circumstances, each party is ordered to pay its own costs of the entire proceedings (claim and counter-claim).

Delivered at Suva this 20th day of April 2018.

David Alfred

JUDGE

High Court of Fiji