IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 52 OF 1987

Between:

SHIU NARAYAN

Appellant

- and -

SHELL FIJI LIMITED

Respondent

Mr. S.M. Koya for the Appellant
Mr. F.G. Keil for the Respondent

Date of Hearing: 12th September, 1988
Date of Judgment: 11th November, 1988

J U D G M E N T

The Appellant appeals against the Decision of Mr. Justice Rooney delivered on the 5th June, 1987 following the hearing of an application by the Respondent Company pursuant to section 169 of the Land Transfer Act.

The decision required the Appellant to give up vacant possession of the land comprised in Crown Lease 10103 of which land the Respondent is the lessee.

From this decision the Appellant appeals on six grounds. It is only necessary, however, to consider the fifth ground which is as follows:

> "The Learned Judge erred in law in not dismissing the Respondent's Summons upon the grounds:-

(a) that material and serious questions of fact were in dispute and they could not be resolved on affidavit evidence and a Chamber hearing of the Respondent's Summons was not proper forum to determine the issues or

(b) that the Appellant had established on Affidavit sufficient evidence to show cause why a summary order for possession ought not to be made under Section 169 of the Land Transfer Act. Cap. 131."

Under the said Section 169 the Respondent was entitled to summon any person in possession of the said crown lease to show cause why the person summoned should not give up possession of the land to the Respondent.

Section 172 of the Act provides as follows:

"If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit:

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled.

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons."

In support of its application, the Respondent filed an affidavit sworn by Mr. P.D. Walsh, its Regional Sales Manager in Fiji. That affidavit alleged (inter alia) that the Appellant's tenancy had been terminated by notice and that he had failed to vacate the premises.

In his affidavit in reply the Appellant stated he was not in possession or occupation of the respondent's land. He further alleged that Nausori Autoport Limited had been in possession and occupation of the land since 8th April, 1984, a date considerably prior to the 10th April, 1987, the date the Respondent instituted the Section 169 proceedings.

There were repeated denials by the Appellant in his affidavit that he was in possession or occupation of the land. He also stated:

> "THAT I say that the Plaintiff entered into a Contract of Sale with the said Nausori Autoport Limited to transfer the said land and not to me personally. I further say that during the negotiations it was agreed that pending the completion of the negotiations between the Plaintiff and the said Nausori Autoport Limited to sell its interest in the said land, the Plaintiff would grant and did grant to the said Nausori Autoport Limited a monthly tenancy over the said land at a monthly rental of $450.00 payable on the 20th day of each calender month as hereinafter mentioned. I deny that I am occupying the said land or the Service Station situate thereon. In any event the letters of 19th January, 1987 and 30th January, 1987 purporting to be Notice to Quit are bad in law. I repeat that the said Nausori Autoport Limited has been and still is in possession and occupation of the said land and the Service Station situated thereon as a monthly tenant."

In a letter annexed to the Appellant's affidavit is a letter written by Mr. Keil who, at all relevant times was acting as solicitor for the Respondent. This letter is marked "Without Prejudice" but no objection was taken

by Mr. Keil to this letter being used as evidence and we must assume his silence signifies no objection to what otherwise have been inadmissible evidence.
We set out the letter in full!

Mitchell, Keil & Associates
Barristers & Solicitors
Commissioners for Oaths
GPO. BOX 1056, Suva.

Telephone 315066
Our ref.3380 SK/FGK/ly
Your ref. NSA/ul

F. George Keil LLB.
Walton DD. Morgan LLB.
Justin March LLB.

25 February 1987

Messrs Wm Scott & Co.,
Solicitors,
GPOL Box 360,
SUVA.

'WITHOUT PREJUDICE'

Dear Sirs,

re: Shell Fiji Ltd. and Nausori Autoport Ltd.

Your letter dated 29th of January 1987 addressed to our client, Shell Fiji Ltd. has been referred to us. We refer to the negotiations that took place between your client and our client in 1984/85 concerning the development of our client's property now comprised in Crown Lease 10103 as a new Shell Nausori Service Station and your client's proposed participation in the project. Before completion of the transaction, your client was advised that our client was not further proceeding with the proposed agreement, for reasons well known to your client.

