

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 116 of 2024

IN THE MATTER of an application under section 169 of part XXIV of the Land Transfer Act, 1971 for an Order for immediate vacant possession.

BETWEEN: **RODERICK GORDON JEPSEN, LEO BACKHOUSE SMITH aka LEO BARRY SMITH and WAYNE WONG** as trustees of **DEFENCE CLUB**

PLAINTIFF

AND: **DINESH KUMAR MANI trading as DAKS KARWASH & DETAILING** of lot 10 Gordon Street, Suva.

DEFENDANT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr Maharaj B.J for the Plaintiff
Ms. Singh N for the Defendant

Dates of Hearing: 21.8. 2024

Date of Judgment: 13.11. 2024

Catch words

Right to Renewal of lease – continuation of rent negotiations

Notice of renewal – improvements as condition of lease

Right to terminate lease – No essential terms of agreement

Permanent fixtures – right to possession

JUDGMENT

INTRODUCTION

[1] Plaintiffs are the trustees of an association which owns a prime commercial property at corner of Hercules Street and Foster Street Suva City more fully

- described in Certificates of Title 3259 and 3260 (Jointly referred in this judgment as The Land).
- [2] Defendant entered in to a lease agreement on 1.3.2018 for a period of three years for a monthly rental of \$1500 and VAT for the 'Premises' shown in Schedule 1 of the lease agreement.
- [3] Special Conditions of the said lease agreement were contained in Schedule 2 and accordingly Defendant was obliged to clear and level the land and also obtain amenities such as water and drainage which require development of the Land in order to operate a carwash and detailing business.
- [4] It is safe to presume that initial rental of \$1500 for three years had factored the sunk cost involve in the establishment of carwash facility on an undeveloped land such as clearing the land and leveling and also water supply to the Land and proper drainage as the land is situated facing two main streets of Suva City.
- [5] Said lease agreement contains a clause for renewal of lease for further fourteen years subject to '**new lease rental agreed upon**'. Plaintiff was informed by Defendant or its agent its desire to renewal and indicated Plaintiff that it was agreeable for reasonable increase in rental at renewal, without specifying time period or interval for increase.
- [6] Defendant in its letter to Plaintiff on 31.01.2024 stated that parties were negotiating about the new rental and estopped from denying this positon. This indicate no renewal of lease. See annexed marked DK3 annexed to the affidavit in opposition of Defendant.
- [7] The letter of Defendant requesting renewal was not responded by Plaintiff and according to Defendant's affidavit in opposition annexed DK3 parties were negotiating for new rental, while Defendant continued payment of rental agreed for three year term expired. Parties were aware of the risks involved as well as advantages in such continuation of tenancy without written contract.
- [8] It is clear that since the land was developed in terms of conditions in Schedule 2 of the lease agreement, Plaintiff could easily sought higher rental from a tenant, but had allowed Defendant to enjoy possession on reduced rental.
- [9] In the absence of contract between parties since 1.3.2021 the relationship between the parties to be presumed monthly tenancy despite Plaintiff's request for renewal, which was not replied and essential terms such as time period or rental agreed between the parties.
- [10] So Plaintiff had taken the business risk of remaining on the Land and conducting its business without fixed term but on the same lower rental agreed in 2018, without an agreement for fixed terms since 1.3.2021 till notice of eviction dated 16.01.2024. Having enjoyed this for another three years without an increase, and cannot seek equity to remain in possession for fourteen years from 2021.

- [11] On 16.1.2024 Defendant was served with a Notice to Vacate the Land by 17.02.2024. Upon failure to vacate this action instituted in terms of Section 169 of Land Transfer Act 1971. After this action Defendant had also institute a civil action seeking certain declarations and specific performance or alternatively seeking liquidated as well as unliquidated damages.
- [12] Defendant had not shown a right to remain in premises either on alleged renewal and or investment made in order to conduct its business in terms of Schedule 2 of the lease agreement. Parties had failed to agree for renewal mainly due to failure to determine new rental.

