

3. In 2016, after he had been registered as owner of the whole property, the plaintiff had his solicitors write to the defendant demanding possession of the property. The solicitors letter says:

We are instructed that you were allowed by our client to live in our clients' house at Lovu, Lautoka without any rent until you found a home as you had no place to stay.

Given the history of the defendant's occupation as set out in paragraph 2 above, most of which is undisputed, this assertion by the solicitor is at least economical with the truth.

4. In the course of their occupation of the property, and in reliance on their status as owners of a half share, the defendant and her family say that they have carried out extensive improvements to the property. It is clear that the plaintiff knew about this, as his solicitors had written to the defendant in 2014 about the issue.
5. The current proceedings, an application under O.113 of the High Court Rules, was filed by the plaintiff in July 2016. The defendant filed her affidavit in response in August, and the plaintiff's reply affidavit is dated 8 September 2016. For reasons that are not clear from the Court's file the decision on the plaintiff's application, refusing the application, was delivered by the Master in September 2019. The plaintiff has appealed that decision and the matter came before me for hearing on 24 July 2020 at which time written submissions were filed by counsel for both parties. I gave leave to the appellant/plaintiff to file submissions in reply within 7 days thereafter, and that was done. Unfortunately, due to a misunderstanding between me and the Court staff, the file was not referred back to me when these reply submissions were filed. I apologise for the delay in issuing this decision.

Order 113 applications

6. Order 113, rule 1 states:

Proceedings to be brought by originating summons (O.113, r.1)

1. *Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.*

In the decision appealed from the Master has provided a thorough analysis of the history, purpose and application of this rule. He concludes this analysis with the following comments:

The above decisions and the commentary on this Order 113 makes it manifestly clear that, the courts must be satisfied that there is no reasonable doubt on, (a) the claim of the plaintiff and (b) on the wrongful occupation of the defendant. It follows that, it is the duty of the plaintiff, who invokes the jurisdiction of this court under this Order, to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his claim to recover the possession of the land. In that process, he must be able to show to the court his right to claim

the possession of the land and then to satisfy that the person or persons (not being a tenant or tenants holding over after the termination of the tenancy) entered into the land or remained in occupation without his licence or consent or that of any predecessor in title. Once the plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant. Then, it is incumbent on the defendant, if he wishes to remain in possession, to satisfy the court that he had consent either from the plaintiff or his predecessor in title. If the defendant can show such consent, then the application of the plaintiff ought to be dismissed.

7. I agree with the Master's analysis as to the application of O.113, r.1. Its purpose is to provide a summary procedure for obtaining orders for possession of land against occupants (e.g. squatters and other trespassers) who have no sustainable claim. The wording of the Rule itself makes this clear. The rule does not apply to persons who entered into or remained in occupation with the permission or consent of the owner, or of any predecessor in title of the owner. Relying as it does on affidavit evidence an originating summons under the rule is not usually a suitable procedure for cases where there is a dispute as to facts which cannot be resolved without cross-examination.
8. This is clear from the exclusion from the rule of tenants holding over after termination of their tenancy, who – although their right to occupy is:
 - i. clearly defined (i.e. by the lease, or tenancy agreement), and
 - ii. has clearly – by definition since they are tenants 'holding over' - come to an end -

cannot be the subject of an O.113 application, presumably because even though such cases may be clear-cut in evidential terms, so that the court can say with a high degree of confidence that the right of occupation has come to an end, there remains the possibility of applications for relief against forfeiture, or arguments about renewal, waiver etc. This exclusion shows how the rule is intended to operate. It applies only to clear cases of trespass, and is not a means of resolving cases where there are contentious issues as to the basis upon which the defendant remains in occupation. A vivid illustration of this distinction can be seen in the decision of the Court of Appeal in England in **Greater London Council v Jenkins** [1975] 1 All ER 354. In that case an order under the rule (in identical terms to that in our O.113, r.1) was refused by the Court of Appeal where the owner had arguably, and without intending to do so, extended the respondent's licence to occupy to a date after the application was filed. Although it was clear that, by the time of the appeal hearing, the licence had expired and the respondent – if he remained in occupation – did so as a trespasser, nevertheless the application for possession could not succeed, because at the time it was filed the respondent's licence to occupy was still current. What emerges from the decision of the Court of Appeal is the necessity for the plaintiff to show that there is no basis upon which the occupier/defendant is entitled to remain on the property. Where the original entry into occupation was with the consent or licence of the owner, the plaintiff must show that the right of occupation has been terminated. That is much easier for the plaintiff to do if it is clear how the right of occupation arose in the first place. If the occupation arose from a tenancy or licence, the plaintiff must show that that tenancy or licence has been properly and

unequivocally terminated. If the plaintiff cannot do so, or if there is a factual dispute about the effectiveness of the termination, or if there is some other alleged basis for occupation which is contentious, an application under Order 113 will probably not be appropriate.

