IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 163/20

IN THE MATTER of Order 113 High Court Rules

BETWEEN **MADHU KANT & UMA KANT** both of Sabeto, Nadi, Cultivator & company secretary respectively

PLAINTIFFS

AND **NAREND NAIR** of Waimalika, Sabeto, Farmer

DEFENDANT

APPEARANCES : Mr C Young for the Plaintiff
Mr N Nambiar for the First Defendant

DATE OF HEARING : 3 November 2020

DATE OF JUDGMENT : 15 February 2021

DECISION

1. This is an application by the plaintiffs under Order 113 High Court Rules seeking an order for possession of land owned by them as tenants under Instrument of Tenancy 8421 issued by the iTaukei Land Trust Board under the Agricultural Landlord & Tenant Act. The land conveyed under the tenancy consists of 4.6688ha owned by the Mataqali Nakabunikoro, Nasivi tokatoka known as Taukomomo No.6 Subdivision Lot 1 in the tikina of Sabetor. The Instrument of Tenancy was registered on the 7th August 2002, but is effective for a term of 30 years from 1 January 2000. Rent is $1200 per year.

2. In a very brief affidavit in support of the application, one of the plaintiffs, Madhu Kant produces copies of the Instrument of Tenancy, and of the notice to vacate issued to the defendant by the plaintiff's solicitors. The affidavit says nothing about the circumstances whereby the defendant came to be in occupation of the land, but does say in paragraph 3:

> *At all material times the Defendant has been occupying and using the property without our permission or consent.*

This is more of an allegation or a submission than it is evidence. It would have been much more informative had it explained what he regarded as 'all material times', and for how long, for what purpose the defendant was in occupation, and his relationship – if any – with the defendant. I note that rule 3 of Order 113 states:

Affidavit in support (O.113, r.3)

3. The plaintiff shall file in support of the originating summons an affidavit stating:

(a) his interest in the land;

(b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and

(c) that he does not know the name of any person occupying the land who is not named in the summons.

If the plaintiff's affidavit complies with this rule it is by the barest margin. No objection was taken by the defendant to any absence of evidence in this area, and there is no suggestion that there are any other, unnamed persons participating in the defendant's occupation.

3. Perhaps fortunately for the plaintiffs, the defendant's affidavit in opposition is even more cryptic. Mr Nair neither admits nor denies the status of the plaintiffs or the existence of the lease (since it is not a denial this must be taken to be an admission). He complains that there is no evidence of the first-named plaintiff's authority to represent the second-named plaintiff – but I don't know why such authority is necessary. He annexes a letter from the Sabeto Central Advisory Committee dated 8 June 2020 to the iTaukei Land Trust Board (the truth of which he obviously accepts, although there is no evidence as to the role and status of the Committee, or from where it obtained its information) that sets out something of the history of the land as follows:

> *Dear Sir*
> *With our advisory capacity we would like to inform that Late Mr Ram Baran Settled with late Dhanbhagyam with her three kids namely: Narend Nair, Satend Nair and Gyanendra Nambiar – in a defector relationship in the year 1963. He build a small house for Dhanbhagya & the kids to stay for life on the ILTB. After 4 years Dhabhagyam has two sons name Rajesh Baran (DOB – year 1965) and Sanjesh Baran (DOB 19.07.68).*
> *On 28th October 1989 Mr Ram Baran passed away. We can confirm that Gyanendra Nambiar Looked after Dhanbhagyam and updated the house and carried out maintenance works on it. Gayanendra Nambiar also had the consent from the land owners but was not issued a separate lease by ILTB.*
> *Dhanbhagyam passed away on 21/04/20. We also confirm that Gayanendra and Brothers are staying there for more than 50 yeas and now the step brothers Name Uma Kant and Madu Kant is asking them to vacate the premises.*
> *Seeing for a fair decision from your honorable office as per the land owners letter attach.*

Also annexed to Mr Nair's affidavit is a letter from the mataqali also indicating to ILTB the land owners knowledge and acceptance (for what it is worth) of the defendant's presence on the land.

4. However, these letters do not, nor does the defendant anywhere else, explain his presence on the land, his relationship with the plaintiffs, how long he has been in occupation of the land and for what purpose, or any basis upon which he claims to be entitled to remain there.

