

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBC 53 OF 2025

BETWEEN: **SUN INSURANCE COMPANY LIMITED**

PLAINTIFF

AND: **CARPENTERS FIJI PTE LIMITED**

DEFENDANT

Appearances: *Mr. H. Nagin for the Plaintiff.*

Mr. S. Sharma and Mr. F. Khalim for the Defendant.

Date/Place of Judgment: *Wednesday 23 April 2025 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

VACANT POSSESSION – s.169 – **LAND TRANSFER ACT 1971**- *does the defendant have a right to possession of the premises when the lease has expired - defendant failed to exercise its right to give the notice within the required timeframe to renew the lease– failure to do so results in the lease to expire – no right of possession arises out of an expired lease – acceptance of rent for period of lease is not a waiver of notice to quit.*

B. Cases:

1. *Rushton (SA) P/L & Ors v Holzberger & Ors [2003] QCA 106.*

C. Legislation:

1. *Land Transfer Act 1971 (“LTA”): ss. 169; 172.*

Application

1. The plaintiff has brought this action under s.169 of the LTA, against the defendant, for an order for vacant possession of the property contained in Housing Authority Sub Lease Number 338330 being Lot 1 on DP 7209 situated at Daniva Road, Valelevu, Nasinu.

Background

2. It is not disputed that the plaintiff is the registered proprietor of the subject property.
3. On or about 2004, the parties entered into an agreement to sub-lease the premises to the defendant. The defendant had been carrying on the business of operating a supermarket from this premises.
4. There has been multiple renewals of the said sub-lease. On 14 October 2020, the parties entered into a further renewal of the leased premises from 1 August 2020 until 31 December 2024: *clause 4(a) of the agreement to sub-lease*.
5. On 18 September 2024, the plaintiff issued to the defendant a notice for the defendant to deliver vacant possession of the said premises when the lease expires on 31 December 2024.
6. The notice to quit was issued on the basis that the defendant had failed to give timely notice to the plaintiff of its desire to renew the sub-lease for a further term of 5 years as required by clause 6(a) of the sub-lease.
7. On 16 December 2024, the defendant wrote to the plaintiff and said that it was exercising its right to renew the lease for a further term of 5 years effective 31 July 2025 pursuant to clauses 4(e) and 6(a) of the agreement to sub-lease.
8. The plaintiff responded to the defendant's notice of 16 December 2024 by a letter of 19 December 2024. The material parts of the plaintiff's letter reads:

- "1. Your purported exercise of option is totally incorrect and unlawful.*
- 2. The Agreement to Sub-Lease is dated 1 October, 2020 and term is clearly stipulated in paragraph 4(a) of the same. The term commences on 1 August 2020 and ends on 31 December 2024.*
- 3. To validly exercise the option to renew you should have exercised the option to renew at least 6 months before the expiry of the lease. See paragraph 6(a) of the Agreement.*
- 4. In this regard we had issued and served a notice dated 18 September, 2024 advising you to vacate the premises by 31 December, 2024 as the lease expires on that date. A copy of the said notice is forwarded herewith..."*

9. The defendant responded to this letter of the plaintiff on 23 December 2024. The material parts of the letter reads as follows:

- “1. Our client disputes and rejects your contention that the exercise of option to renew vide its letter dated 16 December 2024 is incorrect and unlawful. We note that you acknowledge and accept that our Client has a right to renew under the sub-lease. This right plainly comes into existence at the “end of the 5th year” of the sub-lease. Please refer to clause 4(e) and 6(a) of the sub-lease for confirmation. The end of the 5th year of the sub-lease accordingly falls on 31st July 2025 and in terms of our client’s right to renew, it is exercisable no later than 28th February 2025. Accordingly, the exercise by our Client of its right of renewal on 16th December 2024 is and remains valid and effectual.
2. Plainly this is inconsistent with our Clients right of renewal which is effectual only “at the end of the 5th year.” Accordingly, we reject your assertion and reiterate paragraph 1 of this letter.
3. The valid exercise of option to renew was exercised when such right accrues at the “end of the 5th year”. We reiterate paragraph 1 and 2 of this letter.
4. Our Client totally disputes and rejects the validity and effectiveness of your purported Notice dated 18th September 2024 for the reasons set out in this letter.

In the circumstances, we are instructed to ask that you please impress upon your Client the need to honour the existence and the valid exercise of our Client’s option to renew. Any action taken adverse to our Client will be resisted in accordance with law.

Please feel free to discuss and/or clarify as necessary.”