Our client was not and is not under any obligation to your client with respect to the previous proposed transaction. Your client has however been permitted to operate our client's service station on a month to month basis. (underlining is ours).

Our client has given the requisite notice for your client to vacate the service station and we expect this to be done on or before the 1st of March 1987 when a stock-take will be done.

If your client does not vacate the premises by the said date, we advise that such further steps as are necessary to obtain possession of our client's service station will be taken without further notice or delay.

Yours faithfully,

sgd. F.G. KEIL

On the face of Mr. Keil's letter, there appears to be a clear admission that Nausori Autoport Ltd. was granted a monthly tenancy of the premises as was contended by the appellant in his affidavit pending finalisation of negotiations for sale of the lease to the Company.

A further affidavit by Mr. Walsh purporting to be a reply to the appellant's affidavit was filed. In this affidavit there is no express denial of the appellant's contention that he was not in possession of the premises and that Nausori Autoport was in possession.

Mr. Walsh's affidavit however discloses that a search at the office of the Registrar of Companies revealed that Nausori Autoport Limited was incorporated on 9th March, 1983 with a nominal capital of $120,000. There were only two $1.00 shares issued, one to the appellant and one to the appellant's wife.

Mr. Walsh stated that prior to the defendant occupying the premises and since August, 1984 to the date of his affidavit, 1st May, 1987 the Respondent had conducted business only with the appellant in his personal capacity and not with his Company.

It appears to us that the learned judge did not fully appreciate the nature of the section 169 proceedings. There is one instance where he is not strictly correct. He stated;

> "The Plaintiff is proceeding under Section 169 (c) of the Land Transfer Act Cap.131. No proof of title to the land was offered by the plaintiff on the day appointed for the hearing of the summons, as is reqired by Section 171, although there has been exhibited the consent of the Director of Lands to the institution of these proceedings".

Section 171 only has application where the person summoned has not appeared. The section states:

> "On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."

In the instant case the appellant did appear, and Section 171 therefore had no application.

This error is a minor one and immaterial as the Respondent's title as lessee of the Crown Lease was not in issue.

In fact it is section 169 which calls for evidence of title. Unless the applicant is the registered proprietor or lessor of the land in question an applicant cannot have recourse to Section 169 at all.

Where there is a further failure to appreciate the nature of the proceedings is the scope of Section 172. (quoted above). The appellant under that section was required to show cause why an order for possession should not be made against him. If he also proves to the satisfaction of the judge a right to stay on the land the judge may (inter alia) dismiss the application.

The appellant's case was that he was neither in possession or in occupation of the land.

If the application was, as stated by the learned judge, under Section 169 (c), namely by a lessor against a lessee or tenant where a legal notice to quit has been given, there was an obligation on the Respondent to establish a tenancy which had been terminated by legal notice to quit but as stated the appellant denied being in occupation.

What was in issue, and what was not specifically decided by the learned judge, was whether in fact the respondent was in occupation of the land. Section 169 makes it abundantly clear, that before the procedure can be used a person summoned must be in possession of the relevant land. Section 169 so far as it is applicable states:

> "The following persons may summon any person in in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-
>
> (a) the last registered proprietor of the land;
> (b) a lessor with power to re-enter where the
> (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."

There are findings of fact by the learned judge, which we do not consider he was entitled to make, faced with conflicting evidence on the issue of occupation and possession of the land. He said:

> "The Plaintiff is proceeding under Section 169(c) of the Land Transfer Act Cap.131. No proof of title to the land was offered by the plaintiff on the day appointed for the hearing of the summons as is required by Section 171, although there has been exhibited the consent of the Director of Lands to the institution of these proceedings.
>
> Despite a notice to quit the defendant is still paying rent by bank transfer "in advance at the beginning delivered for the months of March and April."

The findings are based on allegations in Mr. Walsh's affidavit.

If the appellant was not in fact in possession of the land the learned judge in our view had no jurisdiction to hear the application. Nor could the respondent use the section 169 procedure if it could not establish that the appellant was in possession.

