

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 360 of 2017

IN THE MATTER of an application
under Section 169 of Part XXIV of the
Land Transfer Act, Cap. 131 for the
Order for immediate vacant possession.

BETWEEN : **SUVA CITY COUNCIL** **PLAINTIFF**

AND : **KHANZ HOLDINGS LIMITED** **DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms N Choo [R Patel Lawyers]

DEFENDANT : Mr V Singh with Mr E Kumar [Parshotam Lawyers]

JUDGMENT BY : Acting Master Ms Vandhana Lai

DELIVERED ON : 08 November 2019

JUDGMENT

[Section 169 – Vacant Possession]

Application

1. This is the Plaintiff's application seeking following orders:
 - a. *The Defendant show cause why an Order for immediate vacant possession should not be made against the Defendant for any further occupation of that part of the Plaintiff's property comprised and described in Crown Lease No. 3560 being part of Section 78*

and Suva on Plan S. 1132 on Shop 3, Suva Market, Suva in Fiji;
and

- b. An Order for immediate vacant possession against the Defendant and the occupants of the Plaintiff's property comprised and described in Crown Lease No. 3560 being part of Section 78 Suva on Plan S. 1132 on Shop 3, Suva Market, Suva in Fiji;*
- c. The costs of this application be paid by the Defendant to the Plaintiffs; and*
- d. Any other such orders this Honorable Court may deem just and expedient.*

The said application is made pursuant to Section 169 of the Land Transfer Act.

Plaintiff's Case

2. The Plaintiff is said to be the registered proprietor of all land comprised and described in Crown Lease No. 3560 situated at Shop 3, Suva Market being part of Section 78 Suva on Plan S. 1132.

According to the Plaintiff, it had on 31 August 1999 entered into a lease agreement with Fiji Fish Limited to permit Fiji Fish to lease the Plaintiff's premises.

In good faith the agreement was not renewed upon expiration and it was implied between the Plaintiff and Fiji Fish that Fiji Fish will continue to hold a bare license over the premises.

In 2015, Fiji Fish sold all its business interests to the Defendant unbeknown to the Plaintiff and failed to obtain a written consent from the Plaintiff to sublease.

Pursuant to Clause 2.05.06 of the expired lease, Fish Shop was not "to sublet, assign or transfer or part with or share the possession of the said premises without the written consent of the Plaintiff".

Following the sale of the business interest of Fish Shop, the Defendant sought to have the management authority of Fish Shop transferred to Defendant, however in light of the said breach of the Agreement by Fish Shop and the Plaintiff's non acceptance of Defendant as new tenants, the Plaintiff by letter dated 30th January 2015 declined its request to transfer the management authority of Fish Shop to the Defendant.

On 11 March 2015, the Plaintiff wrote to Fiji Fish and advised them that the tender was awarded to Fresh ét International for occupancy of the premises and requested Fiji Fish to vacate the premises in 30 days.

The Defendants subsequently on 16 March 2015, wrote to the Ministry of Local Development, Urban Housing and Environment raising its grievances against the Plaintiff.

After assessing the Plaintiff's position, the Ministry made a finding that Fiji Fish had breached its Agreement with the Plaintiff in transferring the premises to the Defendant. The Ministry further informed the Plaintiff to proceed with the execution of the agreement with Fresh ét.

Again on 10 June 2015 the Plaintiff informed Fiji Fish on the issuance of the tender to Fresh ét and addressing the issue of breach of agreement by Fiji Fish in subletting the premises without the Plaintiff's consent.

A Notice to Vacate was served on 31 July 2017 and despite service the Defendant wilfully refuses to vacate the property.

The Plaintiff is now losing rental it was to receive from Fresh ét.

Due to the sale of Fiji Fish, the agreement between the Plaintiff and Fiji Fish is deemed to have been terminated with Plaintiff not recognising the Defendants as its tenant.

Defendant's Case

3. Whilst opposing the application the Defendant states as follows:

The agreement between Fiji Fish and the Plaintiff expired in 2002.

