IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Civil Appeal No. 9 of 1982

Between:

AZAD WALI s/o David Shafiq Appellant

and

ALI MOHAMMED s/o Rajai Respondent

Mr. R. Chandra for the Appellant.
Mr. J. Singh and Mr. R. Patel for the Respondent.

JUDGMENT

This is an appeal from the judgment of the Magistrate's Court Suva delivered on the 29th December, 1981 wherein an order was made against the appellant/defendant that he give vacant possession of certain premises occupied by him to the respondent/plaintiff.

The respondent purported to terminate the appellant's monthly tenancy by a six calendar months notice delivered to the appellant on the 31st August 1979 to vacate by the 29th February 1980.

It is not in dispute that the provisions of the Fair Rents Act applied to the tenancy and section 19(1)(e) in particular.

The provision is as follows:-

"19(1) No judgment or order for the recovery of possession of any dwelling-house to which this Act applies or for the ejectment of a lessee therefrom shall be made, and no such judgment or order made before the commencement of this Act shall be enforced, unless -

(a).....

(b).....

(c).....

(d).....

(e) the premises are bona fide required by the lessor for his own occupation as a dwelling-house and the lessor gives at least twenty-eight days' notice in writing to the lessee requiring him to quit and (except as otherwise provided in this section) the court is satisfied that reasonably adequate and suitable alternative accommodation is available at a rent not substantially in excess of the rent of the premises to which the judgment or order relates; "

The provision is also governed by the fourth proviso to subsection (1) which specifies, that the existence of alternative accommodation shall not be a condition of an order on the grounds specified in paragraph (e), where the period of notice given is at least six months.

The appellant has raised four grounds of appeal but only the first two need be considered. They are:-

"1. THAT the Learned Trial Magistrate erred in law and in fact in failing to direct his mind as to whether the Plaintiff was acting bona fide when maintaining that he required the demised premises for his own use as required under s. 19(e) of the Fair Rent Ordinance.

2. THAT the Learned Trial Magistrate erred in law and in fact in finding that a six months notice was sufficient without there being need for the Plaintiff to prove that he was acting bona fide and required the premises for own occupation as a dwellinghouse. "

The learned Magistrate in his judgment said:

" I further find as a fact that the Plaintiff does require the said premises for his own occupation as a dwelling house for his family. Assuming that I am held wrong in this finding, I consider that the fact that a six months' notice had been given is sufficient to entitle the Plaintiff to vacant possession bearing in mind the said proviso to s. 19. "

I can at this stage dispose of the second ground without first stating the facts.

The Magistrate clearly erred in holding that a six months notice "is sufficient to entitle the plaintiff to vacant possession bearing in mind the said proviso to section 19. "

The six months notice operates merely to remove the requirement in paragraph (e) that the Court must be satisfied that suitable alternative accommodation is available before it makes an order.

Before an order can be made under paragraph (e), the Court must be satisfied on the following matters:-

1. The premises are covered by the Act and are bona fide required by the lessor for his own occupation as a dwelling house and

2. At least 28 days notice in writing has been given to the tenant to quit and

3. The Court is satisfied that suitable alternative accommodation is available provided that

4. Requirement 3 has no application if the notice in 2 is not less than 6 months.

There is also an overriding provision that in any of the cases in the subsection (10 paragraphs) the Court must consider it reasonable in any event to make an order for recovery of possession.

While the appellant is correct in stating that the Magistrate erred as regards the effect of the six months notice, that is not the end of this appeal.

The Magistrate had to consider whether the respondent had established that he bona fide required the

premises for his own occupation as a dwelling house. That was in fact the only issue he had to consider.

He did purport to find as a fact that the respondent required the premises for "his own occupation as a dwelling house for his family".

Virtually the only finding of fact the Magistrate made is the one to which I have just referred. The appellant admitted in the Court below being a monthly tenant and receiving the notice to quit.

The appellant in his Defence in the lower Court raised the issue that the respondent did not require the premises "for his own use and occupation" and that his claim was not bona fide.

If the Magistrate considered the evidence in support of that defence it does not appear in his judgment.

I have experienced some difficulty in deciding what flat the appellant occupied. The respondent in his Statement of Claim alleged there was a two storied building at 74 Suva Street containing two flats on the ground floor and three flats on the first floor. It also alleges the appellant occupied flat No.1 on the ground floor. The appellant admitted these facts in his Defence.

In evidence before the Magistrate the respondent gave conflicting evidence. He said in evidence in chief there was a two storied building on his land in which there were two flats, one of which was occupied by the appellant. He then mentions there are two buildings both double storied one with two flats and the other with six flats. He said the appellant was occupying a flat in the six flat building.

He said he wanted the flat for his own use and that his son, who was living with him at the time, wanted the flat.

The respondent also stated he lived in Marlows Road in a 3 bedroom house in which 7 people lived. He wanted the flat so one or two of his children could live there.

In cross-examination he said he wanted the flat for his own use and went on to say he wanted the flat for his 21 year old son.

He added to the confusion by then stating the appellant was in top flat No. 1.

I am unable to determine what flat the appellant occupies but the respondent admitted that when he gave the appellant notice to vacate two of his flats were vacant.

In his notice to the appellant the respondent did not offer the appellant one of the two vacant flats and he sought possession on the grounds that the flat was required for the respondent's own use.

It was established in evidence that, before the notice to quit was given, the appellant had successfully applied to the Fair Rents Board to fix the rent. It was fixed at a sum below that charged by the respondent.

I have mentioned only the evidence of the respondent since the Magistrate has not dealt with the evidence in his judgment. The admissions made by the respondent can be treated as facts.