10. The plaintiff writes back on 23 December 2024 and clarifies its position. The material parts of the letter reads:

- “1. We repeat the contents of our letters of 18th September, 2024 and 19th December, 2024 and write to advise you the contents of the said letters are correct and lawful.
2. Paragraph 1 of your said letter is not correct. If you read the Sub-Lease dated 1st October, 2020 carefully it shows the commencement date is 1st August 2020 and is for a term of 4 years and 4 months and the Sub-Lease expires on 31st December, 2024. See paragraph 4(a) of the Sub-Lease agreement. It does not have a full 5th year as it expires on 31st December, 2024.
3. Paragraph 6(a) provides for option to be exercised at least six months prior to the expiration of the Sub-Lease. Here your client did not exercise the option six months prior to the expiration of the Sub-Lease on 31st December, 2024.

4. *Kindly therefore please advise your client to vacate the premises before the 31st December, 2024. If your client fails to vacate then our client will take necessary legal action for vacant possession and also claim substantial damages and indemnity costs."*

11. On 23 December 2024, the defendant deposited the rent of January 2025 in the plaintiff's bank account which the plaintiff refunded. The plaintiff informed the defendant vide a letter dated 27 December 2024 that it has refunded the rent and that from 1 January 2025 the subject site will be declared a construction site.

12. On 31 December 2024, the defendant again deposited the rent of January 2025 in the plaintiff's account in the sum of \$16,500. On 6 January 2025, the plaintiff again refunded the rental payment. The plaintiff directly wrote to the defendant on this date and said as follows:

"With reference to the 2nd payment of \$16,500 that was received on 31st December 2024.

As per instructions from Sherani & Co. on 2nd January 2025 the refund of the full amount of \$16,500, has been transferred back to your respective bank account.

The Tenancy Lease Agreement is expired, please stop making payment.

If you require any further information, please contact our lawyers Sherani & Co.

Thank you for your attention to this matter."

13. There is a series of correspondence between the parties maintaining their position. I need not deal with each and every one of it as neither party has changed its position.

14. On 24 January 2025, the plaintiff filed this action for vacant possession. Subsequently, on 14 February 2025, the defendant filed a writ action against the plaintiff seeking amongst other orders, a declaration that the notice of renewal of lease agreement by the defendant is valid and effectual and for an order that the plaintiff renews the lease for a further term of 5 years.

Issues

15. Under s.172 of the LTA, the defendant must show that it has the right to possession of the premises sought to be vacated.

Law and Analysis

16. The position of the defendant is that it has the right to possession of the land under the agreement to sub-lease dated 14 October 2020.
17. That agreement, according to the defendant, by virtue of clause 4(e) expires on 31 July 2025, as it says that at the end of the 5th year of the sub-lease, the agreement shall be subject to a renewal for two terms of 5 years.
18. The defendant says that since the agreement started from 1 August 2020, the 5th year will end on 31 July 2025. The 1st year ends on 31 July 2021, the 2nd on 31 July 2022, the 3rd on 31 July 2023, the 4th on 31 July 2024 and the 5th on 31 July 2025.
19. According to the defendant since clause 6(c) gave the defendant a right to exercise the option to renew 6 months before the expiration of the lease, it exercised the option on 16 December 2024 which was 6 months before the lease expired on 31 July 2025.
20. The defendant is saying that the plaintiff is wrongly asserting that the lease expires on 31 December 2024, which cannot be so under clause 4(e) of the sub-lease. The defendant says that based on the plaintiff's wrong interpretation, the plaintiff issued a notice to quit when the time to exercise the right to renewal had not lapsed.
21. The defendant further asserts that the terms in the sub-lease are contradictory. Clause 1 says that the commencement date is 1 November 2019 when clause 4(a) says that the commencement date is 1 August 2020. Clause 4(a) says that the lease period is for 4 years 4 months. Clause 4(e) says that the agreement is subject to renewal at the end of 5th year which makes the period of lease for 5 years. Clause 4(a) and 6 (a) states that the lease agreement is to be renewed for a term of 5 years.
22. The defendant says that given the contradictions, the plaintiff has misconstrued that the agreement to sub-lease expires on 31 December 2024. This contradictory clauses raises serious conflict between the plaintiff and the defendant. The defendant says that s.169 application is therefore not the proper forum to resolve the conflict.
23. The defendant asserts that the writ action which was filed after the s.169 proceedings were filed is the correct procedure to resolve the issue of whether the defendant has validly exercised its right of renewal and whether as a result, the plaintiff must renew the lease for a further term of 5 years.