There was such a serious conflict on the issue of possession that the learned judge could not, in our view, and should not have attempted to resolve the conflict.

Mr. Keil's apparent admission which supports an allegation made by the appellant, raises doubts which could only be resolved by a hearing in open court. Mr. Keil attempted to explain that the second paragraph was ambiguous. We could not entertain such an explanation from the bar table.

Where there is a serious conflict raised by the affidavits filed section 169 application procedure is not one to be adopted and recourse should be had to court action.

In the instant case the appellant alleged that his company Nausori Autoport Limited was in occupation and possession of the land. There was no supporting affidavit on behalf of the company. Section 169 procedure does not provide machinery for that company to apply to be joined as a defendant and the appellant could do no more than disclose that his company was in possession.

Order 113 of the High Court Rules does provide such a procedure which is by way of originating summons. That procedure is not applicable in the instant case to decide the issue and proceedings should have been instituted by writ of summons.

The learned judge failed to appreciate that the section 169 procedure had no application if the company was legally in possession. He ignored any rights the company might have had. A hearing in open court would have decided that issue.

It appears to us that both parties, including the learned judge, overlooked the fact that, in law, the appellant and his company are two separate legal entities. Whatever suspicion that may have been raised by the fact that the appellant was in full control should have been ignored.

Mr. Keil appears to have viewed the existence of the company as a sham and continued throughout the hearing as treating the appellant's occupation as being "in propria persona" and not as Managing Director on behalf of the company. Otherwise Mr. Keil would not have given an undertaking to the court "to return the property to the appellant in its present condition". That undertaking is embodied in Mishra J.A.'s Ruling when he refused a stay of execution.

Mr. Keil is not entirely to blame.

Nowhere in his affidavit, where he repeatedly denied he was in occupation or possession of the land, did the appellant disclose that he was in fact in occupation or possession not in propria persona but as Managing Director on behalf of the company. He alleged that Nausori Autoport Limited was in possession and occupation. A company cannot physically occupy land and can only do so through human agency.

That the Appellant was in fact physically in occupation of the land is only disclosed by him when he filed an application for stay of execution.

In his affidavit in support he stated:

"that if the order for vacant possession is enforced before the decision of the Fiji Court of Appeal is delivered irreparable harm will be done to Nausori Autoport Limited, I am the Managing Director of this Company and the order for possession has been made against me personally.

that if the order is enforced against me personally, I will not be able to discharge my duties as a Director and shareholder of Nausori Autoport Limited."

Those statements leave us in no doubt that the Appellant was actually in occupation or possession but only on behalf of his Company.

This situation should have been disclosed in the Appellant's first affidavit if our understanding is correct. In any event he should not have been permitted to change his stance when seeking a stay of execution.

The instance case was not one which should have been considered by the learned judge and could only in view of the conflict in the affidavit evidence have been resolved in open Court.

We allow the appeal and set aside the learned trial judge's order.

Before we deal with the matter of costs we have to consider the undertaking Mr. Keil gave to this Court.

Mr. Keil appears to have been under a misapprehension regarding the appellant's status at the time he gave his undertaking. Nausori Autoport Limited is not a party to the action. Posession of the property should not be given to the appellant in his capacity as managing director of his company in view of the fact that he repeatedly stated on oath that he was not in occupation or possession of the land and thereby misleading the Court.

By the time the undertaking was given the appellant appears quite improperly to have vacated his in propria persona mantle and donned the mantle giving him the protection afforded by the fact that he was managing director of his company which was in possession and occupation through his agency.

Mr. Keil's undertaking appears to have been given not to the appellant in propria persona but to him on behalf of the company which was not a party to the action.

The company has instituted action against the respondent and it is still open to the company to seek recovery of the premises or damages.

We accordingly state that we will not hold Mr. Keil, or the respondent, to the undertaking given to this Court to hand over possession to the appellant.

On the question of costs our order is that each party meet their own costs of the appeal and of the section 169 application. Had the appellant not denied he was in occupation of the premises and, quite

improperly in our view disclosing the true situation only when seeking a stay, costs would have followed the event and the appeal would have been allowed with costs to him.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal