

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 88 OF 2013**

**BETWEEN** : **VISHAN RAGHUVER SINGH RAJPUT** t/as **VISHAN**  
**INFOTECH** situated at Lot 19 at 111 Vitogo Parade, Lautoka.

**PLAINTIFF**

**AND** : **MADHU KANT GOVIND** of 4641 La Mirada Avenue, Apt No.  
4, Los Angeles, CA 90029, USA.

**1<sup>ST</sup> DEFENDANT**

**AND** : **SHAMENDRA KUMAR RAM** of Saru Back Road, Lautoka,  
Bailiff.

**2<sup>ND</sup> DEFENDANT**

**Appearances** : Mr W. Pillay for the plaintiff  
Ms N. Khan for the first defendant  
Second defendant unrepresented

**Date of Trial** : 05 March 2018

**Date of Judgment** : 28 May 2018

## **JUDGMENT**

### **Introduction**

[01] The plaintiff brings this action against the defendants seeking general damages. His claim is based on unlawful and wrongful distress.

[02] At the trial, the parties did not lead oral evidence. It was agreed to rely on affidavits filed by the parties in the interlocutory applications. The plaintiff confined his evidence to his affidavit in support of *ex parte* application filed on 21 May 2013 and his affidavit filed on 24 May 2013, in response to the second

defendant's affidavit in reply. The first defendant relies on his affidavit filed on 4 July 2013, and his affidavit in support (for leave for the first defendant to further amend his amended statement of defence) filed on 28 August 2015.

- [03] Further, the plaintiff and the second defendant have filed submissions. The first defendant did not file any although he was given time for that purpose.

*The Background Facts*

In or about January 2010, Madhu Kant Govind, the first defendant, rented out the offices situated at his premises at 111 Vitogo Parade, Lautoka to Vishan Raghuver Singh Rajput t/a Vishan Infotech, the plaintiff. There was no written tenancy agreement. It was a verbal agreement. The dispute arose between the parties over the arrears of rent. The plaintiff issued demand notice through his solicitors demanding outstanding rental. The plaintiff emailed to the first defendant and gave an undertaking to settle the remaining rental dues. In May 2013, the first defendant through his bailiff, the second defendant issued a distress to recover the arrears of rental. The second defendant executed the distress. The plaintiff says the distress was unlawful and wrongful. He claims general damages against the defendants.

*First defendant's defence*

- [04] The first defendant filed a further amended statement of defence and counterclaim. He states that: the notice of distress claimed the rent due for the office, the second defendant is a duly registered bailiff with the lawful authority to effect distress. He further states that in the 5 day period that the second defendant effected distress on the three office spaces occupied by the plaintiff. The plaintiff had via telephone offered to settle half of what was owed to the first defendant, which the first defendant denied.

*First defendant's counterclaim*

- [05] The first defendant counterclaims against the plaintiff damages, loss and mesne profit from January 2010 until judgment or vacant possession of the property is delivered to the first defendant. The first defendant's counterclaim is made on the basis that the plaintiff has failed to adequately compensate the first defendant

for the benefit the plaintiff obtained by use and occupation of three spaces and has therefore unjustly derived a benefit from the same.

*Second defendant's defence*

- [06] The second defendant filed his statement of defence and states that he levied distress for rent according to law and explained the procedures and result in the event if the rent is not paid or satisfied with evidence of payment.

**The Law**

- [07] Section 3(1) of the Distress for Rent Act 1961 ('DR Act') provides:

*Distress to be levied by certified bailiff*

*3.-(1) From and after the commencement of this Act no person, other than a landlord in person, shall act as a bailiff to levy any distress for rent unless he or she shall be authorised to act as a bailiff by a certificate in writing to that effect, and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time in such manner as may be prescribed by rules made under the provisions of this Act.*

**The Issue**

- [08] The issue before the court is whether or not the distress for rent was lawfully executed by the first defendant.
- [09] The plaintiff seeks remedies in compensation. The basis of the claim is that the plaintiff unlawfully and wrongfully executed a distress for rent.
- [10] The plaintiff argues that the distress for rent was unlawful because the rent agreement between the parties is illegal in the absence of consent of the Director of Lands. The plaintiff heavily relies on s.13 of the State Lands Act 1945 ('SL Act') and on the decision of *Chalmers v Pardoe* [1963] 3 All ER.