The Magistrate did not properly consider the evidence before him. The respondent's admissions raises a very strong inference that the premises were not bona fide required by him. Apart from the two vacant flats at the time he gave the appellant notice, the respondent gave evidence of tenants moving out and new tenants moving into his flats. When asked why his son did not move into one of the vacant flats the respondent said his son wanted to stay in No. 1 flat (presumably the flat occupied by the appellant).

The Magistrate also did not properly consider whether the respondent wanted the premises for his own occupation as a dwelling house.

The premises are in Suva Street whereas the respondent lives with his family in Marlows Road.

The Fair Rents provision, section 19(1)(e), differs from the United Kingdom provision in schedule 1(h)(i) of the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (c32). This is a provision enabling a Court to make an order against a tenant for possession of a dwelling house without proof of suitable alternative accommodation, where the dwelling house is reasonably required by a landlord for (i) himself; or (ii) any son or daughter of his over eighteen years of age or (iii) his father or mother.

Despite the different provisions the United Kingdom authorities do assist on the issue whether the dwelling house was required by the respondent.

The United Kingdom provision uses the words "for himself" whereas the Fiji provision uses the words "for his own occupation".

In my view the difference between these two sets of words is significant. I will return to consideration of this matter after considering United Kingdom authorities.

In Smith v. Penny [1946] 2 All E.R. 672 it was held that the words "for himself" should not be strictly interpreted as meaning occupation for residence by the landlord personally, but should be interpreted as covering the case of his wanting the house as a family house, whether he intends to live in it himself or is unable to do so for some special reason. The landlord in this case was a publican and was compelled to live on the licensed premises. He wanted his own house for occupation by his two young children and a housekeeper employed to look after them. He was separated from his wife. An order for possession

was made.

In Richter v. Wilson [1963] 2 All E.R. 335 the Court of Appeal held that the test whether the landlord required the upper floor of a residence for himself was whether, if he recovered possession, there would be two households or a single household in the house. On the facts the married couple he proposed to instal in the upper floor would be a separate household and accordingly he would not occupy that floor as a residence for himself and was not entitled to an order for possession.

The Court in Wilson's case distinguished Smith v. Penny. Willmer L.J. said at p. 337:-

> "Basically it was a case in which he required the accommodation for his children; i.e. persons who could fairly be said to be an emanation of himself; and this court decided that in those circumstances such a plaintiff does reasonably require the premises as a residence for himself. Both Scott L.J. and Somervell L.J. made it clear in their judgments that the word "himself" must include a man's wife and children....."

In Richter's case reference was made to the unreported case of Bloomfield v. Westley (July, 1962) in which Lord Denning made the following remarks: -

> "I can understand that there may be cases where a landlord or landlady - it may be a young couple who have an addition to their family by way of children, or it may be a couple who want to take in an aged parent - could quite reasonably claim an extension to their premises on the ground that the extension was reasonably required as a residence for a member of the family, I quite agree that that is a reasonable and a likely way in which this Act [the Rent and Mortgage Interest Restirctions (Amendment) Act, 1933, Sch. 1, para. (h)] might operate. My trouble in this case is to bring the facts within such a principle as was suggested. I would agree that if this niece had been a member of the family before and was coming back to live with her aunt, there might be more in it; or if there was clear evidence that she was coming, so to speak, to be a member of the family, to act as a nurse or as a daughter helping her mother,

> it might be different. But on the facts of this case, when the plaintiff has said that the niece would have her own kitchen and would have her own separate flat, it seems to me that the judge must have found that the niece was going to be in separate occupation of the top floor on her own account and not as a member of the aunt's family..... on that view of the facts /the plaintiff/ does not require it as a residence for herself; she requires it as a residence for her niece, and that is not one of the conditions under which the court can make an order for possession under the Rents Acts. "

The three English cases I have referred to are of some assistance albeit the wording of the United Kingdom Act is different.

Quite apart from the fact that the words "for himself" and "for his own occupation" are different, on the facts in this case I would not hold that the respondent wanted the premises "for himself".

The words "for himself" do not necessarily connote that the landlord must personally occupy the premises as was held in Smith's case. However, the words "for his own occupation" used in the Fiji Act clearly indicate that the landlord must require the premises to live in himself with or without his family.

The respondent's family house is at Marlows Road and the evidence is quite clear that he intends to provide a separate house for his son who is marrying shortly, if he has not already married. He cannot on the facts require the premises "for his own occupation". There was no evidence he ever intended to occupy the premises himself.

The Magistrate erred in law, on the facts which he found, in applying those facts to the legal issue he had to decide. The facts did not establish that the premises were required by the respondent "for his own occupation" and the Magistrate should have so found.

The United Kingdom Act has special provisions for the situation where a landlord reasonably requires possession of premises for any son or daughter of his over 18 years of age or for his mother and father.

The Fair Rents Act has no such provisions. In a country where more than half the population lives in close knit family groups, which include married children and their families, it may be that there should be similar provisions but that is a matter for the legislature to decide.

Even had the United Kingdom provisions been in force here the respondent may have experienced difficulty in getting an order. With so many of his flats falling vacant he would find it difficult to establish the premises were "reasonably required" by him. The tenant, also if the United Kingdom provisions applied would have no difficulty in establishing that "greater hardship" would be caused by granting the order than in refusing it.

The appeal is allowed. The Magistrate's order is set aside and the respondent's claim dismissed with costs to the appellant of this appeal and of the Court below.

(R.G. Kermode)
JUDGE

SUVA,
16th August, 1982.