FACTS

- [13] Defendant entered in to a lease agreement dated 1.3.2018 for undeveloped land for three years for the use of the Land for Car Wash and Detailing Service (Car Wash) and one of the condition in the said lease was to clear it and level the said land and provide water and drainage facilities to the Land. Monthly rental for three years was fixed at \$1,500 and VAT.
- [14] Clause 2.1 of the Lease Agreement stated
- ‘The Lessor leases the Premises to the Lessee for the Term of three (3) years, at the monthly Rent and for the Permitted Use. Lease agreement is subject for renewal annually at the said date.’
- [15] It is noted that last sentence of the said clause which states a ‘renewal annually’ does needs to be read along with Clause 22 which specified a renewal only at the end of three years period. Neither party rely on this discrepancy.
- [16] Clause 22 of the Lease Agreement Stated,
- ‘22.1 If the Lessee pays the Monthly Rent when due during the Term and observes the other terms and conditions contained or implied in the Lease and gives the Lessor written notice, at least three months before the expiration of the Terms, of the Lessee’s desire to take a renewal of the Lease, the Lessor will grant the Lessee a renewal of the Lease for a period of 14 year subject to new lease rental agreed upon.’
- 22.2 The renewed lease shall commence from the expiration of the Term and be on terms and conditions be agreed upon.
- 22.3 Such tenancy may be determined by 60 days’ notice by either party to the other or expiring on any day.’
- [17] Defendant commenced Car Wash on the Land after clearing the area and levelling it in terms of the conditions contained in Schedule 2 of the Lease Agreement; and other improvements dated in paragraph 18 of the affidavit in opposition.

- [18] Defendant had stated that it erected permanent structures on the land and allegedly invested approximately \$80,000 on the Car Wash and for this he had also obtained finance in 2018.
- [19] Plaintiff is seeking summary eviction of Defendant from the Land on the basis that there was no renewal of lease in terms of Clause 22 of the Lease Agreement between the parties and tenancy had continued on the basis of monthly tenancy.
- [20] Defendant is objecting to eviction on the basis that there was a renewal of the lease for fourteen years and or on equity due to investment on the Land.
- [21] Defendant was served with notice of eviction on 16.01.2024 granting requesting to vacate the premises by 17.2.2024.
- [22] For this Plaintiff replied by its letter of 31.1.2024 (marked DK 3 to affidavit in opposition) which inter alias stated
- ‘.....
- Regardless of previous discussions we are ready to agree with the proposed rent by the club which is \$2,500 plus VAT. It would be of great help if this could be reconsidered by the committee and we would continue the venture here in the years to come.’
- [23] Defendant in the affidavit in opposition state it was granted renewal of lease.
- [24] According to Defendant lease agreement of 1.3.2018 had not expired.

Preliminary Objections

- [25] Defendant also has taken following preliminary objections
- a. Only Roderick Gordon Jepsen is recorded on the Certificates of Title . Wayne Wong’ or Leo Barry’s registration as trustees not shown on the Certificates of Title.
 - b. Validity of Trustee Actions under Defence Club ‘s Constitution cannot be determined without the Constitution of the Club.
 - c. Registered Proprietor and Capacity to Depose Affidavit
 - d. Duty of Care and Trustee Authority in Eviction
- [26] It is admitted that at least one party named as Plaintiff is a trustee and his name is registered on the Titles. So in my mind that is sufficient to institute this action by way of originating summons as long as there is no dispute trusteeship.

- [27] Defendant which had entered in to lease agreement of 1.3.2018 is estopped from denying trustees' right to enter in to contractual obligations and rights and obligations derived on said agreement , including and not limiting to institute an action for eviction of Defendant. There is no requirement to annex the constitution of the association for this action as right to this action is statutory and not based on common law. So the contention of Defendant is without merit.
- [28] The issue of validity of action is derived from the registration on the Certificates of Title and basis of institution of action in terms of Section 169 of Land Transfer Act 1971 is registration of proprietorship. It reads,
- “169. 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.**” (Emphasis added)
- [29] Plaintiff's contention is the term of lease had expired in 2021. There is no dispute as to the lease agreement.
- [30] Alternatively, Plaintiff can institute action as last registered proprietor of the Land. Interpretation Section of Land Transfer Act 1971, defines proprietor exclusively, as
- "Proprietor" means the registered proprietor of land, or of **any estate or interest therein;**(emphasis added)
- [31] From the above it is clear that any registered proprietor of the Land can institute this action by way of originating summons in terms of section 169 of Land Transfer Act 1971 and there is no need to examine the constitution of the association in order to ascertain validity of this action instituted by trustee.
- [32] There is no need for all the proprietors registered to institute action. It required only a registered proprietor.
- [33] Defendant is estopped from denying registered proprietor of the Land registered on the memorial as interest holder as “Appointment of Trustee”

recorded in the memorials of both CT 3259 and 3260. This was the same position that remained on 1.3.2018 when the lease agreement was entered, which contained common seal of the association.

