IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0040 OF 1995S
[High Court Civil Action No.254 of 1992]

BETWEEN: RANJIT SINGH AND BASANT KUAR

APPELLANTS

- AND-

GORDON WILSON-SPEAKMAN
THE REGISTRAR OF TITLES
THE ATTORNEY-GENERAL

RESPONDENTS

Mr. D. Sharma for the Appellant
Dr. K.E. Tronc with Mr P. Knight. for the first Respondent
Mr. D. Singh for the second and third Respondent

Date and Place of Hearing	:	20, 23 and 24 February, 1998, Suva
Date of Delivery of Ruling	:	27 February, 1998

JUDGMENT OF THE COURT

At the commencement of this appeal Mr. Singh advised us that both the Registrar of Titles and the Attorney-General agreed to abide by the decision of this Court and for that reason sought leave to withdraw. Leave was accordingly granted.

Background

On 15 June 1978 the first respondent became the registered proprietor of all the land known as "Bala" comprising 137 acres and contained in Certificate of title Volume X!/05 Folio 218. He acquired this land subject to lease no. 53574 which had been previously registered

under the provisions of the Land (Transfer and Registration) Ordinance (Cap 120). The lease was in favour of Bhagat Singh as lessee and was for a period of 99 years from 1 January 1954. The lessee died in 1987 and the appellants are the Executors and Trustees of his estate.

Proceedings

Over the last 13 years numerous proceedings have been filed both in the High Court and as well in the Agricultural Tribunal. They all have as their source a notice to quit issued by the first respondent and dated 22 April 1985. The format and mode of service of this notice has been the subject of extensive argument and submissions by both the first respondent as to its efficacy; and the appellants as to its defects. The proceedings that followed the issue of that notice to quit may be summarized as follows:-

(a) Civil action no. 854 of 1985 dated 18 Septemer 1985; filed in the High Court by the first respondent; who has not pursued this claim although it is still current.

(b) Proceedings no. 1 of 1987 dated 7 January 1987 and filed in the Agricultural Tribunal by the first respondent who has not pursued this claim;

(c) Civil action no. 422 of 1988 dated 1 June 1988; filed in the High Court by the first respondent who has not pursued this claim although it is still current;

(d) Civil action no.254 of 1992 dated 21 May 1992; filed in the High Court by the Applicants; the Judgment of which is the subject of this appeal.

Civil Action no. 254 of 1992

A. Judgment of Scott J. dated 10 May 1994

This judgment considered the following preliminary issues -

(a) whether Lease No. 53574 was or is subject to the provisions of ALTA;

(b) if so, whether the said lease was properly terminated by the First Defendant by the notice to quit dated 22 April 1985; and

(c) if so, whether any right of relief against forfeiture or other right subsists in the Plaintiffs.

The learned Judge decided the first of those issues on the basis that the disputed land had always been rural and therefore classified as agricultural. As a result he determined that it came within the provisions of the Agricultural Landlord and Tenant Act (Cap. 270) (hereinafter referred to as "ALTA") and as a consequence it was not necessary for the status of the land to be determined

by the Agricultural Tribunal. He went further and found that this land known as "Bala" did not fall within the exemption provisions of Section 3 subsections 1 (a) to (c) of ALTA. Accordingly His Lordship determined that Lease no.53574 was subject to the legislative provisions of ALTA.

The second issue, as one would expect, required a detailed consideration of the notice to quit dated 22 April 1985. This had been issued 9 years earlier. The appellants challenged the legality of that notice both as to its form and the method of its service. On the other hand the first respondent relied upon its legal efficacy in order to support the actions he had initiated under the provisions of the Land Transfer Act (Cap. 131) and which had resulted in the Registrar of Titles cancelling and removing from the Title the appellants lease no. 53574.

