IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal Nos. 7, 8 & 9/81

Between:

1. RAM NAND s/o Badal
2. SHYAM KAUR d/o Ram Anuz — Appellants

and

1. INIA TUKANA — Respondent in 7
2. NEUMI MATASERE — Respondent in 8
3. SIAMONI DUNASALI — Respondent in 9

H.M. Patel for the Appellants.
A. Tikoram for the Respondents.

Date of Hearing:

Delivery of Judgment:

JUDGMENT OF THE COURT

Gould V.P.

In these three actions applications were made to the Supreme Court under section 169 of the Land Transfer Act, 1971, by the appellants, calling upon the three respective respondents to show cause why they should not give up possession of premises they were occupying, to the appellants. The respondents are tenants of the appellants, each respectively of one portion of the same building in the Nadi area, owned by the appellants. The procedure under sections 169-172 of the Land Transfer Act is summary and the tenant is required by section 172 to show cause why he refuses to give possession. In the Supreme Court the actions were consolidated and the learned Judge dismissed all three applications; the appellants bring this present appeal from that decision.

Though in form applications under section 169 of the Land Transfer Act, the proceedings fell to be determined under the provisions of the Fair Rents Act (Cap.241). This was becouse in all cases it was common ground that the requisite notice had been given terminating the tenancies, and that the premises were dwelling houses to which the Foir Rents Act applied.

The oppellants, husband and wife, purchased the property in question about three years ago, and in April, 1979, served each of the respondents with six months' notice to quit. They refused to give up possession. The relevant provisions of the Fair Rents Act ore contained in section 19. Subsection (1)(e) thereof reads:-

> "19(1) No judgment or order for the recovery of possession of any dwelling-house to which this Ordinonce applies or for the ejectment of a lessee therefrom shall be made, and no such judgment or order made before the coming into force of this Ordinance shall be enforced, unless -
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> (e) the premises ore bona fide required by the lessor for his own occupation as a dwelling-house and the lessar 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 reosonably adequate and suitable alternative occommodation is available at o rent not substantially in excess of the rent of the premises to which the judgment ar order relates; and in any such case as oforesaid, the court considers it reasonable to make such an order: "

A proviso follows of which the following is relevant:

> " Provided that the existence of alternative accommodation shall not be o condition of an order on the grounds specified in paragraph

(e) of this subsection -

(v) where the period of notice given is at least six months. "

We will refer to further sections later.

It will be seen, that as in the present cose at least six months' notice had been given, the question of the avoilability of suitable alternative accommodation was eliminated by the fifth paragraph of the proviso. Therefore what the appellants had to showwas that the premises were bona fide required by them for their own occupation as a dwelling house; then if the court considered it reasonable to make such an order, they would be entitled to an order for possession. In the event in the present case the question whether it would be reasonable to make the order, did not arise, as the learned Judge found thot the appellants failed to show that they bona fide required the dwelling house for their own occupotion.

The English section uses the words "reasonably required" and the Fijian section "bona fide required". There is probably little difference though we are inclined to think that bona fide, meaning in good faith or genuinely (Shorter Oxford English Dictionary) may be less demanding than "reasonably". As is stated in the Rent Acts by Megarry (9th Edition) p. 258 -

> " In determining whether the premises ore reasonably required by the landlord, the position of the tenant e.g. any hardship to him, is irrelevant, although it is of course material on.... the generol issue of reasonobleness. "

In England the meaning which has been attached to the words "reasonably required" is stated as follows, at the same page of the work just cited:

"The landlord must show a 'genuine present need' for the house and not be 'moved by considerati ns of preference and convenience merely..... The words "reasonably required" connote something more thon desire, olthough ot the some time something much less than absolute necessity will do', e.g. where he is living under cramped conditions far from his work, and possession of the premises would olleviate both defects. It must not be forgotten that at common law the londlord is entitled to possession os of right; it has been observed that it is wrong to regard the tenant as having a prima facie right to remain and the landlord as seeking an indulgence from the court, although this view is not without its difficulties. "

The grounds of appeal in the present case read as follows:-

"1. That the learned triol Judge erred both in law and in facts in holding that the plaintiffs did not require the premises as described in the application of the appellants/ plaintiffs for their own purposes.