[34] Defendant in the submission had admitted at least one trustee named in this action is registered as trustee, and that is sufficient for Plaintiff to institute action for eviction in terms of Section 169 of Land Transfer Act.

[35] Plaintiff as trustee can institute an action to secure vacant possession and preliminary objections of the Defendant are overruled

[36] In order to remain in possession of the Land Defendant is required to satisfy the provisions contained in Section 172 of Land Transfer Act 1971. It states as follows:

“If the person summoned appears he may show cause why he refuses to give possession of such 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 with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit.

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceeding against the person summoned to which he may be otherwise entitled.

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.”

Right to Renewal

[37] Defendant in paragraph 17 stated that it was under ‘presumption’ that it had ‘continuing lease for next 14 years’ from the expiration of three year lease agreement entered on 1.3.2018. This ‘presumption’ was based on its letter of intention for renewal and also for increase of rental from 1.3.2021. This letter was not replied by lessor.

[38] According to Defendant parties were unable to agree on to the new rental and were negotiating (See DK 3). For obvious reason Defendant did not pursue this request and no communication between the parties regarding renewal till notice of eviction served in 2024.

[39] In the lease agreement entered on 1.3.2018 Clause 22 dealt with Right of Renewal and it stated

22.1.If the Lessee pays the Monthly Rent when due during the Term and observes the other terms and conditions contained or implied in the Lease and gives the Lessor written notice, at least three months before

the expiration of the Term, of the Lessee's desire to take a renewal of the Lease , the Lessor will grant the Lessee a renewal of the Lease for a period of 14 years **subject to new lease rental agreed upon**

22.2. The renewed lease shall commence from the expiration of the Term and be on terms and conditions be agreed upon.

22.3 Such tenancy may be determined by 60 days' notice by either party to the other or expiring on any day.'

- [40] From the above mentioned Clause 22 Right to Renewal is not unilateral and Defendant's desire to renewal is subject to 'new lease rental agreed upon' by parties and it is misconception on the part of Defendant to think that it can give its desire for renewal and presume extension of fourteen years without agreeing to a rental for such a long period of time. By the same token Defendant admitted that they were discussing 'rent negotiations' with Plaintiff as to the new rental. Annexed DK3 to affidavit in opposition dated 31.01.2024 was written after notice of eviction served to Defendant, and this letter is silent about renewal period of fourteen years.
- [41] Defendant in their letter expressing desire to renewal is annexed as DK-2 was dated 23.12.2020 and stated it was 'writing to extend our (its) interest for the renewal of our (its) lease for Lot 10 Gordon Street Suva'.
- [42] It is an admitted fact that Land comprised of two land parcels contained in two certificates of title namely CT 3259 and CT 3260 despite the lease agreement annexed by both parties only mention CT 3259 in its Schedule 1. There was no dispute on this and neither party rely on this and had not mention in the written submissions. It is admitted fact that both certificates comprised the Land and it was subject matter in this action.
- [43] Plaintiff had indicated its desire to extend the lease, but by the same token had requested a 'reasonable increase' in rentals. So the Defendant had requested for determination of new rental and also sought a reasonable increase in the rental. It is not clear whether Defendant is seeking a rental increase for fixed period for which period. It is unlikely a commercial rental being fixed for fourteen years. From annexed marked DK-3 it is clear that 'rent negotiations' had not resulted with meet of minds of the parties. So there was no renewal on the admitted facts.
- [44] There are no disputed facts to be determined as to the renewal as DK-3 is admission on the part of Plaintiff that there was no renewal as 'rent negotiations' were not concluded when the eviction notice issued .
- [45] Without prejudice to above, interpretation of the lease agreement of 1.3.2018 is vital to arrive at a decision as to whether there was a valid renewed lease agreement between the parties. Both parties were dealing a commercial lease and Defendant is conducting a car wash.