24. The defendant says that the parties must give oral evidence on what were the terms of the lease at the time of negotiation.
25. The defendant says that I must apply the doctrine of contra proferentem as the time period for the lease and the time to exercise the option to renew are susceptible to multiple interpretations.
26. Mr. S. Sharma also argues that after giving notice to quit, the plaintiff accepted rentals for the month of October, November and December. The plaintiff has accordingly waived its right to enforce the notice.
27. Let me first address the issue regarding the alleged contradictions in the agreement to sub-lease. The first contradiction that the defendant points out is in the commencement date of the sub-lease. The defendant says that the commencement date in clause 1 is 1 November 2019 whilst the commencement date in Clause 4(a) is 1 August 2020.
28. The defendant's counsel, at the hearing, submitted that the commencement date in clause 1 showing as 1 November 2019 is clearly wrong. Mr. Sharma accepts the commencement date as 1 August 2020.
29. If that is the case then there is no conflict regarding the commencement date. The plaintiff and the defendant both accept that the lease starts on 1 August 2020.
30. The defendant obviously cannot rely on the commencement date of 1 November 2019 or else its argument that the lease expired at the end of 5th year being 31 July 2025 will not have a leg to stand on.
31. Let me now go to the issue of when the lease expired. The plaintiff says that the expiry date is clearly given in clause 4(a) which is 31 December 2024. The plaintiff says that clearly the period of the lease is also mentioned as 4 years 4 months and since the term 4 years 4 months and 31 December 2024 complements each other, the defendant cannot assert that the lease expired on 31 July 2025.
32. According to the plaintiff, "*end of the 5th year*" in clause 6(e), is 31 December 2024 as the 1st year ends in 2020 being the year on which the lease commences.

33. Is there an actual contradiction and confusion in the term of the lease and the period on which it ends?

34. I will refer to the relevant clauses of the agreement to sub-lease. Clause 4(a) reads:

"The sub-lessor will sub-lease to the sub-lessee, which will take on sub-lease from the sub-lessor the property for a term of 4 years 4 months from the commencement date. For avoidance of doubt the term of this agreement and the lease contained herein will commence on 1 August 2020 and shall end on 31 December 2024."

35. Clause 4(e) reads:

"It is hereby agreed and understood by both parties that, at the end of the fifth (5th) year of this sub-lease, this Agreement shall be subject to a renewal for two terms of five (5) years upon satisfaction of clause 6 below with new monthly rental to be determined at the commencement of each term is to be mutually agreed upon by the parties and shall not be more than the accumulated CPI for previous term or rental valuation and is subject to the same covenants conditions restrictions and provisions as are herein contained in this Sub-Lease provided that the monthly rental sum shall not be in a lesser amount than the monthly rental sum paid immediately prior to the renewal."

36. Clause 6(a) reads:

"The sub-lessor and the sub lessee further covenant with each other that at least six (6) months before the date of expiration of the lease herein the sub-lessee shall give to the sub-lessor notice in writing should the sub-lessee desire to take up a renewal and in a further Lease of the demised premises for a further term of 5 (five) years from the expiration of the term hereby granted the renewed term shall take effect upon the immediate expiry of the initial lease and the sub-lessor shall grant renewal from 01st January 2025 at a rental to be agreed upon by the parties hereto having regard to accumulated CPI for pervious term or rental valuation on the time of, or immediately prior to, such renewal and otherwise is subject to the same covenants conditions restrictions and provisions as are herein contained in this Lease , however provided that the monthly rental sum shall not be in a lesser amount than the current sum."

37. Clause 4(a) clearly states that the term of the lease is 4 years 4 months. It does not say that lease is for 5 years. The time period is clearly stated to run from 1 August 2020 to 31 December 2024. These specific dates of 1 August 2020 to 31 December 2024 clearly establishes and confirms that the lease is for a term of 4 years 4 months.