The Court below in deciding against the appellants held that the lease had been properly terminated by the notice to quit issued 9 years earlier and that the first respondent was not estopped from relying upon it nor had he waived his rights as alleged by the appellants. Whether the notice to quit and non compliance with it in fact terminated the lease is a matter we will discuss in further detail later in this judgment when we consider the issue of waiver.

The third issue was summarily dismissed by the learned Judge on the grounds that the appellants had failed to apply for relief against forfeiture before the expiration of the notice to quit as required by the provisions of ALTA in that regard.

B. Ruling of Scott J. dated 22 September 1994

The appellants initiated proceedings seeking consolitation of actions 854 of

1985; 422 of 1988; and 254 of 1992 which were all then current and pending in the High Court.

That application was dismissed not only because different Solicitors were involved in the various actions but also because of the unrelated format of the proceedings themselves.

C. Judgment of Scott J. dated 2 December 1994

This Judgment considered whether the Registrar of Titles "..... acted lawfully when on the 7th and 8th of May 1992 he accepted and acted upon a notice of application for cancellation of lease sent to him by the first defendant under the provisions of section 57 of the Land Transfer Act (Cap. 131) resulting in the cancellation of the lease in question namely Lease no. 53574....."

As a result of a careful analysis of the provisions of s.57, Scott J. found, quite correctly we agree, that the cancellation of the appellants lease was premature and they were therefore deprived of the opportunity to apply for relief against the forfeiture of their lease. He accordingly granted the declaration applied for and declared that the second respondent had unlawfully purported to register the re-entry and cancellation of Lease no.53574. The second respondent then reinstated the lease on the Land Transfer Register.

It is against that background that this appeal is brought against the Judgment of Scott J. dated 2 December 1984 and which incorporates his Judgment on the preliminary issues

delivered on 10 May 1994, and his ruling dated 22 September 1994.

Rulings preliminary to the substantive appeal

(1) Counsel for the first respondent by notice of motion dated 18 February 1998 sought leave to adduce fresh evidence from the first respondent in the form of a lengthy affidavit with annexures "A" to "R" attached. Counsel subsequently elected not to proceed with that application, which was dismissed.

(2) Counsel for the first respondent objected that "the appeal per se is a time barred nullity because of the futile filing of the notice of appeal after the expiry of the statutorily mandated period allowed."

We disallowed that objection. We accepted Mr Sharma's oral application and granted the leave he sought to proceed with the appeal. We indicated that we would give our reasons for that decision and this we now do.

The Judgment appealed against was sealed on 7 February 1995. Counsel for the appellants accepts that his appeal is against an interlocutory order. Rule 12(2)(f) of the Court of Appeal Rules provides that there shall be no appeal against an interlocutory order "without the leave of the Judge or of the Court of Appeal." The Judge did grant leave to appeal on 3 July 1995

and notice of appeal was filed on the same day. There was no objection to the granting of leave to appeal on 3 July 1995, or at any subsequent hearings associated with the procedural matters to this appeal. Indeed at the hearing on 3 July 1995, Counsel for the first respondent is recorded as having submitted -

> ***"We were under the impression that leave was required. We have concur that now no leave is required."***

The issue now raised is whether the court below on 3 July 1995, had jurisdiction to grant leave when the application was out of time. Counsel for the first respondent accepts that

> ***"The rules of the Court of Appeal do provide at Rule 27 for an enlargement of the time limits for filing a notice of appeal."***

That rule states -

> ***"27. Without prejudice to the power of the Court of Appeal, under the Supreme Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period."***

That Rule provides that the Court below has jurisdiction to enlarge the time prescribed by Rule 16 only if the application is "made before the expiration of that period" i.e. in this instance on or before 28 February 1995. The court below therefore did not have jurisdiction to grant the appellant leave to appeal out of time. However, subject to the principles that apply to an application for leave to appeal out of time this Court's power to grant such leave is not so limited. As well as Rule 27, Section 17 of the Court of Appeal Act (Cap 12) provides -