2. That the learned trial Judge erred in law in holding thot the word "reauire" in the Fair Rents Act means "needs".

3. That the learned trial judge erred in law in holding that the Appellant wos not able to look after his grondchildren due to his advanced age where there was no evidence to the contrary. "

We will deal with ground 2 first. The learned Judge said on this subject in his judgment -

" I think that the word "required" as used in section 19(1) of the Fair Rents Ordinance indicates some need on the part of the landlord. It does not simply mean that he "wants" the premises but that in all the circumstances he octually needs or requires them. "

This is on the lines of the opinion we have quoted above from Megarry concerning the English interpretation. Megarry had also indicated that the word "required" was ambiguous and in some jurisdictions had been held to mean demanded or claimed. One reference given is of interest. It is the case of Kiely v. Loose /1948/ V.L.R. 181 in which the words "does reasonably require the premises for his own occupation" fell to be construed. The learned Judge held that the expression means that "the requirement of the premises by the lessor (i.e. his claim or demand for them) must be for the purpose of his own occupation and must be reasonable".

Part of the reasoning behind this finding is found in the fact thot the alternative construction may work injustice by excluding the question of comparative hardship. If the owner cannot show a "need" for the premises for his own occupation, the tenant is completely protected, whether or not he is a man of wealth.

That situation arises here. On the finding of the learned Judge that the appellants did not require the property the position of the respondents does not have to be considered, though it would have been relevant to overall reasonableness if the learned Judge had had to decide, in his discretion, whether to make an order for possession.

However that may be, we do not say thot the learned Judge was wrong in following the English interpretation, though we have already intimated that the use of the words bona fide require a less rigid interpretation than "reasonably".

For the purposes of the other grounds of appeal it is necessary to examine the facts.

The appellants are husband and wife, aged respectively 80 and 60 years; the wife is not in good health. They have

been living for many years on 20 acres of land at Natadola held under lease, with one year to run before it expires. There is a question (unresolved in the Court below) whether they might be entitled to an extension of the lease under the provisions of the Agricultural Landlord and Tenant Act (Cap.242) as amended.

Living with the appellants on the farm was a son, who did the farming; he had a wife and three children and though it is not clearly stated, it can be assumed that they live there also. Three grandchildren, a girl of 16 and boys of 14 and 13, children of another son who is serving a life sentence in gaol, likewise live with the appellants. The Nadi property was purchased some three years ago and the intention was that the appellants should reside in it with their three grandchildren, leaving the son to farm the Natadola property, for which task the appellants were too old. The three grandchildren go to school, but the Natadola property is about two miles from the bus and the road is baggy, with bush on either side. It is suggested that the girl might be in danger of being molested.

The learned Judge's summary of the appellants' need, as expressed in his judgment was:-

> " He bases his need for possession on two grounds,
>
> (i) unsuitability of the house at Natadola for children's education and
>
> (ii) probable termination of his agricultural lease in a year or so. "

The picture conveyed by (i) above is perhaps over simplistic. As we see it, the appellants' approach was that they were growing old, that they had purchased a house in a more convenient district in order to live in it with their three grandchildren. The learned Judge's observations were:-

" It is apparent from his evidence that the plaintiff has lived on his farm at Natadola for almost 30 yeors. He has obviously reored his family there ond his family comprises two sons and five daughters all of whom are now married. Therefore, it is hard to accept that the situation of his house at Natadola is not suitable for bringing up children and sending them to school. It is mode more difficult to occept by the fact that during the past twelve years the three grand children of the plointiff hove been brought up in the Natadola home and have been educated in that areo. I om not persuaded that the house in the Nadi vicinity is required, that is to say, is needed for the education, convenience or safety of those three children.

In any event, the plaintiff says that if he moves out of the farm house his married son who looks after the farm will remain behind and care for the farm. I wonder how many children that son has and why he does not want to move for educational and such like reasons.

I also find it hard to accept that it is the plaintiff (who is 80 years) and his sick wife of 60 years who alone have been doing the hard work of bringing up their grandchildren. I note that they live in the same house with the married son and his wife, i.e. in the plaintiff's house at Natadola.

If the plaintiff obtoined possession of the "Nadi" house and if he went to live there with the three grandchildren, who would look ofter the children? The plaintiff is 80 years and not getting younger. He was not unhoppy to be seated when giving evidence. Then there is his sick wife. The picture I get is of the three grandchildren in such circumstances trying to look after the plaintiff and his wife as well as themselves.

I am by no means persuaded on that evidence thot the move from Natadolo is required in the interests of the three grondchildren; in other words the Nadi house is not shown to my mind to be required for their benefit. "

With all respect we find a good deal of what is said there to be rather argumentative. If people of the appellants'

age decide that they have had enough of farming and desire a change of environment it surely is for them to make such family arrangements os seem good to them; as is stated above they are not to be regarded as seeking an indulgence. The impression is given that the learned Judge suspects that if the appellants are successful they do not really intend to use the premises as a dwelling house at all. Two of the three respondents made quite unsubstantiated allegations in affidavits that the appellants intended to renovate the premises and earn more rent. It wouldalmost appear that the learned Judge may have had in mind some occurrences of that sort.