[46] The leading authority on the interpretation of contracts is found in Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28; [1998] 1 WLR, 896, where Lord Hoffmann (at pages 912 H to 913E) stated as follows:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next. It includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of its words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 19; [1997] AC 749).

(5) The "rule" that words should be given their '*natural and ordinary meaning*' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does to require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191. 201;

"...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense." (emphasis is mine)

- [47] In the application *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR, 896, the background to the document dated 28.12.2020 which is marked DK2 there is nothing for 'presumption' of a lease agreement if both parties had not agreed for terms and conditions of the renewal .Renewal is possible subject to new rental being agreed. This is because of lower rental agreed for first three years, considering the amount of investment needed to develop the land such as clearing, leveling and obtaining amenities such as water and construction of proper drainage which would invariably develop the Land thus attracting higher commercial rental after three years. So the Parties knew the bargain they had entered and it was clear any renewal must accompany with increase of rental for fixed period agreed by the parties with necessary conditions. This had not happened and there was no renewal. This is evidenced from Defendant's letter of 31.1.2024 annexed as DK 3 to the affidavit in opposition
- [48] This letter of 31.1.2024 was written after notice for eviction was given by Plaintiff, but Defendant was "ready to agree" a monthly rental of \$2500 and VAT and further stated that parties were in discussion of new rental. This is clear indication that no renewal was agreed upon by the parties. (See DK-3 annexed to affidavit in opposition). In this letter there was no mention of renewal of fourteen years and this is an afterthought. This proves no rental agreed when notice to vacate issued.
- [49] So the desire to renewal was expressed but for what period Plaintiff sought revision of rental is not stated. Such things cannot be 'presumed'. It is also important to note that though right to renewal was given in Clause 22 it cannot be unilateral as it was subject to new lease rental being agreed upon. Despite the request for renewal of rental, no fixed time period for such increase was suggested apart from that no period of such increment was mentioned. It makes no business sense to fix a commercial rental for fourteen years without periodic increments and or other method for increase of rental periodically.
- [50] Defendant had not stated whether they would like to continue with the same terms and conditions or what new terms were required. Despite Defendant's intimation for renewal of time period no method of increase of rental or any fixed interval for such determination of rental decided. Renewal of the lease agreement of 1.3.2018 is invariably linked to new rental being agreed with reasonable period for increment of such commercial rental. It is unconscionable to think a commercial rental will remain same for fourteen years while 'rent negotiations' had continued for over three years.

- [51] Lease agreement stated in Clause 22.2 that renewed 'leased shall commence from the expiration of the Term **and be on terms and conditions agreed upon**'. So the conditions of the renewed term needs to be agreed upon by the parties and there is no indication as to any new terms which parties agreed.
- [52] Another vital condition that was required to be agreed between parties in a lease agreement was the right to terminate before expiration. This is more applicable for long terms lease. Defendant had 'presumed' fourteen year period for lease as Defendant had not refused its request for renewal. If so on what conditions. Defendant cannot blow hot and cold, if Defendant is relying on the conditions of the lease agreement of 1.3.2018 for fourteen years lease, the same termination clause should also apply.

Termination

- [53] In terms of clause 13.1 of the lease agreement despite time period stated in the said agreement was three years either party could terminate it by giving thirty days notice. So even during operation of three year time period that commenced on 1.3.2018 either party could terminate the lease with thirty days' notice.
- [54] In such a situation it is not possible for Defendant to claim that it had obtained fourteen year lease through renewal of the lease agreement from 1.3.2021 and to remain in possession on commercial rental fixed in 2018. The termination clause that allowed termination of lease with thirty days' notice, and Defendant was aware of eviction by notice agreed by parties voluntarily.
- [55] Defendant cannot seek proprietary estoppel or promissory estoppel or unjust enrichment to remain in possession of the Land as it had taken the commercial risk of doing business without written contract and had also continued payment of lower rental without increase since expiration of the lease of 1.3.2018, and a clause for termination.
- [56] Defendant in the affidavit in opposition at paragraph 12 stated that lease agreement of 1.3.2018 had not expired and annexed it as DK1. If so clause 13.1 of the said agreement is applicable for termination of it and only thirty days' notice required.
- [57] Plaintiff had not given such thirty day notice of termination, for obvious reasons, but this shows Defendant cannot seek possession for fourteen years on equitable remedy which is dealt later.

