

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0059 of 2003
(High Court Civil Action HBC 31 OF 2002)

BETWEEN:

HARDEO PRASAD f/n Badal

Appellant

AND:

ABDUL HAMID f/n Ahmed Ali

Respondent

Coram: Sheppard JA
Tompkins JA
Ellis JA

Hearing: Wednesday 10th March 2004

Counsel: Mr. S. Chandra for the Appellant
Mr. S. Sharma for the Respondent

Date of Judgment: Friday 19th March 2004

JUDGMENT OF THE COURT

The Judgment appealed from is a judgment of the High Court (Pathik J) delivered on 1st August 2003. The matter before his Lordship was an

application for summary Judgment in an action for possession of land . The proceeding was brought pursuant to S.169 of the Land Transfer Act (Cap.131).

His Lordship said that the Plaintiff (now the Respondent) was the registered proprietor of the land. We refer to him hereafter as "Hamid". The Defendant (now the Appellant) ("Prasad") was in occupation of a portion of the land. He had not paid any ground rental in respect of the land since 1973 either to the Director of Lands or Hamid since Hamid became the proprietor of the land. His Lordship said that the consent of the Director of Lands had been obtained to the initiation of the proceedings. He referred to another action which is pending in the High Court (HBC N0.0089 of 1994S) in which Hamid was the first Defendant and the Director of Lands the second Defendant. The action was brought by Prasad who was alleging fraud in that Hamid had knowledge or was to be deemed to have knowledge of Prasad's interest in the land and had disregarded his interest by accepting a new lease of the land in his own name on the land.

His Lordship referred to an interlocutory Judgment he had given in that matter on 8th April 1994 where he ruled on the status of Prasad in relation to his interest in the land. His Lordship had said that he found no lease document had ever issued to Prasad or his father before him in respect of the relevant land which he referred to as Lot 24. Prasad was paying \$2 land rent to the Director of Lands until 1973. Nothing was paid after that. He has remained on the land ever since and he is still in

occupation of it. His Lordship said that there was no evidence to show that Prasad was ever issued with any tenancy document. He added;

“ Although he built a substantial dwelling house on the land it was done without the consent on the Director of Lands even though the Suva Rural Local Authority and the Town Planning Board gave the necessary permits to build. How far the Director of Lands was involved in the permission to build the house was a matter to answer in the trial of the action.”

His Lordship went on to say that Prasad had said that an equitable interest in the land had been created in his favour in the circumstances outlined by him. On 1 February 1994 he had been given notice to remove his dwelling house within 7 days. His Lordship summed up the position by saying that Prasad was a person without a lease, a tenancy or a licence of any kind enabling him to occupy the land. That being the situation, so far as the Director of Lands was concerned, it was for it to answer the allegation against it in the trial of the action and not for his Lordship to decide on the affidavits in the application before him.

It is next convenient to refer to the relevant provisions of the Land Transfer Act (Cap.131). The sections in question are ss.169, 170, 171, and 172. Relevantly s.169 provides that the last registered proprietor of the land may summon any person in possession of the land to appear before a Judge to show cause why the person summoned should not give up possession of the land to the applicant.

Hamid is the registered proprietor of the lease of the land and thus had standing to bring these proceedings. By section 170 the summons is to contain a description of the land. That provision was complied with. Section 171 is not relevant. But critical to this case is S.172 which provides that, if the person summoned appears, he may show cause why he refuses possession of the 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.

As has been remarked in other cases, provisions of this kind are common in many common law countries. There is a substantial amount of authority dealing with them and with the principles which apply when the procedure of summary judgment is invoked. The all important question always is whether the Defendant can prove to the satisfaction of the judge a right to the possession of the land. These words have been the subject of some judicial gloss both in Fiji and elsewhere. For present purposes it is sufficient to refer to a decision relied upon by the primary judge in *Morris Hedstrom Limited v. Liaquat Ali* (Action N0..153/87) where the Supreme Court said (at p.2) that under s.172 the person summoned may show cause why he refuses to give up possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Court added that that was not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What was required was that some tangible evidence establishing a right or supporting an arguable

case for such a right, must be adduced. What we have called the gloss on the section derives from the summary nature of the proceedings instituted under s.169. Courts are always reluctant to give summary judgment in cases where a Defendant shows that he has some reasonably arguable defence or case which requires to be heard at a proper trial of the proceedings.