5. Not in any way relenting from his determination to provide only the bare minimum of information, the plaintiff, in a 5- paragraph affidavit in reply says that the defendant has been in occupation of the plaintiffs' land only since 2016, that the

defendant and his brothers own and occupy an adjoining piece of land under a residential lease from the ILTB, and that they (the plaintiffs) are the sons of Ram Baran. From this I take it that Dhanbhagyam was their de facto step-mother, and that the defendant is their step-brother. I also assume that in some way the death of their step-mother in 2020 has triggered the present application, but I don't know why. It would have been so much simpler, both for the parties and the court, if this evidence had been properly set out in the plaintiffs' first affidavit. Instead their failure to explain this background leads to the suspicion that relevant but inconvenient facts are being selectively hidden. When both parties engage in this conduct the court can have little confidence about its ability to administer justice.

The law

6. Order 113, rule 1 states:

> ***Proceedings to be brought by originating summons (O.113, r.1)***
> *1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.*

7. It is clear from the cases applying this rule that Order 113 provides a procedure to deal summarily (and hopefully quickly) with claims to which there is clearly no defence. The point is made in the decision of the Court of Appeal of England and Wales in **Dutton v Manchester Airport** [1999] 2 All ER 675 at 679 as follows:

> *Order 113 was introduced in 1970 (by the Rules of the Supreme Court (Amendment No 2) 1970, SI 1970/944), shortly after the decision of this court in* ***Manchester Corp v Connolly*** [1970] 1 All ER 961, *[1970] Ch 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right--that is to say, against trespassers. The order does not extend or restrict the jurisdiction of the court. In* ***University of Essex v Djemal*** *[1980] 2 All ER 742 at 744,* [1980] 1 WLR 1301 *at 1304 Buckley LJ explained the position in these terms:*
>
> > *'I think the order is in fact an order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, un-interfered with by unauthorised adverse possession.'*

Also relevant to this issue is the commentary in The Supreme Court Practice, 1993 (the White Book) Vol 1, O.113/1-8/1 at page 1603 as follows:

> *This Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without a licence or consent and without any right title or interest thereto.*

8. In a decision in September 2019 in **Nadhan v Reddy** [2019] FJHC 894; HBC131.2016 (18 September 2019) Master Azhar undertakes a thorough analysis of the purpose and application of Order 113, concluding that review with the following comment (at paragraph 13 of his decision):

> *The above decisions and the commentary on this Order 113 makes it manifestly clear that, the courts must be satisfied that there is no reasonable doubt on, (a) the claim of the plaintiff and (b) on the wrongful occupation of the defendant. It follows that, it is the duty of the plaintiff, who invokes the jurisdiction of this court under this Order, to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his claim to recover the possession of the land. In that process, he must be able to show to the court his right to claim the possession of the land and then to satisfy that the person or persons (not being a tenant or tenants holding over after the termination of the tenancy) entered into the land or remained in occupation without his licence or consent or that of any predecessor in title. Once the plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant. Then, it is incumbent on the defendant, if he wishes to remain in possession, to satisfy the court that he had consent either from the plaintiff or his predecessor in title. If the defendant can show such consent, then the application of the plaintiff ought to be dismissed*

a summary that I gratefully adopt

9. In dismissing an appeal against the decision in **Nadhan v Reddy** ([2020] FJHC 798) I said at paragraph 8:

> *What emerges from the decision of the Court of Appeal [in **Greater London Council v Jenkins** [1975] 1 All ER 354] is the necessity for the plaintiff to show that there is no basis upon which the occupier/defendant is entitled to remain on the property. Where the original entry into occupation was with the consent or licence of the owner, the plaintiff must show that the right of occupation has been terminated. That is much easier for the plaintiff to do if it is clear how the right of occupation arose in the first place. If the occupation arose from a tenancy or licence, the plaintiff must show that that tenancy or licence has been properly and unequivocally terminated. If the plaintiff cannot do so, or if there is a factual dispute about the effectiveness of the termination, or if there is some other alleged basis for occupation which is contentious, an application under Order 113 will probably not be appropriate.*