> ***"Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just."***

This Court also has recourse to the practice and procedure of the Court of Appeal in England. Rule 7 of this Courts Rules provides -

> *"7. Where no other provision is made by these Rules, or by any other enactment, the jurisdiction, power and authority of the Court of Appeal and the judges thereof shall be exercised -*
>
> *(a) in civil causes or matters, according generally to the course of the practice and procedure for the time being observed by and before Her Majesty's Court of Appeal in England;"*

Order 3 r 5 provides -

> *"5- (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.*
>
> *(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period."*

The relative principles we are required to consider are -

1) The length of the delay;

2) the reasons for the delay;

3) the chances of the appeal succeeding if time for appealing is extended;

4) the degree of prejudice to the would-be first respondent if the application is granted.

We are of the opinion that this case does satisfy the above criteria. For those reasons we granted the leave sought.

(3) Counsel for the appellants by notice of motion dated 20 October 1997 also sought leave to adduce fresh evidence. By an interim ruling we gave leave to call, by subpoena if necessary, a witness who could identify the land the subject of this appeal with what we were told was "exempted" land. Mr Narayan a technician from the Lands and Survey Department was called to give evidence before us. The maps and plans he produced certainly identified the land "Bala" and as well the "exempted area". But no one plan showed those areas superimposed so that their relationship and relative boundaries could be positively identified. Because of this uncertainty we refused leave to produce the plan of exempted land referred to in the affidavit of Jagjit Singh. We were not persuaded that the numerous other items of evidence exhibited in respect of which leave was sought were sufficiently relevant to justify their admission, or were not available or could not have been discovered in time for the trial with due diligence. Accordingly we refused the application.

Having considered and explained those preliminary applications we now turn to consider the substantive appeal. The notice of appeal sets out 12 grounds of appeal which, as

can be appreciated, overlap in varying degrees. Counsel for the appellants in his helpful skeleton submissions consolidated his grounds as follows:-

(1) Issues in relation to the notice to quit;

(2) Whether the lease could be terminated by a mere notice to quit;

(3) Issues of waiver and consolidation;

(4) Rights of relief against forfeiture.

Issues in relation to the notice to quit

The form of notice to quit issued by the first respondent on 22 April 1985 was in the following form -

"Denmark House
40 Weghorn Steet
Ipswich, Queensland 4305
AUSTRALIA

Mr. Bhagat Singh
P O Box 3623
Samabula
Suva
Fiji

NOTICE TO QUIT

TAKE NOTICE that as lessee of the land known as 'Bala' as contained in registered lease number 53574 you are HEREBY given three (3) months notice to Quit the said land on the ground of contravention of the Agricultural Landlord and Tenant Act, namely placement of a first registered mortgage on the said lease without prior approval of the lessors.

However, should the said mortgage be removed from the said lease within the said three months, this notice shall be deemed cancelled and of no force and effect.

.....G.S.
For lessors"

Dealing firstly with the form of such a notice. That was considered by this Court in the case of Ram Lochan Regan v. Satya Nand Verma 11 F.L.R. 240 which decided that while no particular form was required to constitute a valid notice to quit, nevertheless it was necessary that the notice -

(1) be addressed to the right person;

(2) properly describe the premises to which it relates;

(3) be plain and unequivocal;

(4) expire at the proper time.

In the Court below the appellants submitted that the notice was invalid because the names of the "Lessors" were not specified in the notice; the appellants were given no opportunity to remedy the alleged breach; and because no demand was made for monetary compensation. As a result, so the appellants submitted, the notice was "equivocal and misleading." Before us, Counsel repeated those submissions, and embellished them. For example he referred to the name of the Lessor not being on the notice, although his address was.

He said that "this was defective in that the 1st respondent's name was not registered against the Lease No. 53574 at the time the notice was issued." That submission is erroneous. The first respondent was recorded as the registered proprietor on 15 June 1978. The notice was issued on 22 April 1985. If Counsel is relying on the caveat registered by the first respondent against the Lease he is again incorrect - that was registered on 22 August 1984.