- [11] Section 13 of the SL Act deals with the requirement of consent of the Director of Lands to any dealings with the land comprised in a protected lease (*'the lease'*). That section spells out:

*Protected leases*

*"13 (1) Whenever in any lease under this Act there has been inserted the following clause –*

*"This lease is a protected lease under the provisions of the State Lands Act" (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*

*Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."*

- [12] Privy Council in Chalmers, above held that dealing in the Land (Native Land) took place here without the prior consent of the Board as required by section 12 of the Ordinance (Now Act) that the dealing was accordingly unlawful. Section 12 of iTaukei Lands Trust Act 1940 is similar to section 13 of the SL Act.

*Rent agreement between the parties*

- [13] There was no formal rent agreement between the plaintiff and the defendant. However, from the evidence, the court can infer that there was an informal rent agreement in existence between them. It was not put in dispute that there was no rent agreement between the parties.

*Illegality Issues*

- [14] Only argument advanced by Mr Pillay, counsel for the plaintiff was that the distress for rent was unlawful as a result of failure to obtain the prior consent as

required by section 13. Counsel does not appear to attack on the procedures adopted by the Bailiff when executing the distress for rent.

- [15] The first defendant is the registered owner of the Protected Lease over which a building is situated with various office spaces. The plaintiff rented these office spaces and defaulted in the payment of rentals. The first defendant as a landlord issued distress for rent against the plaintiff. The word 'Landlord' is defined in the DR Act: "Landlord" means the lessor or sub-lessor of any premises, under any lease or agreement of tenancy, and includes any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement (see s.2, DR Act).
- [16] The first defendant was sub-lessor of the premises. He was receiving the rents from the plaintiff. He, therefore, falls within the definition of Landlord as explained in the DR Act. As a landlord, the first defendant was entitled to levy a distress for rent to recover arrears of rentals.
- [17] The first defendant authorised the second defendant, a bailiff to levy the distress for rent. The second defendant was a registered bailiff with a certificate in writing at the time of levying the distress for rent on behalf of the first defendant.
- [18] The subject premises is not a land as submitted by the counsel for the plaintiff. It is a state land. The first defendant has been issued with a protected lease. The relevant consent issue is governed by section 13 of the SL Act. This section proclaims that a lessee of a protected lease cannot alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same without the written consent of the Director of Lands first had and obtained.
- [19] The crux of the plaintiff's argument is that the first defendant had entered into a rental agreement without the written consent of the Director of Lands and acted upon. Therefore, the distress for rent was illegal.
- [20] The first defendant has obtained the required consent to sublet the shops, flats and offices. He applied for consent by his application, which was received by Ministry of Lands and Mineral Resources on 20 April 2012. However, the

Divisional Surveyor Western, by his letter dated 7 January 2013, had given his approval for the first defendant to sublet the premises (Lot 19 Sec 3).

- [21] It is true there was no consent when the parties enter into a rental agreement. However, the written consent was subsequently given to the first defendant to sublet the shops, flats and offices. The agreement was, therefore, not illegal. Entering into an agreement subject to consent of the Director of Lands is not illegal nor did it make the agreement void *ab initio*.
- [22] Fiji Court of Appeal in *Ram Chandra Reddy v Subandra Devi, Director of Lands* (Civil Appeal No. AB 0026 of 2013), where consent was subsequently withdrawn, and it was regranted. High Court held that there was no valid agreement as consent was withdrawn, said (turning down the High Court judgment) when the Director regranted his consent, the agreement became enforceable...'
- [23] In the instance case, the Divisional Surveyor Western had subsequently gives his consent for the first defendant to sublet the premises. Therefore, the rental agreement was not illegal or void *ab initio* as argued by the plaintiff. The agreement became enforceable and the first defendant was entitled to levy distress for rent.

*The regularity of distress for rent*

- [24] The bailiff was a registered bailiff with a certificate. He executed the distress after given due notice thereof and affording an opportunity to settle the arrears of rent. It was only executed when the plaintiff failed to produce proof of payment of the arrears.
- [25] There was no complaint that the distress was levied between sunset and sunrise or on any Sunday or on Good Friday or Christmas Day against s.5 of DR Act. There was also no complaint that the distress for rent was levied on goods and chattels that are exempt from distress for rent against section 4 of the DR Act.
- [26] In the circumstances, I find that the distress levied by the first defendant through the second defendant, a certified bailiff against the plaintiff was lawful.