The market premises has 3 stops that are available for rent as fish sale shops;

The practice by SCC has been that tenancies are allowed to continue. If a tenant wishes to sell its business to a third party then the tenancy continues with the new tenant without there being any disruption to the tenancy by SCC. The deponent of the affidavit has dealt with SCC for the past 10 years in his previous role as Managing Director of Celtrac Holdings Limited, a company that had been a tenant for another shop at the Suva market.

As early on 30 April 2014 the Plaintiff was informed by the Fiji Fish Marketing Group Ltd that the Suva Market Fish Shop has been managed and operated by its new tenant – the Defendant – since 17 March 2014;

This notification was given to the Plaintiff almost 4 years before the current proceedings were filed. The Defendant has remained at the premises as a tenant in all that time.

The Defendant had purchased the business of Fiji Fish at the said premises when Fiji Fish was facing financial difficulties;

The Defendant then invested (\$25, 000.00) to purchase the shop and to fit it out for their use.

The Defendant also employs 5 staff at the shop. These staff will lose their jobs if the Defendant is ordered to leave the premises as the Defendant does not have sufficient means to sustain these staff without work. Their families who are in turn supported by the income that these staffs earn will suffer.

The letter dated 11 March 2015 was addressed to Fiji Fish almost a year after the Defendant had started operations at the premises. Fresh ét International already had tenancy of 2 out of 3 shops in that area. With the 3rd shop Fresh ét would be allowed to have a monopoly of the entire area. The Plaintiff would be encouraging this monopoly and due to the lack of competition the general public would be affected.

By its letter dated 19 June 2015, the Permanent Secretary for Local Government, Housing and Environment had written to the Special Administrator of the Plaintiff directing that the signing of the lease agreement with Fresh ét International be held-off for a period of 6 months. The PS also advised the Plaintiff to relook at the decision of leasing out of the third fish shop to Fresh ét International.

The letter dated 6 October 2015 signed by Nilesh Naidu is not a letter that the Defendant accepts as properly sent by the Ministry. The said letter does not refer to the earlier letter dated 19 June 2015 and there is no response to the issue of there being no competition for Fresh ét International if it is given tenancy of the third premises.

The Plaintiff's procedure for tenancies in the past has been different from the procedure that was being adopted in this matter. The Plaintiff had on one occasion tried to shut off the electricity to the premises so that the Defendant could not operate from there. The Plaintiff was then directed by the Minister for Local Government to resume the supply of electricity.

The Defendant has at all relevant times been ready able and willing to maintain the tenancy relationship. The Plaintiff's actions in calling for tenders while there is an existing tenant and awarding the tender to Fresh ét International creating a monopoly for that entire area does not create a competitive business environment which best suits consumers.

Preliminary Objections

4. The Defendant's Counsel in their written submission has raised preliminary issues concerning the Plaintiff's affidavit in support; no consent being sought from the Director of

Lands as the property is a Crown Land and the Certified copy of lease is not a recent certified copy.

No authority annexed by deponent of the affidavit in support.

5. The Defendant's Counsel submitted that there is no authority provided by Bijay Chand to show that he has the authority of the Suva City Council to swear the affidavit.
6. Bijay Chand on paragraph 1 of the affidavit in support states he is the Acting Chief Executive Officer with the Plaintiff and he is authorised to swear the affidavit and depose matters on behalf of the Plaintiff.
7. The Plaintiff, Suva City Council is a body corporate duly constituted under the Local Government Act.
8. The appointment of the Chief Executive Officer of the Council is pursuant to the statutory provision in particular Section 35 (1) and (2) (a) of the Local Government Act and which sections reads:
 - (1) *Every Council shall appoint fit and proper persons to be town clerk, and may appoint such other officers and servants as the council considers necessary for the efficient discharge of its functions;*
 - (2)
 - (2A) *The town clerk who shall also be Chief Executive Officer of the Council shall be*
9. Further Section 133 of the Local Government Act allows a town clerk to certify copy of minutes of the Council or a committee which is "prima facie" evidence of appointment, resolution of the Council or Committee.