9. In this case the defendant says she is in occupation as a purchaser of the property, and there is documentary evidence to substantiate that assertion, albeit that there are also arguments to refute it. As the Master observed in paragraph 13 of his decision:

The purpose of the Order 113 of the High Court Rules, in its plain meaning is to provide a summary and speedy procedure for the recovery of possession of any land when it is in wrongful occupation by a person who has no consent or licence from the applicant or his predecessor in title. The above discussion clearly shows that, the claim of both the plaintiff and the defendant to occupy their respective portion of the property stems from the Transfer of Agreement to Lease by the original lessee Victor Naresh Mani who transferred the undivided half share of the property to both the plaintiff and Ramend Ramiya. Whilst the plaintiff is the direct transferee of Victor Naresh Mani, the defendant's late husband had Sale and Purchase Agreement with other transferee and co-owner – Ramend Ramiya. The very fact is that, the original lessee Victor Naresh Mani did not have authority to transfer his rights under the "KN1" – the Agreement to Lease, without the consent of iLTB. In this sense, both the plaintiff and the defendant are in equal position with other over the right to occupy their respective portion of the subject property.

It is particularly important to note that the issue of ILTB consent to these transactions arose only in the affidavit of the plaintiff in reply (to which the defendant is of course not entitled to respond) to the defendant's disclosure of an agreement for her purchase of a half share of the property from the plaintiff's brother. In raising the issue the plaintiff says no more than to note the absence of evidence of ILTB consent to the defendant's purchase agreement. Having raised the issue, as the Master notes in the passage quoted above, the plaintiff says nothing about whether the transfer of the property to him had the approval of ILTB. I have no doubt that this is a live and important issue. But it is not an issue that can be decided without more evidence, and argument, and this application does not now provide the opportunity to submit the evidence which might support any argument about the validity or enforceability of the sale and purchase agreement.

Grounds for appeal

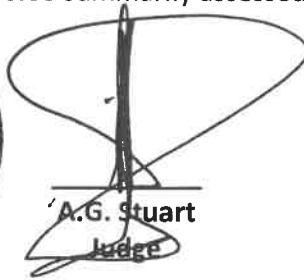
10. In the Notice and Grounds of Appeal dated the 8th October 2019 the appellant raises the following issues:
1. *That the Master erred in fact and in law in dismissing the vacant possession application when the Defendant has not shown any legal right to remain on the property.*
 2. *That the Master erred in law and in fact by not holding the agreement dated 5th June 1997 was tainted with illegality and was without the consent of ILTB.*
 3. *That the Master erred in law and in fact by not considering the Defendant had no legal right on the property as their stay has not been consented by ILTB and does not disclose any legal right to remain on the property.*

4. *That the Master erred in law and in fact by not allowing the immediate vacant possession of the land described in the Originating Summons filed 1st July 2016 when the Defendant has not fulfilled the requirements of section 12 Itaukei Land Trust Act (cap 134).*
11. Agreeing as I do with the Master as to the purpose and application of Order 113, I do not accept that he has erred in his analysis of this case. As I have observed above, an application under Order 113 is designed for those cases where it is clear that the defendant has no right to be in occupation of the land in question. For such cases the order provides an efficient, economical process for recovering possession. It is not intended or suited to cases where there are contested rights, particularly where there is contested evidence crucial to the outcome of the case.
12. Addressing the points on appeal more specifically, I don't agree that the defendant has *not shown any legal right to remain on the property*. The defendant says that she is on the property as a purchaser of a half share of the property from Ramend Ramaiya, and she has produced evidence – a copy of the sale and purchase agreement - to support this contention. Issues that arise from this agreement include those raised by him as to the need for ITLB consent, whether that consent has been or can still be obtained, and whether the plaintiff had sufficient knowledge of this agreement at the time he acquired the interest formerly owned by his brother to make it enforceable against him. These and any other issues that are raised have still to be determined, but it is not correct to say that the defendant has 'not shown any legal right to remain on the property'. It might well be that she can show that the agreement she has is valid and enforceable against the plaintiff. Counsel for the plaintiff referred me to the decision of (then) Master Nanayakkara in **McGregor Investments Ltd v Farook** [2016] FJHC 274 in which the Court made a thorough exploration of arguments raised as to the defendant's claim to have agreed to purchase the property the subject of the application. In that sense the case was similar to this one. But a significant difference in the cases is that the issue of the absence of consent to the transaction whereby the defendant claimed to be entitled to occupy the property was raised by the plaintiff from the start, and the defendant had the opportunity to respond to the argument and the evidence that supported it. In its decision the Court in **McGregor** was able to conclude, on the much more complete evidence than has been presented here, that the absence of consent was fatal, and that there was no evidence of fraud on the part of the registered proprietor whereby his title might be defeasible. A similar conclusion cannot be made here.
13. The other three points on appeal are really variations of the same argument, and attract the same response. Without further evidence and argument it is impossible to say whether the defendant's claimed interest is enforceable, but she has certainly shown enough to make the outcome of this Order 113 application inevitable. Applying the wording of the Order, the plaintiff has not shown that the defendant is *a person ... who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his*. It would have saved a great deal of time and expense if the plaintiff had sensibly accepted, as soon as the defendant's affidavit was filed, that

the application under Order 113 could not succeed, and instead issued a writ of summons so that the issues could be thoroughly explored.

14. Accordingly, the appeal is dismissed. The defendant is entitled to costs against the appellant in the sum of \$1500.00 summarily assessed.




A.G. Stuart
Judge

At Lautoka this 30th day of September, 2020

SOLICITORS:

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