CENTRAL RENTALS LIMITED

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v.

PATTON & STORCK LIMITED

[COURT OF APPEAL, 1996 (Tikaram P, Casey, Handley JJA) 16 August]

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Civil Jurisdiction

Landlord and tenant- whether Registrar of Titles entitled to cancel a lease- whether exercise of power by Registrar subject to challenge in Court- breach of covenant- whether right of re-entry or forfeiture restricted where only a part of the demised premises are sublet. Land Transfer Act (Cap. 131) Sections 57
C *and 168; Property Law Act (Cap. 130) Section 105 (8) (a).*

The landlord alleged a breach of covenant by the tenant against subletting and on this ground the Registrar of Titles cancelled the lease. On appeal the Court of Appeal HELD: (i) in the absence of lawful re-entry and recovery of possession by the landlord the power of cancellation given to the Registrar was not exercisable
D (ii) the exercise by the Registrar of his power was subject to challenge in the High Court under Section 168 of Cap. 131 (iii) prior to exercising his power the Registrar must give notice to all persons "interested in the lease" including the tenant and (iv) a tenant who in breach of covenant has sublet part of the demised premises has no right to apply for relief against forfeiture on the ground of the breach.

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Cases cited:

Abrahams v. Mac Fisheries Ltd. [1925] 2 KB 18
Barrow v. Isaacs & Son (1891) 1 QB 417
Brooker's Colours Ltd. v. Sproules (1910) 10 SR (NSW) 839
F *Carrington Co. Ltd. v. Saldin* (1925) 133 LT 432
Cook v. Shoesmith [1951] 1 KB 752
Frazer v. Walker [1967] 1 AC 569
Jackson v. Simmons [1923] 1 Ch 373
Laffer v. Gillen [1927] AC 866, 40 CLR 86
Lam Kee Ying v. Lam Shes Tong [1975] A.C. 247
G *McKinnon v. Portelli* 60 SR (NSW) 343
Moore v. Ullcoats Mining Co Ltd. (1908) Ch 575
Niranjan v. A.G. (1959) 5 FLR 78
Ram Kali v. John Bayly (1954) 4 FLR 139
Ranjit Singh v. Gordon Speakman CA 254/92
Re Register [1958] NZLR 1050
Russell v. Beecham [1924] 1 KB 525

Shiloh Spinners Ltd. v. Harding [1973] AC 691
Town v. Stevens (1899) 17 NZLR 828

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H.K. Nagin for the Appellant
H. Lateef for the Respondent

Judgment of the Court:

This is an appeal from the judgment of Fatiaki J. in a landlord and tenant case. B
The subject lease (20187) granted on 24 March 1939 for a term of 75 years was registered on 29 March 1939. The appellant (the landlord) is the successor in title of the original landlord, and the respondent the equitable assignee of the original tenants. The respondent failed to pay the rent due on 1 July 1993 and on 20 December that year the appellant issued a month's notice to quit expiring on 31 January 1994. The notice alleged breaches of covenant by sub-letting part of C
the premises without first obtaining the landlord's written consent, and failure to pay rent. On the same day the landlord returned the respondent's cheque dated 27 October 1993 for the rent due on 1 July.

On 15 February 1994 the landlord applied to the Registrar of Titles under s.57 of the Land Transfer Act (Cap. 131) "for registration of its re-entry on and recovery D
of possession of the land comprised in the above mentioned lease No. 20187". The only ground relied on in the notice to the Registrar of Titles was the alleged breach of the covenant against subletting. Notice of that application was given to the respondent on 14 February. The Registrar purported to cancel the lease the day the landlord's application was lodged. This is surprising since the statutory declaration of Jameela Sherani sworn 14 February 1994 lodged on behalf of the E
landlord stated that the application had only been served on the respondent the day before.

Para (b) was included in s. 57 on the enactment of the Land Transfer Act following the repeal of the Land (Transfer and Registration) Ordinance (Cap. 136) (1955). Its evident purpose was to reverse the effect of Ram Kali v. John Bayly (1954) 4 F
FLR 139 to ensure that a lessee is given a reasonable opportunity to make submissions to the Registrar against the cancellation of the lease and if necessary to take court proceedings.

On 30 March 1994 the respondent commenced proceedings by originating summons in the High Court claiming a declaration that the Registrar of Titles G
had unlawfully cancelled the lease, and for an order that it be re-instated as a valid lease on the title. The landlord, the Registrar of Titles, and the Attorney-General, were named as defendants.