Sub-section (2) reads:

"A documents whatsoever purporting to be issued, or written by or under the direction of the council of a municipality and purporting to be signed by the Mayor, Town Clerk, shall be received as evidence in all courts of law and shall be deemed to be issued or written by or under the direction of the Council without proof unless the contrary be shown".

10. These provisions of the Local Government Act, gives to the Town Clerk who is the Chief Executive Officer wide powers in executing documents.
11. I do not find that Bijay Chand being the Chief Executive Officer is required to submit an express authority to say he can swear and depose the affidavit on behalf of the Council.
12. This preliminary issue raised by the Defendant's Counsel is dismissed.

Consent of Director of Lands

13. Annexure "BC1" to the affidavit in support is a certified copy of the Crown Lease No. 3560.

The said lease is protected lease under the provision of the Crown Lands Ordinance.

14. Pursuant to Section 13 of the State Lands Act any dealings with a state land without the Director of Land's consent is prohibited.
15. However here the Defendants are said to be unlawfully in possession of the premises. There is no evidence to state they had the consent of the Director of Lands to occupy the premises.
16. In the case of **Prasad v. Chand a Lautoka High Court Civil Action No. HBC 0384 of 1999 (delivered on 30 April 2001) reported in [2001] FLR 164** Gates J. whilst dealing with issue of prior consent of the Director of Lands favoured Lyon's J's approach in

Parvati Narayan v. Suresh Prasad (unreported) Lautoka High Court Civil Action No. HBC 0275 of 1996 (delivered on 15 August 1997) where on page 4 Lyon J found consent was not needed at all since the "*section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's Consent*".

17. Accordingly, I hold that prior consent of the Director of Lands is not required in this case.

Latest Certified Copy of the Crown Lease

18. The said application was filed on 7 December 2017. Annexure "BC1" is the certified copy of the Crown Lease which is certified by the Registrar of Titles on 7 March 2017. Said lease is issued to Suva City Council for 99 years with effective from 1 January 1957. Said lease expires in 2056.

19. With no evidence to the contrary I dismiss the Defendant's preliminary issue concerning the certified copy lease.

Determination of the Application

20. Section 169 of the Land Transfer Act reads:

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*

21. As mentioned earlier Suva City Council is registered lessee of the property hence it has established its right to bring the proceeding under Section 169 of the Act.
22. Property as described in the originating summons is that comprised and described in Crown Lease No. 3560 being part of Section 78 Suva on Plan S. 1132 on Shop 3, Suva Market.

Hence the Plaintiff has fulfilled the requirement of Section 170 of the Land Transfer Act.

Has the Defendant shown cause and proved to the satisfaction of the Court a right to the possession of the land?

23. The said premises was leased to Sea Investments Company Limited a subsidiary of the Fiji Fish Marketing Group Limited for 3 years with effective from 01 June 1999.
24. There is nothing in the lease agreement to state that upon expiration of the lease and with no renewal of the same what was the terms and condition upon which the Sea Investments Company Limited would continue to occupy the premises.
25. One of the clause in the expired lease was that:

2.05.06 Not to sublet, assign or transfer or part with or share the possession of the said Fish Shop or part thereof without the written consent of the lessor.
26. Section 106 of the Local Government Act also specifically states:

“(2) No tenant of any building referred to in subsection (1) may sublet any such building without the written consent of the Council.”
27. There is no evidence to suggest that consent of the Director of Lands (under Section 13 of the States Land Act) and the consent of the Council under Section 106 of the Local Government Act was obtained.

28. The Defendants have failed to show cause and prove to the satisfaction of the court its right to remain in possession of the premises.
29. Accordingly I grant an order in favour of the Plaintiff.

Final Orders

30. The Defendants is to give possession of *Plaintiff's property comprised and described in Crown Lease No. 3560 being part of Section 78 and Suva on Plan S. 1132 on Shop 3, Suva Market, Suva in Fiji* to the Plaintiff.
31. Execution is stayed for 90 days.
32. The Defendant is further ordered to pay cost to the Plaintiff summarily assessed at \$1,000. Said cost is to be paid in 14 days.





Vandhana Lal [Ms]
Acting Master
At Suva.