Their reassessment of rent under ALTA § 40(1)(g)(ii) was unlawful and overridden lease.

Land - covenants + conditions 325
Landlord and tenant - lease rent - reassessment
ALTA § 3, § 9,
ALTA - implied terms
ALTA - interpretation
Words + Phrases - "contract of tenancy"

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

ACTION NO. 30 OF 1981

Respondent (lessee) had a 30 yr lease with Appellant (lessor) lease provided for reassessment in 1988. However in lessor reassessed rent, F.C.A. held that lessor could not charge rent until 1988 under terms of lease.

Between:

NATIVE LAND TRUST BOARD — APPELLANT

- and -

RAM DASS s/o Hardin — RESPONDENT

Sir John Falvey Q.C. and A. Qetaki
for the Appellant.

M.S. Sahu Khan for the Respondent.

Date of Hearing: 24th November, 1981.

Delivery of Judgment: 27 NOV 1981

JUDGMENT OF THE COURT

Spring, J.A.

This is an appeal from the Supreme Court of Fiji sitting at Lautoka given on 8th May, 1981. The appellant, Native Land Trust Board, is the lessor under a certain agricultural native lease granted by it in respect of 19 acres 3 roods of agricultural land situated at Ba; the lease was registered on 7th November, 1966, under No. 12513; the respondent is the lessee. The lease is for a term of 30 years from 1st January, 1963; the lease is dated 18th October, 1966; the rental for the initial term is £22.6.4. Clause (1) of the lease provides:

> "(1) The rent shall be subject to reassessment in the years 1988 to a maximum not exceeding six (6) per centum of the unimproved value of the land."

The circumstances giving rise to this appeal may be briefly stated. On 29th December, 1967, the Agricultural Landlord and Tenant Act (hereinafter called "the Act") was passed into law. The Act deals exclusively with rights and obligations of landlords and tenants of agricultural lands. The preamble to the Act reads :

> "An Act to provide for the relations between Landlords and Tenants of Agricultural Holdings and for matters connected therewith."

It is however much more than that; the main object of the Act appears to be the affording to a considerable degree security of tenure to tenants of agricultural land to provide for their welfare and, no doubt, for the advancement of agriculture generally in Fiji. Section 3(1) of the Act provides that the Act shall apply to all agricultural land in Fiji with certain exceptions which are of no importance in this appeal. Section 3(2) reads :

> "The provisions of this Act shall prevail notwithstanding the provisions of any contract of tenancy created after the commencement of this Act."

Section 9(1)(g)(i) and (ii) of the Act reads :

> "9(1) The following conditions and covenants shall be implied in every contract of tenancy of an agricultural holding subsisting at or after the commencement of the Ordinance .....:
>
> (g) on the part of both -
>
> (i) in relation to contracts of tenancy made after the commencement of this Ordinance, that the rent shall be liable to reassessment at the expiry of the fifth year of the term of the tenancy and thereafter at the expiry of each successive period of five years, on either party to the agreement, serving notice of the party at least three months prior to the expiry of the five year period that he requires the rent to be reassessed;

(ii) in relation to contracts of tenancy subsisting at the commencement of the Ordinance, that the rent shall be liable to reassessment at any time on either party serving not less than three months notice in writing on the other party that he requires the rent to be reassessed, and thereafter, after each successive period of five years, on either party serving a notice in writing on the other party at least three months prior to the expiry of each such five yearly period, that he requires the rent to be reassessed."

On the 13th May, 1980, a notice under section 9(1)(g)(ii) of the Act was sent by appellant to the respondent advising that the rental under his lease No. 12513 had been reassessed at $275 per annum, such reassessment of rent to apply from 1st September, 1980. No agreement was reached between appellant and respondent over the reassessment of rent and proceedings were instituted by appellant to have the Agricultural Tribunal assess, fix and certify the rent in accordance with the Act.

It is agreed that the reassessment was not made in accordance with clause (1) of the lease.

The respondent issued proceedings out of the Supreme Court seeking a declaration that appellant was not empowered to reassess the rental payable by the respondent under the said lease except in accordance with the provisions of clause (1) thereof.

The learned Judge in the Court below held that the express statutory provisions of the Act did not override the terms of the lease and that the appellant was not entitled to reassess the rent until 1988 in accordance with the provisions of the lease.

The appellant has appealed to this Court and the nub of the appeal is whether the reassessment of rental proposed under section 9(1)(g)(ii) of the Act was lawful and overrides the provisions of the lease No. 12513; this is the question we are asked to determine.