On 19 January 1995 the trial judge delivered his reserved judgment, in which he found for the respondent and ordered that it be relieved from forfeiture of the

lease on condition of paying $480, the arrears of rent, into Court for payment out to the landlord, and he ordered the Registrar of Titles to correct the register by cancelling the notification of the re-entry on the certificate of title. He also ordered the respondent to pay the landlord $1,500.00 compensation for illegal alienation and restrained it from "continuing to alienate" any part of the leased property to the unauthorised sub-tenant Arun Mishra.

The landlord appealed to this Court, naming the plaintiff in the proceedings in the High Court as the sole respondent.

The lease contained a forfeiture clause in the following terms:-

> "13. It is hereby agreed that if the said rent or any part thereof shall be in arrear for the space of seven days after any of the days whereon the same ought to be paid as aforesaid ... or if there shall be any breach or non - observance of any of the Lessee's covenants herein contained then and in any of the cases it shall be lawful for the Lessor at any time thereafter to re-enter into and upon the said premises or any part thereof in the name of the whole and the same to have again and re-possess and enjoy as in his former estate ..."

The Judge found that the landlord had not validly forfeited the lease because it had neither re-entered physically, nor effected a constructive re-entry by commencing an action for possession.

Section 57 of the Land Transfer Act provides, so far as relevant; -

> "The Registrar, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor either by process of law or in conformity with the provisions for re-entry contained ... in the lease, shall cancel the original of such lease and enter a memorial to that effect in the register..."

When the landlord applied on 15th February 1994 for cancellation of the lease under this section it had not recovered possession of the property. The respondent was still in possession. Compare Niranjan v. A.G. (1959) 5 FLR 78. The land lord not issued process of law to recover possession, and its claim to have re-entered was based solely on the service and expiry of its notice to quit.

The Judge held that the notice to quit did not effect a re-entry but instead had waived any such right by recognising the subsistence of the lease for a further six weeks. The landlord had not given a notice under s.105 (1) of the Property Law Act requiring the tenant to remedy the breaches of covenant relied upon. This subsection provides that a right of forfeiture is not "enforceable by action or otherwise" unless and until such a notice has been served. The landlord however

sought to bring itself within s.105 (8) (a) which provides:-

"The provisions of this section shall not extend - A

(a) to a covenant or condition against assigning, sub-letting, parting with the possession, or disposing of the land leased;"

The relevant covenant in clause 1, provided:-

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"The Lessee will not transfer or sublet or part with the possession of the said premises or any part thereof without the previous consent in writing of the Lessor but so that such consent shall not be unreasonably arbitrarily or vexatiously witheld".

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The covenant, in accordance with good conveyancing practice, bound the tenant not to transfer or sublet the premises " or any part thereof". However the Judge following English authority, held that s. 105 (8)(a) only excluded from s. 105 (1) those cases where the covenant restricted alienation of the whole of the leased land and had no application to a covenant to the extent to which it restricted alienation of only part. D

He therefore granted the relief previously referred to and also a declaration that the Registrar of Titles had improperly and unlawfully cancelled the lease, although this was not included in the formal orders of the High Court.

Procedural Challenges E

The landlord's notice of appeal challenged the judgment on both procedural and substantive grounds. Grounds 1 and 7 claimed that the trial judge had erred in granting relief which was not pleaded or available under s. 168 of the Land Transfer Act and in granting relief against forfeiture under s. 105 of the Property Law Act when no such remedy had been sought. F

Ground 14 challenged the summary dismissal of the landlord's action for possession No. 183/94.

The respondent's summons stated that it was issued pursuant to s. 168 of the Land Transfer Act. This section applies in litigation between parties where there G is no challenge to any decision of the Registrar, but we see no reason why it should not extend to cases where the Registrar has made entries in the register unlawfully or in error but is not willing to apply to the High Court under s.166 to have the register corrected. There is nothing in Part XXIV of the Act "Special Jurisdiction of the High Court" to exclude its ordinary jurisdiction to protect property rights and to grant relief against unlawful administrative action. It

appears to us therefore that the first claim in theRespondent's summons was either authorised by s. 168 as a proceeding respecting land subject to the Act, or it invoked the High Court's general jurisdiction over the Registrar of Titles in respect of unlawful administrative action on his part.

The Respondent did not plead any claim for relief against forfeiture, and no such claim was raised orally before the Judge, although there was argument as to the effect of s.105 (1) and (8) (a) of the Property Law Act. There is no necessity for a tenant to plead a claim for relief against forfeiture. See Lam Kee Ying v. Lam Shes Tong [1975] A.C. 247 at 257 and the cases there cited. However there must at least be an informal application for such relief.

