

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 22 of 1985

Between:

- 1. DINESH JAMNADAS
s/o Jamnadas Lalji
 - 2. SATISH JAMNADAS
s/o Jamnadas Lalji
- Appellants

and

HONSON LIMITED Respondent

Mr. H.K. Nagin for the Appellants

Mr. H. Lateef for the Respondent

Date of Hearing: 17th July, 1985

Delivery of Judgment: 20th July, 1985

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from a decision of the Supreme Court, Suva, giving vacant possession of certain shop premises to the respondent under section 169 of the Land Transfer Act.

The shop in question forms part of a substantial building consisting of shops and offices situated in central Suva. A five-year tenancy held by the appellants in respect of the shop expired on 31st October, 1984.

On 11th July, 1984 the respondent wrote to them requiring them to vacate the shop on that date. On the same day, i.e. 11th July, 1984, the appellants wrote to Duncan Honson, a director of the respondent Company who was then in Vancouver, Canada, asking him to grant them a new tenancy at least for three years, if not five, and offered to pay \$900 per month which the respondent had fixed for that shop. The monthly rent under the old tenancy agreement had been \$600. Honson in his reply, inter alia, said :-

" If you wish to continue as our temporary tenant until my return I am prepared to extend your stay for three months as our tenant, but there will be no lease to your shop, and you must pay \$900 per month from 15 November 1984 to 15 February 1985, plus your share of the running costs of the airconditioning.

Would you please confirm whether you wish to continue as our temporary tenant under the terms and conditions I have just outlined above. "

No reply to this letter was received by the respondent, but on 21.11.84 the appellants paid the increased rent at the rate of \$900 for the month of November.

On 27th December, 1984 the respondent served on the appellants the following notice :-

"Dear Sirs

RE: HONSON BUILDING

On instructions received from our above-named client we hereby give you notice to vacate the premises on or before the 31st January, 1985.

You are no doubt aware that the Leasing Agreement entered into between yourselves and our abovenamed client in respect of

leasing a shop premises in its building situated in Thompson Street, in the City of Suva expired on the 30th November, 1984. Since the expiry of the Lease you became a monthly tenant having paid rent for December 1984.

As you are aware that the premises which you were leasing is a commercial one and since the Lease has expired our client is entitled to give you one calendar month's notice to vacate the premises.

Please note that if the premises is not vacated by the stipulated date and rent paid up to date our client will have no alternative but to issue Supreme Court proceedings to have you evicted from the premises. "

On 28th January, 1985 the appellants instituted proceedings in the Supreme Court challenging the validity of this notice to quit and seeking a declaration that they were entitled to a three-year tenancy of the shop. On 1st February, 1985 the respondent applied to a judge in chambers for immediate vacant possession under section 169 of the Land Transfer Act, which provides a speedy procedure for obtaining possession where the occupier can show no cause why an order should not be made. Where, however, he can show an arguable defence the application is dismissed without prejudice to the applicant's right to proceed by way of writ.

At the hearing, the appellants' main submission was that, as proceedings relating to the same matter were already before the Supreme Court, the application should be dismissed. The learned Judge, quite correctly in our view, held that existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169 of the Land Transfer Act. He said :-

" The defendants' case is that there was an agreement to grant them a lease which is an interest in land. They have

not produced any memorandum or note thereof signed by the plaintiff or its agents and it must therefore be assumed that no such memorandum or note exists. "

He made an order for immediate vacant possession.

The appellants appeal against that order on the following grounds :-

- "1. THAT the learned trial judge erred in law and in fact in holding that the Appellants had not shown cause why an order for vacant possession should not be made.
2. THAT the learned trial judge erred in law and in fact in not holding that the Notice to Quit dated 27th December, 1984 was not a valid notice.
3. THAT the learned trial judge erred in law and in fact in not dismissing Supreme Court Civil Action No. 84 of 1985 and ordering that Supreme Court Civil Action No. 73 of 1985 should proceed to trial.
4. THAT the learned trial judge erred in law and in fact in not holding that Supreme Court Civil Action No. 84 of 1985 was an abuse of process as Supreme Court Civil Action No. 73 of 1985 was still pending. "

As we have already indicated, we see no merit in grounds 3 and 4. The main question before the learned Judge, was whether the respondent had shown conclusively that the appellants' tenancy, such as it was, had been effectively terminated by the notice to quit. Duncan Honson's letter, referred to earlier, clearly shows that a tenancy for a fixed period of three months ending on 15th February, 1985 was offered to the appellants at an increased rent of \$900 per month. Receipts issued by the

respondent showed that such a rent had been paid. There was, therefore, written material on which the appellants could seriously content that a tenancy for a fixed period of at least three months, if not three years, had been granted to them.

The relevant part of section 89(2) of the Property Law Act under which the tenancy was purportedly terminated reads :-

"89. (2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows :-

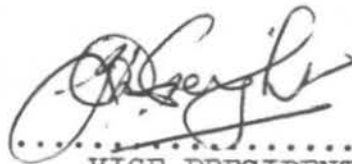
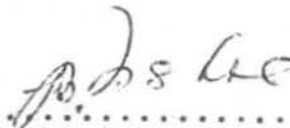
(a)

(b) where the rent is payable for any recurring period of less than one year, notice for at least a period equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not. "

The appellants submit, with considerable force, that if evidence could establish a tenancy agreement for a fixed period, the respondent's notice to quit would be ineffective. We accept that there was sufficient written material before the learned Judge to form the basis for a serious challenge to the validity of the notice to quit.

We have, therefore, reached the conclusion that, on the material presented to the learned Judge, this was not an appropriate case to be dealt with under section 169 of the Land Transfer Act. The appeal is, therefore, allowed and the order for possession set aside with costs to be taxed in default of agreement.

Issues of part-performance and applicability of section 59 of Indemnity, Guarantee and Bailment Act to tenancy agreements were also raised by the appellants but we do not find them necessary for our decision and, in view of the likelihood of further proceedings in the matter, consider it undesirable to comment on them.

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VICE PRESIDENT.....
JUDGE OF APPEAL.....
JUDGE OF APPEAL