Leaving the law, one needs to go to the evidence which was relied upon by Prasad to resist the order that was sought. That can be best done by referring first to his Lordship's judgment. He referred to the 1994 proceedings.

In the present case his Lordship said it was Prasad's view that just because there was pending the 1994 case, the eviction proceedings could not proceed. Prasad submitted that this was a good reason for him to resist the application under s.169 of the Land Transfer Act. After quoting some authority, the learned Judge concluded that the existence of the 1994 proceedings was not by itself a matter sufficient to resist an application under s.169.

After referring to some of the submissions relied upon by counsel, his Lordship referred to the history of the matter. He said rent had been paid by Prasad to the Director of Lands from 1961 to 1973. He said that a three bedroom house was built on it "right in the middle of the boundary which was towards Hamid's land." His Lordship said that in the 1994 proceedings Hamid had set out particulars of fraud. These

are contained in an affidavit sworn in those proceedings. It was before the learned Judge. In that affidavit Prasad said that he was residing on freehold land referred to as "Lot 24 (Part of Kalabu)" which had been leased to his father by the Director of Lands. He said that in 1940 his father had become very ill. He devised the land to four brothers including Prasad. He said all four brothers continued to live on the land until 1960 when they decided to subdivide the land into four different lots.

Prasad accompanied by his Solicitor visited the Lands Department and discussed the case with a Mr. Ronwell who he understood to have been the Director of Lands at that time. After the meeting the lawyer advised him that Mr. Ronwell was going to issue Prasad with a new lease for his share and the dwelling house could then be constructed on the land. Shortly after he agreed to take the lease a Mr. Naidu from the Lands and Survey Department placed pegs on the ground that delineated the lot. At the end of 1960 an employee left a message that the lease was waiting for collection at the office. He sent his wife to pick it up but she was told that he had to collect it personally. He went to the Lands Department and saw a Mr. Ashif Ali. He said that the office was being painted and the lease had been misplaced. He could not locate the lease. He said he would contact Prasad upon finding the lease. Mr. Ali did not contact him "for a few months" so Prasad visited him. He did that several times. Each time he was told that the lease could not be found. He said that after a few years he became very concerned and one day met Mr. Ali in the Suva market where he was buying his

vegetables. He expressed great concern about the lease. Mr. Ali said he would look for the lease if he was given 150 pounds. Prasad refused to give him the money.

All this time he said he kept paying the ground rent for the land and produced some of the receipts for his payments. He continued paying rent until 1973 "when the department suddenly stopped receiving the rent". He visited the Lands Department on a number of occasions to pay the rent and each time the officers of the department refused to accept it without giving him any reasons.

He then referred to his obtaining consent from the Suva Local Rural Authority and the Town Planning Board to the building of the house. He said permission was granted on 3rd October 1963. He built a substantial permanent house. He estimated the value of it to be \$30,000. A copy of the permission is in his evidence.

Hamid said that he was the registered proprietor of the lease granted to him by the Department of Lands. He said that Prasad was occupying his property because of the erection of a pit latrine in the end part of his fence. He said that his Solicitor had requested Prasad to remove the pit latrine and fence. He had refused to do so.

The lease itself is described as an industrial lease and is said to have been registered on 1 February 1994. The term of the lease is 99 years. In his affidavit Prasad said that the purported registered lease had been

fraudulently and dishonestly obtained by Hamid from the Director of Lands. He also said that he had been advised that the purported lease was not properly registered under the Land Transfer Act. The affidavit was sworn in the 1994 proceedings. He said that he denied erecting a pit latrine and part of a fence on the land. He said that he in fact occupied most of the land in question and that part of his house which had been erected with the approval of the Suva Local Rural Authority and the Town Planning Board in 1963 was built on the land.