10. When it comes to the defendant's opposition to an application under Order 113, the burden of showing that they have a case that justifies refusing the plaintiff's summary application is not particularly high, particularly if it is based on a factual dispute. The summary nature of the jurisdiction is not suited to resolving contested issues of fact requiring evidence, cross-examination etc. But the court is not credulous, and it is not the court's function to make assumptions to fill in gaps in evidence left by the parties. In its decision in **Eng Mee Yong v Letchumanan** [1979] 3 WLR 373 the Privy Council (per Lord Diplock) made the following often quoted comment in a case involving the removal of a caveat:

> *Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he may think just the Judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements*

contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

Although the case concerned the removal of a caveat, the Privy Council made clear how the principles are not vastly different from those that apply to interim injunctions, and – I would add – applications under Order 113. All are cases that are, in a sense interlocutory, at least when assessment is necessary of the case that is raised against the status quo. Again, quoting Lord Diplock from **Eng Mee Yong**:

> *The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a "probability", a "prima facie " case or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried.* ***American Cyanamid v. Ethicon Ltd.*** *[1975] AC 396.*
>
> *This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.*

11. Because of the summary nature of an application under Order 113, and because of the wording of the rule itself, it is clear that the court does not, in an application for possession, embark on an assessment of the balance of convenience. Instead, if the defendant is able to present evidence and/or argument that reaches the 'serious question' level as to both fact and law, he is entitled to have the application under section 113 dismissed, so that the plaintiff pursues its application for possession in ordinary proceedings where the issues raised can be properly explored and decided.

Analysis

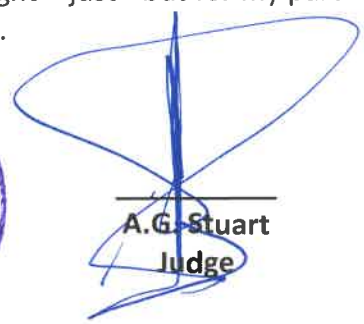
12. Applied to the present case, these principles mean that the defendant must point to some basis on which he is entitled to remain on the plaintiffs' land. He has not done so, and while from the meagre evidence provided on both sides I can imagine that there might be facts arising from the parties' relationship that would be the basis of such an argument, it is not for the court to speculate about whether such facts exist, or otherwise to fill in the gaps that have been left. It is just as likely that there are no such facts, because surely, if there had been, the defendant and his advisers would have taken steps to ensure that those facts came before the court. It is not enough to establish a case, for the defendant to show that others know of his situation and support him, which is all that the letters from the mataqali and the Sabeto Central Advisory Committee (whatever function it serves) show. What the defendant needed to show, but has not, is that there is some basis whereby he is arguably entitled to remain in occupation of the land against the wishes of the plaintiffs, who, on the evidence of the Instrument of Tenancy, are clearly entitled to possession.

13. I do not agree with the the defendant's submission that the plaintiffs are obliged to obtain the consent of ILTB to their application, and/or to join the Board as a party to these proceedings. The ILTB has issued a lease to the plaintiffs, and the plaintiffs are entitled to enjoy all the benefits of their tenancy, including – unless they have in some way compromised that right (e.g. by the conferment of a sub-lease or licence to the defendant) – the right to possession and occupation of the land. There is no role that the ILTB has to play in the exercise of those rights by the plaintiff. Even if there is some issue of compliance with the terms of their tenancy, that is a matter between ILTB and the plaintiffs only, and cannot be raised by the defendant as an answer to the present application.

Conclusion

14. Accordingly, the plaintiff is entitled to an order against the defendant for the immediate possession of the property (including any dwelling thereon) held by the plaintiffs as tenants under Instrument of Tenancy 8421 described in the application, and I so order.

15. I should add that the brevity of the plaintiff's evidence is such that, had it not been for the complete failure of the defendant to articulate any basis upon which he was entitled to remain on the property, the application would likely have failed. Of course, the plaintiffs may say that they provided sufficient evidence to justify their application. They are right – just - but for my part I would have expected more, and I make no order for costs.



A.G. Stuart
Judge

At Lautoka this 15th day of February, 2021

SOLICITORS:
Young & Associates, Lautoka for the applicant.
Gosai & Nambiar Lawyers, Suva for the defendant