Rental

- [58] Defendant in paragraph 19 of the submission contend that acceptance of rental and 'conduct' is a consent to renewal of lease and estopped from denying absence of renewal as it had admitted 'rent negotiations' had not concluded even on 31.1.2024.

[59] This contention that acceptance of rental while 'rent negotiations' being concluded is not renewal of the lease for fixed period .Section 89 of Property Law Act 1971, reads;

“89.-(1) No tenancy from year to year is implied by payment of rent.

(2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows:-

(a) where the rent is payable yearly or for any recurring period exceeding one year, at least six months' notice expiring at the end of any year of the tenancy; or

(b) where the rent is payable for any recurring period of less than one year, notice for at least a period equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not.”(emphasis added)

[60] There is no implication of renewal of the lease for fourteen years by acceptance of rental as parties had not agreed on vital terms of such renewal including increase of rental and other conditions that would applicable for such a long period.

[61] So the issue of increase of rentals and its reasonability cannot create a right to possession to the Land. Commercial contracts are agreed by agreement of the parties.

[62] Lease Agreement between the parties to this action were entered for commercial activity and such agreements needs to be interpreted in same context. Defendant on 31.1.2024 after service of notice for eviction had written a letter proposing a rental increase to \$2,500 and VAT. This again shows that there was no rental agreed for renewal between the parties and they continued without fixed term of lease on the old rental.

Indefeasibility

[63] The Land Transfer Act in NZ at that time was based on the same principles and provisions are analogous to Fiji's legislation as both were based on Torrens system. The language contained in the Land Transfer Act 1971 and the provisions relating to indefeasibility of the title and the meaning is clear.

In *Fels and another v Knowles* and another (supra) further at p 620 the following appears:

‘The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.’

[64] The Section 2 of the Land Transfer Act defines the word ‘instrument of title’ as follows:

"Instrument of title" includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be.

[65] In this action the title is freehold hence registered proprietor has infeasible title subject to small window to challenge on the basis of fraud in obtaining the title. There is no allegation of such a fraud.

[66] The Defendant is not alleging any fraud against the Plaintiff as to how Plaintiff obtained title or anything relating to the title.

[67] Even a mere allegation is not sufficient to disallow eviction in terms of Section 172 of the Land Transfer Act, as stated by Gates J (as his lordship then was) in *Prasad v Mohammed* [2005] FJHC 124; HBC0272J.1999L (3 June 2005). In that case it was further held:

“A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy.”

[68] Affidavit in opposition has not shown a right to possession in terms of Section 172 of Land Transfer Act 1971.

Investment – Fixtures on the Land.

[69] According to Text Hinde McMorland & Sim Land Law in New Zealand (LexisNexis NZ Limited) Chapter 6 -: Landholder’s Rights

“5 THE EXTENT OF THE LANDHOLDER’S RIGHTS: FIXTURES

Broadly, a fixture is anything, once a chattel or personal property that has become so attached to land as to form in law part of the land and to have become real property. The principle is expressed in the maxim *quicquid plantatur solo, solo cedit* — whatever is affixed to the soil, belongs to the soil. It is very difficult to say with precision what constitutes an annexation sufficient for this purpose, but the practical consequence of a chattel becoming a fixture is that property in the chattel will, by operation of law, pass from the owner of the chattel to the owner of the land.”(foot notes deleted).

- [70] The improvements done by the Defendant to the Land such as clearing the land and levelling and provision for water and drainage were conditions of the agreement of 1.3.2018. These were contractual obligation vested with Defendant in terms of Schedule 2 to the lease agreement of 1.3.2018.
- [71] So these investments must have been factored in to agreed rental in the lease agreement and cannot create a right to remain in possession.
- [72] The lease agreement was a commercial agreement lease rental for three years must have considered these factors in determining ground rental for three years. This will not be the same for any extended period as developed land attracts higher rental.
- [73] The structures on the Land are fixed to land permanent nature but had done so on monthly tenancy as lease agreement of 1.3.2018 allowed parties to terminate tenancy with one month notice. These structures were built for the purpose of conducting a carwash. So the claim for investment is a separate issue from eviction.
- [74] These are business decisions done relating to commercial property. Hinde McMorland & Sim Land Law in New Zealand (LexisNexis NZ Limited) further stated

“An object which is brought on to land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.

