IN THE HIIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

HBC 66 of 2012

BETWEEN : **CANE FARMERS COOPERATIVE SAVINGS AND LOANS ASSOCIATION LIMITED** registered cooperative having its registered office at 9 Namoli Avenue, Lautoka, Fiji.

PLAINTIFF

AND : **FIJI ELECTRICITY AUTHORITY** a body corporate established under the Electricity Act CAP 180 of the Laws of Fiji, Marlow Street, Suva.

DEFENDANT

Appearances : Mr Nawaikula of Nawaikula Esquire for the Plaintiff
Ms Sharma, FEA in House Counsel for the Defendant

R U L I N G

INTRODUCTION

[1]. The plaintiff, Cane Farmers Cooperative Savings And Loans Association Limited (**"CFCSLA"**) applies to this Court for an Order for summary eviction against the defendant, Fiji Electricity Authority (**"FEA"**) pursuant to section 169 of the Land Transfer Act (Cap 131). The land in question is described as NL 28252 Legalega (Part Of) Lot 4 on SO 5504 in the Tikina of Nadi Province of Ba (**"Lot 4"**). Lot 4 is 4554 square meters in size. Lot 4 is, in fact, an *i*Taukei Lands Trust Board Tourism Lease. Section 169 states as follows:

> The following persons may summon any person 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 lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;
> (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.

[2]. CFCSLA qualifies under the first limb of section 169. CFCSLA relies on an affidavit of Jone Kedraika which is filed herein support of the application. A copy of CFCSLA's title is annexed to his affidavit confirming the same. Once it is

shown that CFCSLA is the last registered proprietor, the onus shifts to FEA to show cause as to why an Order for vacant possession should not be granted against it (see **section 172** of the **Land Transfer Act**). In discharging that burden, FEA must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under **section 169**. This does not mean that FEA has to prove conclusively a right to remain in possession. On the contrary, it is enough that he shows some tangible evidence establishing a right or at least supporting an arguable case for such a right (see **Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2**).

BASIC FACTS

[3]. The basic (undisputed) facts that emerge from the affidavits filed by both parties are as follows. Airport Land Development Company Ltd (**"ALDCL"**) had undertaken a major land development project in Legalega in Nadi. The project involved the subdivision of a particular piece of land into commercial, hotel/special purpose and residential lots. Details of the description of the land in question are not known. What I gather though is that Lot 4, a Tourism Lease granted by the *i*Taukei Lands Trust Board to CFCSLA, was amongst the lots that were carved out of the ALDCL development project.

[4]. The project was managed by ALDCL's CEO and Managing Director, namely one Ratu Jona Rayasi. As developer, ALDCL, was obligated to arrange with the relevant authorities regarding the reticulation of basic amenities such as electricity[1], water etc. Pursuant to that duty, ALDCL then approached FEA regarding the reticulation of electricity to the subdivision. And following some consultation, FEA advised ALDCL of the total costs involved as well as its (FEA's) terms and conditions for electrifying the project. Notably, one of FEA's terms was that ALDCL secure easement rights for placing FEA's assets.

[1] Annexed to Basant Kumar's affidavit and marked "A" is a true copy of the said offer for the supply of electricity to ALDCL.

[5]. It appears that the plaintiff and ALDCL did negotiate for some time over the said easement rights over Lot 4 for FEA's purpose. I gather also that the plaintiff did give consent vide a letter dated 06 March 2008 addressed to the Electrical Engineer, FEA (letter reproduced in part below):

> Re: CCSLA Hotel Lease at Legalega (Pt. OF) Lot 4 on SO 5504 – NLTB Ref. 50036742 – FEA Sub Station
>
> With reference to the abovesaid subject please be advised that the Association as the Lessee has given consent to the Developer for the construction of the sub-station on our Lot 4 at the Nadi Airport Development site.
>
> We hope that the letter will serve to clarify our stand on the issue.
> For further clarification you may contact the undersigned.
>
> Yours faithfully
>
> Jone Kedraika
> Manage/Secretary (sic)
>
> cc. Airport Land Dev. Co. Ltd

[6]. The plaintiff does not deny having written the above letter. Kedraika explains the above letter as follows in paragraphs 7 and 8 of his affidavit in reply:

> ...in answer to paragraph 9 I admit the content of the Annexure D in that affidavit. I say the consent was given to the developer in lieu of negotiation that was pending with the developer at that time. Such negotiation was never completed and the plaintiff and the developer did not execute any agreement for easement.
>
> ...it is because nothing eventuate and no easement was ever agreed being the reason that we are taking this action against the defendant which in itself, and I can confirm again, is a clear sign that whatever the consent that was given has been revoked.

[7]. It appears that pursuant to the above, the developer then went ahead and erected the structure which is the substation in question. This structure houses the FEA's electrical equipment namely an 11KV transformer, cables, switchgears, wires and fuses that transmit and distribute power supply to Lot 2 and to other Lots as well.

FEA'S CASE

[8]. FEA has filed an affidavit of Basant Kumar to oppose the petition. Kumar presents FEA's case to justify remaining in possession as follows:

(i) this is not the first time this problem has occurred in this development scheme. On previous occasions, when FEA's substation had encroached over and onto a private boundary, the substation had to be removed at the developer's costs after the developer had admitted to FEA that an error was made by him in identifying the correct lot for the construction of the substation.