Finally, counsel, when dealing with the form of the notice submitted that it did not comply with the provisions of section 38(1) para (a) (b) and (c) of ALTA, which provide as follows:-

> ***"38(1) A right of re-entry or forfeiture under any proviso or stipulation in a contract of tenancy for a breach of any covenant or condition, express or implied, in such contract of tenancy shall not be enforceable, unless and until the landlord serves on the tenant notice -***
>
> ***(a) specifying the particular breach complained of; and***
>
> ***(b) if the breach is capable of remedy, requiring the tenant to remedy the breach; and***
>
> ***(c) in any case, requiring the tenant to make compensation in money for the breach, and if the tenant fails, within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to to make reasonable compensation in money, to the satisfaction of the landlord for the breach."***

But in the present case the notice clearly specifies the breach complained of viz. ".....placement of a first registered mortgage on the said lease without prior approval of the lessors;" and specifies how the breach is to be remedied viz. "..... removed from the said lease within the said three months....." and makes no claim for compensation. It is well settled that ommission from the notice of any request for compensation does not invalidate the notice but merely disentitles

the landlord from recovering compensation in a subsequent action for forfeiture and damages for breach of covenant.

In our opinion there is no merit in the appellant's submissions criticising the form of the notice.

The appellants however challege not only the form of the notice but whether the notice is appropriate to a lease which is registered under the Land Transfer Act. This challenge relies on the original registration of lease No. 53574 on 1 December 1953 under the provisions of the Land (Transfer and Registration) Ordinance (Cap. 120). Originally the lease was for 21 years. Then on 12 July 1960 it was extended to a term of 99 years to issue from 1 January 1954. However, the ALTA legislation only came into force on 29 December 1967. It was on this basis that the appellants in the court below originally challenged the applicability of the ALTA legislation and submitted that it was the Land Transfer legislation that applied. Before us a further dimension was added by the attempt to introduce further evidence to prove that this land was exempted from the provisions of clauses 6 - 7 and 13 of ALTA. The application to admit that further evidence was refused. We are satisfied that the provisions of ALTA do apply to this land. Section 9(1) of that Act provides -

> ***"The following conditions and convenants shall be implied in every contract of tenancy of an agricultural holding subsisting at or after the commencement of this Act;-***
>
> ***(e) on the part of the tenant -***

> *(ii) not to part with the possession of, mortgage, assign, sublet or otherwise alienate the holding or any part thereof without the consent in writing of the landlord previously obtained, which consent shall not be unreasonably withheld, and then, only in accordance with the provisions of this Act;"*

The actions of the then lessee when he registered a mortgage in favour of Westpac Banking Corporation on 28 February 1984 was a clear breach of section 9(1)(e)(ii) of Alta. That breach justified the notice to remedy that was subsequently issued by the first respondent. All that was required at that time was for the then Lessee to discharge the mortgage; for him to apply to the first respondent for consent to re-mortgage the Lease to Westpac Banking Corporation for the purpose of carrying out the development work be proposed; and then if the first respondent refused consent unreasonably to apply to the Agricultural Tribunal to formally dispense with the first respondent's consent. That, the Lessee sadly failed to do. This interminable litigation has followed as a result.

Having considered the form of the notice and the legislation applicable, we now turn to the method of service adopted by the first respondent. He relied on two methods - the first notice was sent by registered post to Post Office Box 3623 Samabula Suva. The appellants do not deny that was the lessee's postal address. They have in fact used it as their address for service on a caveat they subsequently registered. The first respondent says he also affixed the notice to the then lessees place of residence at Vesida Place some 4 1/2 miles from Nasinu. This area was not serviced by the postal authorities so that personal service in the ordinary way was not possible. The first respondent also served a copy of the notice on the Westpac Banking Corporation.