38. There is no contradiction in clause 4(a) for the defendant to be confused. The defendant raises a conflict arising from clause 4(e) from the use of the words “*at the end of the 5th year*”.
39. The defendant chooses to ignore clause 4(a) and the term of lease and the period of expiry endorsed therein and prefers to read clause 4(e) in isolation. Clause 4(a) and (e) has to be read together and if it is read conjunctively, there is no conflict as to when the 5th year ends. It ends on 31 December 2024 because the 1st year ends on 31 December 2020.
40. I turn to clause 6(a). This provision complements clause 4 (a) and reinforces that the lease will expire on 31 December 2024. It says that “*...the renewed term shall take effect upon the immediate expiry of the initial lease and the sub-lessor shall grant renewal from 01st January 2025...*”. Even this clause indicates that the lease was to expire on 31 December 2024 and if there is any renewal, it will be from 1 January 2025. If the lease were to expire on 31 July 2025, then the renewal cannot be from 1 January 2025 because clause 4 (e) says that the renewal shall be at the end of fifth year. If the defendant’s calculation is used then 1 January 2025 will only come to 4 ½ years. How can a renewal be granted at the end of 4 ½ years when the defendant in no uncertain terms knows that it will be granted at the end of the 5th year?
41. The defendant’s misunderstanding is self-inflicted only to avoid the application for vacant possession. Under clause 6(a) it was required to give at least 6 months before 31 December 2024, notice in writing to the plaintiff of its desire to renew the lease. The defendant failed and as a result the lease expired on 31 December 2024.
42. The time within which the defendant had to exercise the option was of essence and the breach of a timely exercise of its right to give notice to renew has resulted in the offer by the plaintiff to renew the lease to collapse. The agreement to sub-lease has therefore expired on 31 December 2024.
43. In *Rushton (SA) P/L & Ors v Holzberger & Ors* [2003] QCA 106 it was said that:

“There are numerous cases establishing the proposition that the terms of an option clause must be strictly complied with. One of the most frequently quoted passages in that regard is that from the judgment of Lord Denning M. R. in United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 WLR 74 at 81:

*“In order to exercise the option, the lessee must give the notice in the specified time...
In point of legal analysis, the grant of an option in such cases, is an irrevocable offer*

(being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with that offer"...".

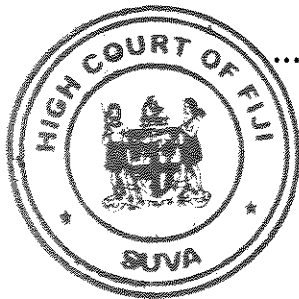
44. I do not find any conflict in the terms of the agreement to sub-lease. The defendant is creating a conflict to prolong the application for vacant possession. There is no need for oral evidence to determine the terms of agreement. If there was any conflict then oral evidence was necessary.
45. I now turn to the defendant's argument that the notice to quit is invalid for two reasons, the first is because the same was issued prior to the expiry of the lease and the second because the plaintiff had accepted rentals after the notice to quit was issued.
46. The notice of 18 September 2024 was to inform the defendant that the lease agreement will come to an end on 31 December 2024 because the defendant had not exercised the right to renew the sub-lease within time. Under s.169 of the LTA, a lessor can issue proceedings for vacant possession against a lessee or tenant if a notice to quit is given or the term of the lease has expired. A notice to quit is given during the pendency of the lease. In this case the lease had expired and then only the s.169 proceedings were issued.
47. The letter of 18 September 2024 by the plaintiff was to indicate that the lease agreement will expire on 31 December 2024 for failure to accept the plaintiff's offer to renew the lease within the required timeframe. I find the notice to quit properly issued within time as the option to renew should have been exercised well before the notice to quit was issued.
48. The acceptance of the rent was only for a period of the life of the lease. If it was for beyond that period, then the defendant could assert that the notice to quit was waived.
49. The defendant had been paying rents when the lease came to an end. The plaintiff refused to accept the rent and refunded the same. That established its intention to proceed with the notice to quit.
50. I do not find any conflicting terms in the agreement to sub-lease and as such I find that the existence of writ action is not sufficient to resist the application under s.169 of the LTA.
51. I find that defendant does not have a right to possession of the premises under an expired lease. It had failed to exercise its rights under the lease and having failed to do so, it cannot continue to assert a right to possession.

52. Since I am of the view that an order for vacant possession should be given, I must consider whether the same should be done immediately. I am mindful of the fact that the defendant is running a large supermarket in Nasinu. Although it is not the plaintiffs fault that the defendant finds itself in, I find that given the nature of the business that the defendant is running, it is just and equitable that time be given to the defendant to find new premises and vacate the property. It will not be easy for the defendant to vacate immediately. It needs to find an alternative premises and cease operations. This cannot happen overnight. I find that a time period of 3 months to vacate is reasonable.

Final Orders

53. In the final analysis, I order the defendant to deliver vacant possession of the property contained in Housing Authority Sub Lease Number 338330 being Lot 1 on DP 7209 situated at Daniva Road, Valelevu, Nasinu, within 3 months.

54. The plaintiff shall have costs of the proceedings against the defendant in the sum of \$3,500 to be paid within 14 days.



Hon. Madam Justice Anjala Wati

Judge

23.04.2025

To:

1. *Sherani & Co. for the Plaintiff.*
2. *Patel Sharma Lawyers for the Defendant.*
3. *File: Suva HBC 53 of 2025.*