In this case no such application was made as the trial Judge noted (Record 82), although he thought that this "does not preclude the exercise by this Court of its ancient equitable jurisdiction to relieve against forfeiture of a lease." However equity does not act in such matters of its own motion and in our view the trial Judge had no power to grant relief against forfeiture when such relief had not been sought at least informally by the respondent. The orders granting such relief must therefore be set aside. There is a further difficulty about these orders because, as will appear, we consider that when these proceedings (156/94) were commenced in the High Court on 30 March 1994 the landlord had not forfeited the lease or made any effective attempt to do so. There was therefore no forfeiture from which the respondent could be relieved.

On 20 April 1994 the landlord commenced an action (183/94) to recover possession of the property. As the trial Judge explained, service of such proceedings constituted an unequivocal election by the landlord to exercise any subsisting right to forfeit the lease.

No order was ever made consolidating action 183/94 with action 156/94. Action 183/94 was before the trial Judge on 13 September 1994 for mention only when action 156/94 came on for trial. That day the Judge noted "the outcome of this application may or may not be determined by the Court's decision in 156/94."

The second action was never listed for hearing before the trial Judge and without hearing the parties he simply said in his reserved judgment in 156/94:-

> "For the sake of completeness the Defendant company's application in civil action 183/94 is hereby dismissed".

In our view, and with respect, the trial Judge was not entitled to summarily dismiss this action without hearing the parties. The validity of the landlord's claim to forfeit the lease by service of process in this action has never been determined, and the respondent has never had an opportunity to seek relief against any such forfeiture. In our opinion therefore the order dismissing action 183/94

must be set aside, and the action remitted to the High Court.

Substantive Challenges

On 20 December 1993 the solicitors for the landlord served a notice on the respondent directed to it and the original tenants giving "one month's notice... ending on 31 January 1994 to quit and deliver possession of our clients premises" on the ground of sub-letting part without consent, and non payment of rent. The notice threatened court proceedings if the premises were not vacated within the stipulated time.

This was not an unequivocal election by the landlord to immediately forfeit the lease, and it did not operate as a re-entry. Indeed it recognised the right of the tenants to occupy the premises for a further six weeks. We agree with the conclusion of the trial Judge on this question, supported as it was by the decisions in Town v. Stevens (1899) 17 NZLR 828 at 830 - 1, Moore v. Ullcoats Mining Co Ltd. (1908) Ch 575 at 587 - 8; Re Register [1958] NZLR 1050 at 1054: and McKinnon v. Portelli 60 SR (NSW) 343 at 350.

It is clear therefore that the landlord's application to the Registrar of Titles on 15 February 1994 for cancellation of this lease was misconceived. Whatever the merits of the landlord's claims, it had taken no effective steps to forfeit the lease either by physical re-entry, or by bringing an action for possession. The landlord's application for cancellation of the lease should therefore have been rejected. Moreover in our view the Registrar had no power to cancel the lease only one day after notice of the application had been given to the respondent, but was bound, when he knew that the respondent was still in possession, to wait a reasonable time, before attempting to proceed.

The Court does not need in this case to determine the nature of the Registrar's power under s. 57 of the Land Transfer Act, or the purpose of the notice which s.57 (b) required to be served on "all persons interested under the lease", but we do not wish to cast doubt on the views of the trial Judge and of Scott J. in Ranjit Singh v. Gordon Speakman CA 254/92 on these questions. Mr Nagin however submitted that s.57 (b) did not require notice to be given to the actual tenant, but only to any other persons who were "interested under the lease". He referred us to a number of sections which contained express references to the lessee, and said that if Parliament had wished to refer to the lessee in s. 57 (b) it would have said so. However in our opinion the expression "persons interested under the lease" was not intended to exclude the lessee, but to include other persons as well such as mortgagees, subtenants or assignees. The tenant is a person interested under the lease, and the respondent, as equitable assignee, was also in that position.