(ii) on 4 March and on 22 April 2008, FEA by letter sought confirmation from ALDCL regarding the easement for the substation in question on Lot 4[2].

(iii) Kumar deposes that since nothing was forthcoming from ALDCL, the plaintiff eventually gave its consent and further confirmed that it had given its consent to ALDCL to construct the substation in question on Lot 4 SO 5504. A letter from the plaintiff to that effect and marked "D" is exhibited to Kumar's affidavit.

(iv) Kumar argues that the plaintiff cannot now argue that they did not grant consent and/or that FEA is occupying the land forcefully and without right.

(v) Kumar also argues that if the plaintiff really objects to the construction of the substation, the plaintiff should have made known its objections to FEA on 26 July 2007 or soon thereafter when the plaintiff commenced its lease. The said substation was not commissioned and energised until more than a year later on 16 September 2008.

(vi) and even after commissioning, the plaintiff did not voice objection to FEA until some three years later in December 2011.

PLAINTIFF'S REPLY

[9]. By the affidavit of Mr. Jone Kedraika, the plaintiff does not deny any of the allegations in Basant Kumar's affidavit. All that Kedraika deposes is that the consent in question was given to ALDCL in lieu of negotiations pending with ALDCL at the time. This negotiation was never completed. Kedraika stresses that no agreement for an easement was ever concluded between the plaintiff and the developer. Kedraika reasons that the fact of the plaintiff having taken this legal action against FEA, in itself, confirms that whatever consent was given, has been revoked.

[10]. Kedraika also exhibits in his affidavit a copy of a letter by the plaintiff's solicitors to FEA dated 21 December 2011 proposing to FEA to settle the issue. The said letter states as follows:

[2] Annexed and marked "B" and "C" is a true copy of the said letters to the developer.

> I act for Cane Farmers Co-operation Savings & Loans Association (CCSLA).
>
> I wish to write to you that you have an equipment in the form of a transformer that is sitting on our clients land without their approval.
>
> As a matter of fact this transformer was located elsewhere in another Lot but the Developer of this land, Mr. Sovau had shifted it to my clients lands (sic) without my clients knowledge.
>
> My client sees there are two options, the first being to get orders for the removal of the facility or to talk with you on terms of mutual benefit. They prefer the second option.
>
> Accordingly he requested if you can be agreeable to reduce your charges to them when they develop this land upon their giving permission for you to continue use.

[11]. Kedraika says that the bottom line is that there is nothing in the plaintiff's title by way of a registered easement or restrictive covenant to indicate that FEA has an interest on the land to be protected.

OBSERVATIONS

[12]. Mr. Nawaikula, a former legal counsel for *i*TLTB, does not raise any issue about whether or not, given that the land in question is on *i*taukei land, about whether or not there was a need to obtain the *i*TLTB consent for the substation and if so, whether or not the developer and/or FEA had sought and obtained that consent. I say no more on this.

[13]. After considering all, I am of the view that FEA has shown sufficient cause to remain in occupation of the substation on Lot 4 based on the following:

(i) the substation was built by the developer, ALDCL, to house FEA's transformer and related equipment as part of its arrangement with FEA.
(ii) the plaintiff obviously had given ALDCL the green light to do so – as evidenced by its (plaintiff's) consent dated 06 March 2008 (see above).
(iii) some six months later, in September 2008, FEA commissioned and energised the substation. But it was not until some three years later, in December 2011, that the plaintiff took objection to the substation. It appears – from where I sit, that the plaintiff took objection after failing to convince FEA to settle on terms stated in its (plaintiff's) letter of 21 December 2011 (see above).
(iv) in my view, the legal issues that arise in this case are not appropriate for summary determination. These issues are:
    (a) given that the plaintiff concedes to having given a consent to ALDCL, and given that ALDCL then relied on that consent to build the substation and, which consent, most likely assured FEA to set up its equipment in the substation - is FEA then entitled to justify

remaining in occupation on that assurance? Whether the plaintiff then is estopped from alleging trespass?

(b) I sense that the plaintiff's issue relates to compensation for the encroachment. If so, then who should pay that (ALDCL? FEA?).

(c) FEA is a commercial statutory authority charged with performing an important public utility service, namely, the reticulation of electricity supplies for public benefit. I accept that, that in itself, does not give FEA any right whatsoever to encroach onto any private property. However, in the circumstances of this case, one might say that all that FEA did was to move its equipment onto the substation that had been built by the developer upon the plaintiff's encouragement. Whether the plaintiff is objecting to the substation encroaching onto its land and/or whether the plaintiff is objecting to FEA 's equipment in the substation is not clear to me. Ultimately, either of these may turn out to be a question of appropriate compensation for the plaintiff.

(d) having said that, it seems to me, on the basis of limited material in affidavits filed, that the plaintiff is entitled to compensation. And as stated, an appropriate compensation may all that is required to appease the plaintiff. I would much rather prefer not to grant a summary Order for eviction against FEA considering that the issues between the parties are otherwise resolvable. And I think the issues between the parties would be best resolved in a writ action by the plaintiff against the defendants.

[14]. The plaintiff would be best advised to file a writ action against both the FEA and the developer. Considering that the plaintiff is already amenable to settling – I suspect this would all boil down eventually to the question: who should compensate the plaintiff for the encroachment and how much compensation should be given. I refuse to grant the Orders sought by the plaintiff and, accordingly, I dismiss the summons. The parties are to bear their own costs.

.....

Master Tuilevuka

05 June 2013