The appellants challenge the form of service adopted by the first respondent. They say that section 39(a) of ALTA provides for a notice to be served -

> **"By sending it by registered post to the usual or last known place of abode of the person on whom it is to be served;"**

The appellants say that Box 3623 Samabula Suva is not the lessees "usual or last known place of abode." Scott J. took a pragmatic and realistic approach to this issue. He said - " my view is that the section must be read to allow service by registered mail at a post office box. It seems to me that a post office box is as much an extension of the addressees place of abode as is a letter box on the garden gate. It is certainly much more secure." We agree. But in any case the first respondent also effected service in accordance with section 39 (c) by affixing the notice to the lessee's residence. Accordingly we reject the arguement that the notice was not properly or adequately served.

Whether the lease could be terminated by a mere notice to quit

Counsel for the appellants submitted that because there was no "effective and/or lawful re-entry" therefore Lease No. 53574 could not be legally terminated. He relied for that submission on clause 5 of the lease which he said contained an express agreement between the parties as to how and under what circumstances the lease could be terminated.

While it is true that lease 53574 could not be terminated by the issue of the notice to quit alone, it is equally true that re-entry following the expiration of the notice to quit can be achieved in a number of ways. The first respondent in this case chose to re-enter the property by the issue of proceedings in the form of the writ and statement of claim in action 854 of 1985. The Court records disclose those proceedings were served on the original lessee and a defence filed. Upon service of a writ for possession, re-entry is complete and forfeiture is created. We refer to Canas Property v. K.L. Television (1970) 2 A.E.R. 795 at 799 where Lord Denning M.R. stated the law as follows:-

> **"My conclusion is that where a tenant has been guilty of a breach which has not been waived, then in order to effect a forfeiture, the lessor must actually re-enter, or do what is equivalent to re-entry namely issue and serve a writ for possession on the Lessee or assignee as the case may be. If the lessee or assignee is a partnership firm (or joint tenants) service on one of them is enough for that purpose, see Doe d Bennett v. Roe (1849) 7 CB 127. The lease is determined as from the date when the writ is served,"**

The writ for possession in action 854 of 1985 was served on 27 September 1985. The first respondent has therefore effected re-entry; the lease has been determined; and forfeiture has been completed.

Issues of waiver and consolidation

In relation to the application for consolidation Counsel for the appellants submitted that the "..... learned Judge erred in dismissing the appellant's application on technical grounds without addressing the relevancy of the application towards the resolution of the issues in Civil action n. 254 of 1992," The brief reasons for the learned Judges extempore ruling are -

> ***"The weakness of the Plaintiffs' argument is that the Application has been made extremely late and not, as it should have been, at the first opportunity. Furthermore, different Solicitors are involved and therefore it is usually impossible to consolidate such Actions (see The Supreme Court Practice - The White Book-1988 Edition paragraph 4/9/1.) Further difficulties are that the present Action was commenced by Originating Summons and the Actions it is sought to consolidate were begun by Writ and that the Plaintiff in the two former Actions is the same person as the Firs t Defendant in the present Action. A final consideration is that I have set aside the whole of today to hear the remaining arguments in Action 254, the present action.***
>
> ***In all the circumstances I am of the view that despite the inconvenience of leaving the foreclosure issue to be litigated, should the Parties pursue it, (a relatively simple and short action I should have thought) the balance of convenience and justice require that I should dismiss this Application which I now do."***

We do not regard those reasons as "technical." Rather they recognize the real difficulties which would occur if the application for consolidation had been granted.

The real thrust of the appellants' appeal as we perceive it was their reliance on Civil action No.422 of 1988, and the question of waiver in so far as it affected the original notice to quit which was the original source of all the subsequent litigation. Counsel for the appellants submitted that the first respondent had waived any rights he may have had under the notice to

quit dated 22 April 1985 when in 1988 he issued proceedings (No. 422 of 1988) to enforce a 1983 agreement to buy the original lessee's interest in Lease No.53574 for $25,000.00. The chronological sequence of events is as follows:-

(1) The original Lessee of Lease No.53574 entered into an option, for the first respondent to purchase his lease for $25,000. The option was dated 4 August 1983 and had to be exercised before 4 February 1984.