Because of the uncertainty of the evidence in relation to the matter we decided to ask the parties to inspect the land which is in the Suva area and try to reach agreement on what part of the house, if any, encroached on to Hamid's land. The result was a surveyor's plan which shows that part of the house does occupy the land the subject of the lease granted to Hamid. About a third of the house encroaches on to Hamid's land. It seems to us therefore that the encroachment is significant. A copy of the survey plan was delivered to us without comment. We assume that this indicates that the parties are in agreement with it. It follows that when Hamid was granted the lease of Lot 10 in 1994 he had either actual or constructive notice of the fact that the land in respect of which he had taken the lease had part of a substantial building upon it.

Paragraph 4 of Prasad's affidavit is in part as follows:

"4. THAT as to paragraph 4 of the Affidavit, I am advised and verily believe that I have a legal interest in the land by virtue of the approval plan of the house on the said land and payment of rent to the Director of Lands since 1963 to 1973. Therefore I refused to move out of the said land. After the Notice was given by the Plaintiff to me to vacate the land, the Plaintiff did commence clearing, levelling and developing the portion of the land. The Plaintiff in fact damaged part of my vegetables and trees and threatened to bulldoze the house I am occupying since 1963. A bulldozer was dispatched to the scene and I had no option but to seek assistance of this Honourable Court."

The Appellant also said that he had been advised that he had legal and equitable rights in the land and that he had full "confidence" to convince the Court during the substantive hearing that Hamid obtained the lease with knowledge and dishonest intent to deprive him of the land.

There is some other evidence which we have considered but do not find it necessary to refer to it.

We return to his Lordship judgment. His Lordship said that it was clear from the affidavit evidence that no particulars of the alleged fraud had been given. He referred to the allegations as being wild and general. His Lordship said that all Hamid had said was that until the 1994 proceedings were finalised Hamid had no right to evict him or enter

the land. His Lordship then made reference to Sections 39 and 40 of the Land Transfer Act dealing with indefeasibility of title. These are well known sections and have been the subject of a number of authorities.

Section 40 provides that, except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from a proprietor of any estate or interest in land shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such a proprietor or any previous proprietor of such estate or interest was or is registered or to see to the application of the purchase money or any part thereof or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and knowledge that any such trust or any interest is in existence shall not of itself be imputed as fraud.

His Lordship also said that, if the Appellant had any claim, it was rightly against the Director of Lands and not against Hamid. He added that the Appellant had not paid any rent to the Director of Lands since 1973 or to Hamid to endeavour to establish "a semblance of an interest in the land". He added that "mere alleged knowledge of the Appellant's interest was insufficient and incapable on its own to impute a fraud in the Respondent".

His Lordship said that, in considering fraud, he had borne in mind the judgment of Salmond J in *Waimiha Sawmilling Company v. Waioni Timber* [1923] NZLR 1137 at p.1175. There Salmond J said that the true test of fraud was not whether the purchaser actually knew for certain of the existence of the adverse right but whether he knew enough to make it his duty as an honest man to hold his hand and either to make further inquiries before purchasing or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance, which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud. There are many cases dealing with this question. Many of these have referred to Salmond J's judgment in the *Waimiha Sawmilling* case. We do not find it necessary further to discuss the authorities.

His Lordship said that he had stated earlier what he had found as Prasad's status in regard to the land. He was not a tenant, there was no tenancy, nothing to show that there was a tenancy and no evidence of payment of rent to anyone. In those circumstances the Court could not interfere with the exercise of discretion on the part of the Director of Lands as to whom he intended to grant a lease of the land. He was entitled to grant it to whoever was most entitled or qualified. In concluding his judgment, his Lordship said that, apart from the general allegation of fraud, the matter was clear cut without complications and

could be easily dealt with in a summary manner. He said that he found that Prasad had not 'shown cause' to his satisfaction why he should not give vacant possession of the land as required under S.172 of the Act. He then made an order that Prasad given immediate vacant possession of the land to Hamid.