Mr Nagin then submitted that the Registrar's action operated to cancel the lease and its validity could not be questioned in the High Court, and he relied on the

decision in Laffer v. Gillen [1927] AC 866, 40 CLR 86. We agree however with the view of the trial Judge that this decision is distinguishable. The ratio of that case so far as it is presently relevant appears at page 897 (96) where their Lordships having referred to the section in the South Australian Act corresponding to s. 57 said :-

> "The Registrar is directed to make the entry in the Register by which effect is given to the forfeiture or determination on receipt of the notice from the Commissioner that the Crown Lease in question has been lawfully forfeited. In this respect the Crown lease is placed in a different position from that occupied by an ordinary lease. In this latter case the lessor, seeking to have registered the fact of re-entry, has to prove the fact, and that it has taken place in manner prescribed by the lease to the satisfaction of the Registrar. The Registrar is then to make an entry in the Register, and the estate of the lessee in the land is then to determine ... When once he has satisfied the Registrar and the necessary entry has been made in the Register, the validity of the re-entry cannot be questioned, for the statute provides that the estate of the lessee in the land shall thereupon determine..."

The Registrar of Titles was bound in Laffer v. Gillen case to record the cancellation of the lease by the Commissioner, having a purely ministerial function, but in the present case the Registrar had to be satisfied of certain matters before he could exercise his power under s.57. Mr Nagin's submission is supported by the statement of their Lordships as to the position with private leases but these were only dicta because the lease there in question was a Crown lease and the issue of the indefeasibility of the register was not before their Lordships for decision.

The plaintiff in that case sued the Minister for trespass for his ejectment from the property formerly leased by him from the Crown. The Registrar of Titles was not a party to the action, and no application was made to rectify the register by removing the memorial cancelling the plaintiff's lease. It is not surprising therefore that their Lordships said (897, 96) "that the validity of the re-entry cannot be in question." They later referred in passing (898, 97) to possible remedies for any hardship to individuals resulting from erroneous entries on the Register, but added:-

> "their Lordships express no opinion on the matter, as the point was not really before them."

We are unable to treat Laffer v. Gillen as a decision that the entry by the Registrar of Titles on the register of a memorial cancelling a lease cannot be challenged in the High Court. On that question we consider we should follow Frazer v. Walker [1967] 1 AC 569, a considered decision of the Privy Council, which dealt fully with the question of indefeasibility of title under the Land Transfer Act 1952 (NZ).

At 585 their Lordships said that registration under that Act -

> "...in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a Court acting in personam may grant."

Similarly the Fiji Act does not deny the right of a plaintiff to bring an action against the Registrar of Titles for such relief based on the Registrar's own wrongful acts or omissions. See also Brooker's Colours Ltd. v. Sproules (1910) 10 SR (NSW) 839 at 841-2 where registration of the cancellation of a lease was held to be no bar to the enforcement of the tenant's equity to relief against forfeiture.

In our judgment the Registrar of Titles had no power on 15 February 1994 to cancel lease 20187 and his action in doing so was unlawful and the entries he made were erroneous. No further dealing with the land was registered after entry of the memorial cancelling the lease. The respondent was therefore entitled to have the register corrected by the removal of the erroneous entry. We therefore affirm the first declaration made by the trial judge in terms of paragraph 1 of the respondent's summons and his order under s.189 of the Land Transfer Act directing the Registrar of Titles to remove the entry cancelling the lease from the Certificate of Title.

The remaining issue in the appeal concerns the effect of s.105(8)(a) of the Property Law Act. The judge held that this was not applicable because the breach of covenant relied on related to only part of the premises, whereas sub s.8(a) only excluded covenants against alienation "of the land leased." If the covenant, to the extent to which it prohibited partial alienations, fell outside s.105(8)(a) the landlord would be bound by s.105 (1) to issue a notice to remedy any breach before proceeding to a forfeiture, and the respondent could apply for relief against forfeiture under s.105(2). If, however, the relevant part of the covenant fell within sub s.(8)(a), the landlord would not be required to serve a notice to remedy the breach, and the respondent would not be entitled to apply for relief against forfeiture under s.105(2).

Section 105(8)(a) is based on s.14(6)(i) of the Conveyancing Act 1881 (Eng) which was repealed by the Law of Property Act 1925 and not re-enacted as part of s.146 of that Act. In Jackson v. Simmons [1923] 1 Ch 373 Romer J. held that the section did not apply to a covenant to the extent to which it restrained the tenant from sharing possession or occupation of any part of the premises. The decision is not directly in point but during argument at 377 the judge also said:

> "The sub section in terms relates only to the 'land leased'; there is no reference to "any part thereof."

The point arose in Russell v. Beecham [1924] 1 KB 525. Two members of the

court, Bankes & Atkin LJJ, expressed no opinion on it but Scrutton LJ held that s.14(6)(i) did not apply to a covenant not to alienate or part with the possession
A of only part of the premises (536-7 and see also during argument at 531).

The trial judge accepted the reasoning of Romer J. and Scrutton LJ in the passages referred to, and there was every reason for him to do so when he was not referred to any other authority. However Mr Nagin, who did not appear below, referred us to two later decisions of single judges to the contrary namely Abrahams v.
B Mac Fisheries Ltd. [1925] 2 KB 18 and Carrington Co, Ltd. v. Saldin [1925] 133 LT 432. In the first of these cases Frazer J..refused to follow the view of Scrutton LJ and said at 35 that it was in accordance with the spirit of the Act, and the history of the law as to relief against forfeiture to give a wider meaning to sub s.(6)(i) "so that a covenant against parting with the possession of part of the premises is within the exception in sub s.(6)." He relied on the fact that
C many cases had been decided in England after 1881 in which the point was not taken on behalf of the tenant where the court assumed that the law was contrary to that stated by Scrutton LJ. His decision was followed by Hewart CJ in the second case. *Halsbury* 4th Ed Vol 27 "Landlord and Tenant" para 439 page 344 refers to these decisions and no others which is not surprising in view of the repeal of s.14(6)(i) in 1925. Mr Lateef referred us to Cook v. Shoesmith [1951]
D 1 KB 752 where Russell v. Beecham was cited, but the decision is not in point.

We have not been referred to any other authority on this question. Faced with this conflict of opinion we think that we ought to follow Abrahams v. Mac Fisheries Ltd. and Carrington Co. Ltd. v. Saldin which were the last decisions on s.14(6)(i) before its repeal. When the Fiji Parliament adopted this section in 1971 in
E preference to s.146 of the Law of Property Act 1925 (Eng) which replaced it, which was more favourable to the tenant, it should we think be taken to have adopted the construction the section had received in the most recent English decisions.

In our opinion therefore the breach of the covenant against subletting relied upon
F by the landlord fell within the exclusion in s.105(8)(a) and the landlord was not obliged by s. 105(1) to give a notice to remedy the breach. It follows that the respondent had no right under s.105(2) to apply for relief against forfeiture in respect of that breach. See *Halsbury* 4th Ed Vol 27 "Landlord & Tenant" para 439 page 344. Moreover it is not clear whether and in what circumstances equity would relieve against forfeiture for wilful breach of a covenant against
G assignment or subletting except in cases of fraud, accident, mistake or surprise. See Barrow v. Isaacs & Son (1891) 1 QB 417, compare Shiloh Spinners Ltd. v. Harding [1973] AC 691, and *Meagher Gummow & Lehane* "Equity Doctrines and Remedies" 1975 pages 374-6.

Neither party proved the date nor the terms of the sublease to Arun Mishra. The Court was informed by both counsel that Mishra had ceased to occupy any part

of the premises but not exactly when this occurred. The landlord became aware of the breach at some stage prior to 20 December 1993, but the evidence does not establish when. There was evidence that the respondent had subleased part of the property without the landlord's prior consent during 1992 and that the landlord became aware of this at some stage but when it did so does not appear.

It appears that the questions for determination in Action 183/94 will include whether there was a subsisting breach of covenant when that summons was served on the respondent, whether the unauthorised sublease was a continuing breach or a breach once for all, and whether it had been waived by the landlord by service of the notice to quit or otherwise. The landlord's knowledge of and attitude towards earlier breaches may also be relevant. In these circumstances we do not think we should express any view on the effect of the notice to quit as a waiver, when that question may turn out to be academic in the light of other facts proved at the trial.

We would add that Mr Nagin did not contend that the landlord could forfeit this lease for non-payment of rent without serving a notice under s.105(1) to remedy the breach.

As each party has been partially successful we think there should be no order as to the costs of this appeal.

We therefore make the following orders:-

(1) Appeal allowed in part.

(2) Set aside the following orders of the High Court -

(a) that the lessees and their assigns are entitled to have hold and enjoy the lands and premises demised by lease No.20187 according to the terms of that lease without any new lease.

(b) the condition for payment of the arrears of rent into Court for payment out to the landlord.

(c) the order for payment of $1500 compensation to the landlord: and

(d) the order dismissing Action 183/94:

(3) Vary the formal orders of the High Court by adding a declaration that on 15 February 1994 the Registrar of Titles improperly and unlawfully cancelled lease No.20187.

(4) Formal orders of the High Court, as varied, otherwise confirmed.

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(5) Any monies in Court to be paid out to the respondent or its solicitors.

(6) Remit Action 187/94 to the High Court.

(7) No order as to the costs of the appeal.

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(Appeal allowed in part.)

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