Thus, buildings and permanent structures erected on land, and items that are an integral part of the land or structure, are normally “part and parcel” of the land itself. Chattels and items of a removable nature, but which have been affixed to the land or buildings are “fixtures” and are also treated as part of the land itself. Lord Lloyd’s threefold classification was adopted by Rebecca Ellis J in *Body Corporate 95035 v Chang*, where it was held that a verandah which was attached to a city building and which projected over the street was “properly to be regarded as real property and part of the land to which it is effectively attached; the verandah can therefore be said to be ‘affixed’ to the relevant freehold(s)”.(foot noted deleted)

- [75] From the above quote from the text and also on admitted facts improvements done were to the structure for the purpose of carwash.

“Whether an item has become part of the land or not is ascertained by applying the classic tests:

- (1)The degree of annexation; and
- (2)The purpose of annexation.”

- [76] In this case the degree of annexation is such that even the Defendant had considered the improvements as part and parcel of the Land for its assessment on improvements. As it stated “current market value of the improvements were assessed at \$80,000.” The assessment was based on valuation marked DK9 but this had not given details of the said assessment. Value of the permanent structures and other improvements on the land such as levelling, drainage, etc. not shown separately. It lacked the vital fact of age of the structures and depreciation applied.
- [77] The purpose of the improvement are also permanent in nature as annexation was done for commercial purpose to conduct a car wash after clearing , levelling and obtaining provision for water and electricity. Since all such improvements needs to be considered together such improvements were necessary to attract customers for carwash and benefited Defendant. There is no need to state such improvements added value to the land, whose ultimate beneficiary is the owner. The fact that successful business was operational on the premises can attract new tenants, thus attracting higher rentals.
- [78] It is clear from the evidence before me that the improvements done were part and parcel of the Land. In the valuation all the improvements taken together and shows they had become part of the Land.
- [79] Defendant may seek compensation for improvements. This can be done by way of proper civil action, but this clearly does not give Defendant a right to possession in terms of Section 172 of Land Transfer Act 1971. If this is recognized as right to possession any tenant will do some improvements to property and on that basis will request possession till adequate compensation is paid or determined by court. This will make eviction in terms of Section 169 of Land Transfer Act 1971 a dead letter and indefeasibility as unworkable for eviction of commercial tenants.
- [80] As Plaintiff admits the improvements on the Land done by Defendant the assessment and extent of improvements can be assessed in a proper action, but that is a separate issue, from eviction.
- [81] There is no right for Defendant to remain in possession based on improvements on the land. Already Defendant had benefitted from remaining in the property without increase of commercial rental since 1.3.2021. Any unjust enrichment can be assessed properly through civil action filed by Defendant, but that does not allow Defendant to remain in the premises.

Unjust enrichment and inducement

- [82] Defendant contend that it had invested about \$80,000 on the Land had submitted a valuation. This investment was after entering in to the lease agreement of 1.3.2018. This agreement clearly allowed parties to terminate lease with thirty days’ notice. So Plaintiff had indicated its terms and

Defendant had invested taking the risk of termination of lease at any time with notice stipulated therein. So unjust improvement cannot be used as a ground for possession in eviction proceedings in terms of section 172 of Land Transfer Act 1971. Both parties had agreed to terminate lease with only thirty days notice, so Defendant is estopped from relying on the unjust enrichment for possession. When parties had agreed to terminate the lease with only thirty days' notice, the relief is limited to civil suit for damages.

- [83] Apart from that these are business risks Defendant had taken and it cannot deviate from the terms agreed. These were the terms that negotiated between the parties and rental was determined accordingly. So having benefitted from lower rental and having taken a business risk it cannot seek equitable relief to remain possession. Defendant had already filed a civil action seeking damages and this action can deal with said issues, but this cannot be abused to remain in possession of the Land.
- [84] Defendant's investment in building fixtures for the purpose of its business of carwash was done at the inception and not after expiration of three years and there was no evidence of any new investment of substantial nature after expiration of the lease agreement in 2021, this also shows that Defendant was aware of its status of possession as 'rent negotiation' not finalized.