The question for us is whether the Jdge has fallen into any error in reaching his conclusion. It seems to us that one matter upon which Hamid might reasonably rely is the fact that on the land was a substantial house, or at least part of one, which had been there for many years. Its presence must have been known to Hamid before he took the lease. In the words of Salmond J the question is whether he knew for certainty of the existence of an adverse right but did he know enough to make it his duty to hold his hand and either to make further enquiry before taking the lease. Was he guilty of the wilful blindness to which Salmond J refers? There was no evidence before the Judge that Hamid knew for a certainty of the existence of an adverse right. But there is a case for saying that, because of the existence of the building on the land, that should have put him on enquiry.

Whether this case is disposed of in a summary way as his Lordship thought it should be or whether it goes to trial and is fully heard, that seems to be the ultimate question which will need to be answered. The matter needs to be decided with it in mind that section 40 of the Act provides that knowledge that any such unregistered interest is in existence shall not of itself be imputed as fraud. That puts it rather

more positively than does the evidence in this case because it is apparently not fraud even if there is knowledge of an unregistered interest. Objectively speaking we know from the evidence that there was no unregistered interest. The Appellant may have had some right arising from his payment of rent until 1973 to occupy the land. He certainly had the permission of the relevant authorities to build the house which is in question but that cannot be determinative of the outcome of the case. If one were to accept Hamid's evidence about his conversations with officers of the Department of Lands many years ago about there actually being a lease which he could pick up but which was never available, one might take the view that he had had a raw deal from the Department of Lands. We could not make that finding in this summary proceeding.

But that does not appear to us to be a reason why we should find that the learned judge fell into error. As was said Prasad may, in the 1994 proceedings, have cause for complaint against the Department of Lands. We make no comment about this because we have not the material before us which would enable us to do so. No more can be said than that about the case which Prasad proposes to make. The important point though is that the matter is between Prasad and the Department of Lands: it cannot concern Hamid. That is a point which the judge himself made very strongly.

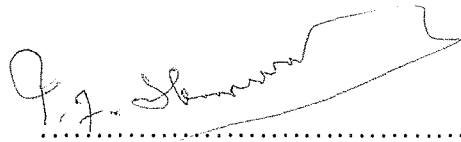
More importantly for present purposes, Hamid has not demonstrated that he has any interest in the land or reasonably arguable case that he has an interest in the land. The evidence points to his never having had any more than a periodic tenancy. The Department of Land's refusal of rent after 1973 suggests that it no longer recognized him as its tenant. Hamid brought the 1994 proceedings but he failed to provide satisfactory particulars of fraud. He has never done so. In short Hamid has not discharged the onus which rests on him under s.172 of the Act..

It is a hard thing to contemplate a situation in which somebody who has occupied land for so many years, has built a house upon that land and, at least at one stage appears to have had some sort of tenancy, now to be faced with the prospect of having a significant part of his home demolished by the actions of Hamid.. But Hamid has his rights. They are clear. The legislation is clear and the authorities under the legislation are also clear. In our opinion the Judge made no error in this case. It was one appropriate for summary dismissal.

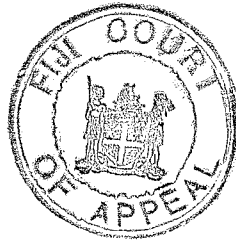
Accordingly the appeal is dismissed with costs which we assess at \$1,000.

During the hearing the parties had some discussions about a resolution of the matter which would involve the removal of that part of the house which encroaches on Hamid's land. Hamid was apparently willing to move that part of the house on to land other than Lot 10 and to do so

at his expense. The offer was made openly and it seems unfortunate that it was not accepted. There is no reason why Hamid should now feel obliged to do what he offered to do but, in all the circumstances, if he could maintain what to us seems to be a generous approach, there may be a measure of overall justice done in the case.



Sheppard JA



Tompkins JA



Ellis JA

Solicitors

Maharaj Chandra & Associates Suva for the Appellant

Patel Sharma, & Associates Suva for Respondent