*Reliance on illegality*

- [27] Assumingly, let me assume for a moment that the rental agreement was illegal. The question then arises whether the plaintiff is entitled to base his claim relying on the illegality.
- [28] The plaintiff claims general damages for unlawful and wrongful distress for rent. The plaintiff contends that the rental agreement was illegal in the absence of consent and as a result the subsequent distress for rent is also illegal.
- [29] A contract may be illegal as a result of statute e.g. any dealing of state lands without the written consent of the Director of Lands would be illegal (s.13 State Lands Act).
- [30] As a general rule courts do not enforce illegal contracts and will not permit recovery of benefits conferred in the performance of an illegal contract. However, the courts will allow recovery where the parties are not *in pari delicto* (not equally guilty), e.g., one of the parties was unaware of the illegality.
- [31] In *Archbold's (Freightage) Ltd v Spanglett Ltd* [1961] 1 QB 374, the defendants agreed to carry a cargo of whisky to London for the plaintiffs who were unaware that the defendants did not have the required licence. The whisky was stolen, and when the plaintiffs claimed damages for the loss the defendant pleaded illegality. The plaintiffs were allowed to sue on the contract for the defendants' loss of the goods en route. The contract was not expressly or impliedly prohibited by statute (i.e., not illegal on its formation) and so was not illegal. It was performed by the defendants in an illegal manner, but the plaintiffs were not a party to that illegal performance and so could enforce it.
- [32] The illegal performer cannot enforce the contract (see *Anderson Ltd v Daniel* [1924] 1KB). In *Ashmore, Benson, Pease & Co. Ltd v A. V. Dawson Ltd* [1973] 1 WLR, defendants carrying tube banks in contravention of legislation specifying the maximum weight of lorries but since plaintiff's representative had been present at loading and had raised no objection, the plaintiff was unable to recover damages when the tube bank was damaged during the journey.
- [33] In the present case, the plaintiff was a performer of the illegal contract. He had benefited from the illegal contract by occupying and having a Training School at

the premises. He was paying rental to the first defendant until the distress for rent was levied. If the agreement was illegal, he was *in pari delicto* (equally guilty). He is not an innocent party. Therefore, he cannot claim damages relying on the illegality.

*First defendant's counter claim*

[34] The first defendant counterclaims among other things that:

- (i) Vacant possession of the property.
- (ii) Mesne profits (to be assessed) from 2010 until judgment or until vacant possession be delivered up.
- (iii) Damages (to be assessed).

[35] The issue of vacant possession does not arise as the plaintiff had already vacated the premises.

[36] The first defendant claims mesne profits from 2010. The plaintiff was paying rent to the first defendant from 2010 and he defaulted in the payment of rentals. That is why the distress for rent was levied against the plaintiff. The plaintiff has deposited a sum of \$22,367.00 into court for rentals payable to the first defendant. The first defendant did not press on the counterclaim he has made in his further amended statement of defence and there is no sufficient evidence showing that the first defendant is entitled to judgment as per his counterclaim.

## **Conclusion**

[37] It is for these reasons, I conclude that the distress of rent executed by the first defendant through the certified bailiff, the second defendant was lawful. As such the plaintiff is not entitled to general damages. Alternatively, even if the rental agreement was illegal, the plaintiff cannot enforce that agreement as he was a performer of illegality. I would, therefore, dismiss the plaintiff's claim with summarily assessed costs of \$2000.00. I would also dismiss the first defendant's counterclaim as it was not established.

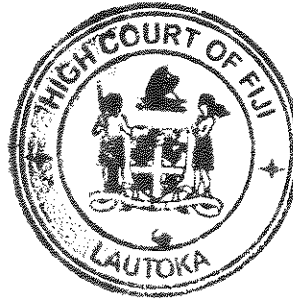


**The Results**

1. Plaintiff's action is dismissed.
2. First defendant's counterclaim is also dismissed.
3. Plaintiff will pay summarily assessed costs of \$2,000.00 to the defendants.

*M.H. Mohamed Ajmeer*  
28/5/18

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**M.H. Mohamed Ajmeer**  
**JUDGE**



**At Lautoka**  
**28 May 2018**

**Solicitors:**

For the plaintiff: M/s Gordon & Co., Barristers & Solicitors

For the first defendant: M/s Natasha Khan & Associates