(2) The first respondent exercised his option on 18 January, 1984 and arranged with his Solicitor's to attend to the necessary documentation.

(3) The original lessee by letter dated 2 March 1984 repudiated the option and refused any longer to be bound by it.

(4) The original lessee died on or about 17 August 1987.

(5) The writ seeking specific performance of the said option to purchase was filed on 16 June 1988 and still remains pending.

It is these proceedings the appellants say constitutes a waiver of any rights the first respondent may claim to have under the notice to quit issued on 22 April 1985. Counsel put it this way -

> *"In this case the 1st Respondent applied to the High Court in 1988 seeking to enforce an agreement between Bhagat Singh and himself to sell the Lease No.53574 to the 1st Respondent. Civil Action No.422 was commenced after the expiration of the Notice to Quit dated 22 April 1985. The 1st Respondent's actions clearly imported the recognition of Lease No.53574 as being valid. Why else would he go to Court in 1988 in order to enforce a 1983 Agreement. The 1st Respondent could not have himself believed his Notice to Quit as being valid since he completely ignored it by his actions in 1988. It is submitted that the 1st Respondent could not rely on the Notice to Quit dated 22 April 1985 on 8th May 1992 or anytime after 1st June 1988."*

That submission fails to recognize that the issue and service of the writ for possession Civil action No. 854 of 1985 operates as a final election by the first respondent to determine and cancel the term of the Lease. The fact that the proceedings are still pending and that no judgment has been secured is of no consequence.

We have also considered whether the option to purchase entered into between the parties may have created a form of tenancy between the signing of the option and the exercise of its acceptance by the first respondent. But the option was dated 4 August 1983 was exercised on 18 January 1984; and so completed 3 months before the notice to quit was in fact issued. Waiver is therefore not available to the appellants.

Rights of relief against forfeiture

Counsel for the appellants places great emphasis on the House of Lords case of **Billson and Others v. Residential Apartments Limited** (1992) 1 AER 141. But that case related specifically to section 146 (1) of the Law of Property Act 1925 in England. Its relevance was whether a tenant could apply for relief against forfeiture in circumstances special to that legislation. In Fiji the Property Law Act (Cap.130) applies. Section 105 provides for the

restrictions on and relief against forfeiture of Leases. Of particular application to this case is section 105(8)(e) which states -

> **"(8) The provisions of this section shall not extend -**
>
> **(e) to any contract of tenancy of agricultural land which is subject to the provisions of the Agricultural Landlord and Tenant Act."**

It is accepted that the "Bala" land is agriculture and consequently is exempted from the relief against forfeiture provisions of the Property Law Act. The appellants only recourse therefore was to apply under the provisions of Section 37(2) (a) of ALTA which provides -

> **"The tenant, may at any time before the expiry of a notice lawfully given and served upon him under the provisions of paragraphs (b) and (c) of subsection (1) and of section 39 apply to the tribunal for relief against forfeiture and pending the award of the tribunal such tenant shall not be evicted."**

We have determined that the notice dated 22 April 1985 does comply with the provisions of paragraphs (b) and (c) of section (1) and of section 39. The time in which the appellants were required to apply to the Agricultural Tribunal was before the expiration of the notice to quit which we have held was given on 25 April 1985 and so expired on 25 July 1985. We

agree with the decision of Scott J. when he declared there was no right of relief against forfeiture subsisting in favour of the appellants.

For all the above reasons the appeal is dismissed with costs to the first respondent.

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Sir Maurice Casey
Judge of Appeal

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Sir Mari Kapi
Judge of Appeal

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Justice J.D. Dillon
Judge of Appeal

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