

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Action Nos. 94 & 96 of 1980

Between

RAM NAND & SHYAM KAUR
son of Badal
and daughter of Ram Anuz

Plaintiffs

- and -

INIA TUKANA & SIAMONI DUNASALI

Defendants

Mr. R. Shanker, Counsel for the Plaintiffs

Mr. S. Matawalu, Counsel for the Defendants

JUDGMENT

The plaintiffs own a residential building which has two tenants from whom they want possession.

They have filed two actions 94 and 96 of 1980 against Inia Tukana and Siamoni Dunasali respectively under S.169 of the Land Transfer Act 1971 asking for possession as against each tenant. The originating summons in each case are supported by identical affidavits and the actions were, by consent consolidated.

Both affidavits allege the existence of a monthly tenancy determined by 6 months' notice to quit served on 7th May 1979.

The notices to quit simply require vacant possession "after the end of 6 months from the date of service" of the notice to quit.

Although the notices to quit state that the plaintiffs want the premises for their own use and occupation no such allegation appears in the affidavit.

Mr. Matawalu for the defendants contends that the premises are covered by the Fair Rents Ordinance and therefore the plaintiffs must prove that they require the premises for their own use and occupation.

It is doubtful whether the summary procedure set out in S.169 Land Transfer Act is applicable to all cases covered by the Fair Rents Ordinance. Section 169 of the Land Transfer Act reads 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".

Under clause (a) of the last registered proprietor is enabled to take summary proceedings against squatters, trespassers, and so forth. It is clearly not intended for use against tenants in possession.

Under clause (b) the proceedings can be adopted where a tenant is in arrears with rent.

Clearly clauses (a) & (b) do not apply to the instant case.

Under clause (c) the plaintiffs might bring a summary action if legal notice to quit has been given.

No complaint has been made as to the form of the notice to quit and it seems to be lucid and unequivocal but is it sufficient to terminate the tenancy if the Fair Rents Act applies. To my mind this is an important issue because S.172 Land Transfer Act requires the tenant to prove to the satisfaction of the judge that he has a right to possession before the summons can be dismissed. On the other hand the Fair Rents Ordinance by S.19, places the onus on the landlord, in certain sets of circumstances, to prove he has a right to possession although at common law he would otherwise be entitled to possession.

The Fair Rents Ordinance as its title indicates is for the protection of tenants and it restricts the landlord's right to possession in cases where the rent is low enough to bring the premises within the Fair Rents Ordinance. The terms of the notice to quit show that the plaintiffs require the premises for their own use. S.19(1) of the plaintiff sets out the circumstances under which a landlord can claim possession and they appear in clauses (a) to (j) thereof. However it seems that we are only concerned with S.19(1)(e) which reads as follows:-

"19(1) No judgment or order for the recovery of possession of any dwelling house to which this Ordinance applies

.....

shall be made, unless:-

- (a)
- (b)
- (c)
- (d)

(e) the premises are bona fide required by the lessor for his own occupation as a dwelling house and the lessor gives at least 28 days' notice in writing to the lessee requiring him to quit and (except as otherwise provided in this section) the court is satisfied that reasonably adequate and suitable alternative accommodation is available at a rent not substantially in excess of the rent of the premises to which the judgment or order relates; and in any such case as aforesaid, the court considers it reasonable to make such an order."

Thus the landlord has to show that he requires possession for his own use and the existence of suitable alternative accommodation at a reasonable rent is available before the court can order the tenant to give up possession. In other words the landlord has to prove the existence of factors supporting his claim to possession; the onus is not on the tenant. Even then the Court has to consider whether it is reasonable in all the circumstances to make such an order.

It would seem that the summary procedure of S.169 Land Transfer Act is not readily applicable to claims for possession under S.19(1)(e) of the Fair Rents Ordinance in that the Court will usually have to hear oral evidence from the landlord before deciding whether an order for possession is reasonable. In fact S.19(5) states that it shall take cognisance of a lessee's protection under the Ordinance even if it is not pleaded.

Accordingly where a landlord adopts the summary procedure of S.169 Land Transfer Act he should, where residential premises are concerned, depose to facts which demonstrate that the Fair Rents Ordinance does not apply.

S.19(1) of the Fair Rents Ordinance limits the common law and statutory jurisdiction of the courts to grant orders for possession if the residence comes within the provisions of the Ordinance. In *Wong Sen Ying v Goverdhan*, (Lautoka) Civ. Action 79/73 I drew attention to the observations of Bankes L.J.

In *Barton v Finghan* 1921, A.E.R. 87, at p.89 (I), who made the same kind of report about S. 5 of the Rent & Mortgage In. (Restrictions) Act 1920 (England) which is similar to our S.19(1).

As I stated in Civ. Action 79/73 (supra) the jurisdiction of the court is not affected if the Fair Rents Ordinance does not apply. But how is the court to know whether the property in question is affected by the Fair Rents Ordinance? In my view the person applying for possession under S.169 Land Transfer Act must show that the Court has jurisdiction to make a summary order. The plaintiff must affirm facts which show that the Fair Rents Ordinance does not apply.

In *Smith v Paulter*, 1947. 1. A.E.R. 216 Denning J. observed at p.217

(E/C):-

"Where there is reason to think that the house is within the Acts (Rent Restoration Acts) it is the duty of the Court to see whether the conditions required by the Act are satisfied, even though not pleaded or raised by the tenant."

His judgment ends as follows:

"It is desirable therefore that in actions for possession of a dwelling house, the endorsement of the writ should state either the reason why the house is not within the Acts or if it is within the Acts, what is the ground on which possession is sought."

If it is alleged under S.169 Land Transfer Act that the premises are within the Fair Rents Ordinance followed by the ground on which the possession is sought what is the position of the tenant? Under S.172 Land Transfer Act he has to satisfy the judge of his right to possession otherwise the summons will succeed. In the instant case the tenants cannot assume the burden of proving that the plaintiff does not require the house for his own use. To place such an onus upon them runs counter to the Fair Rents Ordinance which requires the plaintiff to prove that he requires the premises for his own use.

I do not think that the summary procedure of S.169 Land Transfer Act is particularly appropriate to actions of this kind because one cannot call upon a protected tenant show cause in an action of this kind. However, the issue is quite apparent in that 6 months' notice to quit having been given the landlord (plaintiff) must prove that he requires for his own use and occupation.

I will allow the proceedings to continue in the form instituted and order that no pleadings be filed. The issue for determination is whether the plaintiff requires the premises for his own use and occupation.

A hearing date to be fixed for $\frac{1}{2}$ day in consultation with the Deputy Registrar.

LAUTOM
22nd May, 1980

sgd. (J. T. Williams)
JUDGE