Proprietary Estoppel

- [85] Defendant had invested on the Land and in terms of the lease agreement of 1.3.2018 schedule 2 obliged to clear the land and level it for the purpose of 'carwash and car detailing business'. So the parties were aware of the need for investment on an undeveloped land.
- [86] Considering these obligations parties had agreed to three year fixed rental with room for either party to terminate said lease with notice of thirty days. So there is no proprietary estoppel created by investment as it was a contractual obligation on the part of Defendant.
- [87] In such a situation Defendant cannot state that there was a mistaken belief that it would obtain renewal of fourteen years at the end of initial three year period. Even during this three year period either party could terminate lease agreement entered with notice stipulated.
- [88] So Defendant cannot seek proprietary estoppel to remain in possession as there was no mistaken belief as to the termination was with thirty days' notice by either party. This fact was known to parties of the said lease agreement when alleged investment made.
- [89] Part of the said investment was an obligation on the part of Defendant in terms of the lease agreement. So there was no mistaken belief on the part of Defendant as termination under lease agreement was only thirty days.

- [90] The principle that equity is based on can be summarized as to prevent unconscionable conduct (See *Gillett v Holt* [2001] Ch 210 at 225, [2000] 2 All ER 289 at 301, CA, per Robert Walker LJ.).
- [91] Plaintiff had allowed Defendant to continue with the commercial lease since 2018 for nearly six years without increase of rental on prime commercial location. This rental was fixed only for three years and even Defendant had indicated its desire to increase of the same after expiration of the three years. This rental was fixed considering the investment needed for clearing and leveling and provision for water and drainage etc which were conditions Defendant agreed as tenant, in terms of the said lease agreement.
- [92] Plaintiff had allowed Defendant to continue with the same rental which it had agreed with such additional conditions stated in Schedule 2 since 1.3.2021. Admittedly this was due to long term 'rent negotiations' between the parties. Plaintiff was generous and had not conducted unconscionable manner in termination of lease before initial three years with only one month notice in terms of the termination clause of the said lease agreement. When parties could not agree and 'rent negotiations' dragged for three years Plaintiff had not insisted any increase and allowed benefit of old rental to be paid . As such Defendant had abused the generosity of Plaintiff by not agreeing to rental and remaining in the premises with lower rental being paid, for nearly three years.
- [93] So Defendant had benefited from rental agreed with conditions attached in Schedule 2, which invariably required investment on land in 2018 but not at the time of expiration of three years in 2021, as these were fulfilled. So Defendant could demand a higher rental but had not done so. Having benefitted from that Defendant is acting in unconscionable manner and claim for equity to remain possession fails.

CONCLUSION

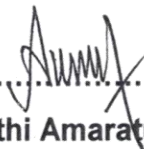
- [94] Defendant was served with notice of eviction. Despite having a right to renew said lease agreement no such renewal agreed and parties continued tenancy on monthly tenancy admittedly parties did not agree on new rental and were negotiating on that. Defendant had requested a renewal of lease without specifying time period or conditions for such period or increased rental. So without such vital conditions being agreed by the parties there was no renewal. Parties admit the lease of 1.3.2018 and its renewal was subject to new rental being agreed.
- [95] The vital facts in this proceedings are not disputed .Defendant admit rent negotiations were not concluded and even after eviction notice rental was yet to be determined (See Annexed DK3). So without new rental being agreed there was no renewal of lease.
- [96] Accordingly there was no extension of lease agreement and Defendant is evicted from the Land comprised in CT3259 and CT 3260.

[97] Plaintiff is granted vacant possession of the land including the permanent fixtures and improvements on the Land. Defendant is ordered not to removal of any structures fixed to the land (eg Sheds, and other fixtures on the land). The execution is stayed considering the circumstances till 28.2.2025. This concession is given considering the nature of Defendant and impact on its business in relocation and also to allow orderly hand over of possession and not to create destructions or removal of value additions it had done to the Land. Cost of this action summarily assessed at \$3000 considering the circumstances of the case.

FINAL ORDERS:

- a. Defendant is evicted from CT 3259 and CT3259.
- b. Execution of the above order is stayed till 28.2.2025.
- c. Defendant not to damage or remove improvements on land including structures on the Land.
- d. Cost of this action is summarily assessed at \$3000 to be paid within 21 days.




.....
Deepthi Amaratunga
Judge

At Suva this 13th November, 2024.

Solicitors

Reddy Nandan Lawyers

Nambiar Lawyers