But the provisions of section 20 of the Fair Rents Ordinance surely militate against such a possibility. Subsection 1 provides that when a landlord has recovered a dwelling house under exactly these circumstances and wishes to let the dwelling house again within six months he must give the former tenant the first option. Subsection (2) provides that in the same circumstances the dwelling house shall not be sold or transferred for two years. Any breach of either subsection is punishable by fine. Apparently the legislature considered these provisions sufficient safeguards against abuse of the procedure.

The learned Judge dealt with the question of the termination of the Natadola lease as follows:-

> " Does the plaintiff need the Nadi house because he may be evicted from his farm at Natadola? He says that the landowner, Hugh Ragg, has some development project in view. On the face of it, by section 13(1) of the Agricultural Landlord & Tenont Ordinance, Cap.242, as amended by Ordinonce 35 of 1976 the plaintiff could be entitled to an extension of his agricultural tenancy by a further twenty years.
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> It may be that the plaintiff's right to such an extension has been negatived under the Cap.242

by litigation instituted by the londowner. If so the plaintiff has not mentioned it.

I am not persuaded on the basis of plaintiff's bald and unsupported statement that his tenancy is bound at law to determine one year or so from now leaving him with no residence. Therefore under that head I am unable to find that the plaintiff requires the "Nadi" house for his own use. There are no other grounds. "

We are inclined to think that there is an element of unfairness in this approach. The male appellant had given evidence, and given his version as best he could - unlike his opponents. He named the purchaser of the land and said they were going to build a hotel there. He said he had been on the land under a twenty-one year lease. When that expired he applied to the landlord for an extension. After litigation an extension for 10 years was granted; but the landlord made it clear that he would not agree to any further extension of the lease. The appellant may not have "mentioned" whether further litigation had actually been put in train, but nobody else was interested enough to pursue a matter which seems quite capable of elucidation. As the matter stands the right of the appellants to a further extension is unresolved, with a firm assertion by the male appellant that his lease will run out in about a year and no significant challenge to that by the respondents. At his age why should he become involved in further litigation about that, if he does not choose to do so.

We incline to the opinion that the learned Judge took too rigid a view, in the circumstances of the case, of the meaning of the word "required". The law says to the landlord - if you give the tenant six months' notice it will not be incumbent upon you to provide alternative accommodation. This was done. The law provides the safeguards we have mentioned against abuse of the process by the landlord. There is a

further safeguard for the tenant in that the court may not make an order unless it considers the making reosonable. To approach the question of the landlord's need too severely tends in some measure to negate these legislative provisions.

In Kiely v. Loose (supra) it was mentioned that in considering a londlord's "need", factors to be considered would include the stote of a person's family, matters of age, sex, and occupation. In the present case we would emphasize the factor of age; as regards the family it would seem that in relation to the grandchildren misfortune has already been encountered, and the appellants are probably the best judges of what is best for their welfare.

We would allow the appeal, but that daes not dispase of the matter. Before the appellants become entitled ta an order for possessian the caurt must consider it reasonable to make it: as is observed in Megarry (op. cit.) p.235 the question af reasonableness can rarely be praperly decided, even in favour of the tenant, without hearing the whole of the evidence, for the tenont as well as the landlord. Here the respondents did not choose to give ony evidence.

The discretion implied in this provision is not that of the Court of Appeal but of the trial Judge. Where it is necesaary to set aside a decision on reasonableness the Court of Appeal will usually order o new trial though, if it is satisfied that it is in possession of the full facts, it may decide the issue itself (Megarry - p.235).

No question of setting aside o decision on reasonableness arises here, as the stoge had not been reached where any such decision was called far. Nevertheless the pasition in this Court is similar. The respondents having given no evidence, could nat complain if this Court dealt with the matter itself, but on consideration af the case as a whole,

we think it will be fair, and will avoid any risk of injustice, if the case is tried again ab initio. This would of course be before another judge.

We therefore allow the appeal, the appellants to have their costs of the appeal in any event. The judgment and order for costs in the Supreme Court is set aside and the case is remitted to the Supreme Court for a new trial ab initio. Costs of the first hearing in the Supreme Court will be in the discretion of the Judge at the new heoring.

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Vice President

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Judge of Appeal

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Judge of Appeal