Sir John Falvey Q.C. for appellant submitted that section 9(1)(g)(ii) was expressed in clear terms and that there was no repugnancy between it and section 3(2) of the Act; section 3(2) provides that in respect of contracts of tenancy coming into force after the passing of the Act there shall be no contracting out of the Act; section 9(1) provides in mandatory terms that certain conditions and covenants "shall" be implied in "every contract of tenancy" of an agricultural holding subsisting at, or, after the commencement of the Act including a provision that the appellant was empowered to have the rent reassessed upon due notice being given and that these conditions and covenants were imported into the lease by virtue of the Act.

Mr. Sahu Khan for respondent submitted that section 3(2) of the Act clearly stated that if any contracts of tenancy of agricultural land created after the coming into force of the Act were inconsistent with the Act then the provisions of the Act would prevail, and, that if the Legislature intended that the provisions of the Act should prevail over contracts of tenancy of agricultural land subsisting on 29th December, 1967, it could have so enacted this provision in section 9(1)(g)(ii).

Counsel referred also to sections 13, 60, 23(2)(b) and 63 of the Act which he claimed supported his argument that the implied terms mentioned in section 9(1) of the Act would only come into effect when no contrary express provisions were contained in the contract of tenancy; he also claimed that section 9(1) was repugnant to, and ambiguous with, other sections in the Act.

Section 9(1)(g)(ii) is a statutory requirement that there shall be implied in every subsisting contract of tenancy of agricultural land as at 29th December, 1967, a provision that the rent payable thereunder shall be liable to reassessment at any time on either party serving not less than 3 months notice on the other that it is desired that the rent be reassessed.

Admittedly the inclusion of the provisions of section 9(1)(g)(ii) into subsisting contracts of tenancy of agricultural land by statutory direction is a substantial interference with the parties' contractual arrangements. However, the Act was passed by Parliament in its wisdom, no doubt, for the benefit of Fiji and to afford some security of tenure to cane farmers; the effect of the Act is to impose a certain "status" on agricultural land in Fiji which binds both the landlord and tenant and any other person having dealings therewith.

The Act contains many provisions which are revolutionary; for instance section 7 of the Act provides that every contract of tenancy under the Act can only be terminated in the manner prescribed by the Act. Section 7 reads :

> "7. Except in the manner provided by this Act -
>
> (a) no contract of tenancy of any agricultural land subsisting at the commencement of this Act or thereafter shall be terminated by the landlord or by the tenant of such land within the term fixed by such contract or during an extension granted in accordance with the provisions of this Act; and
>
> (b) no contract of tenancy of any agricultural land created after the commencement of this Act shall be terminated as aforesaid within the minimum term specified in section 6."

Section 4 of the Act is likewise revolutionary; a tenancy can be one implied or presumed to exist by operation of law; section 4 raises a strong presumption of a tenancy in favour of persons who were, when the Act came into force, occupying agricultural land for a period of 3 years or more albeit that such occupiers may hold no title to such land; in these circumstances an occupier of agricultural land can obtain security of tenure which may never have been in contemplation of the parties.

Section 3(2) of the Act provides that it shall be unlawful to provide in contracts of tenancy of agricultural land created after 29th December, 1967, any provision excluding the operation of the Act; in other words it shall be

unlawful to contract out of the Act in respect of any contract of tenancy of agricultural land entered into after 29th December, 1967.

It is to be noted that section 15 of the Act states that any provision in a contract of tenancy whereby the tenant purports to contract himself out of the Act or the effect of which would be to contract the tenant out of any such provisions shall be against public policy and void.

Turning now to an analysis of section 9(1) - it is stated that "the following conditions and covenants shall be implied in every contract of tenancy of an agricultural holding subsisting at or after the commencement of the Act".

A contract of tenancy is defined in the Act as follows :

> "'contract of tenancy' means any contract express or implied or presumed to exist under the provisions of this Act that creates a tenancy in respect of agricultural land or any transaction that creates a right to cultivate or use any agricultural land."

It is common ground that the lease comes within the foregoing definition and that the lease was subsisting at the commencement of the Act.

Terms implied by law in a contract do not depend on the intention of the parties. Mr. Sahu Khan complained that if the statute imported the covenants and conditions set out in section 9 of the Act into a contract of tenancy of agricultural land existing rights of the parties may be interfered with. We merely observe that many Acts of Parliament, in fact, do interfere with existing rights of parties and the Act incontrovertibly does this.

In Baynes & Co. v. Lloyd & Sons /1895/ 1 Q.B. 820 Lord Russell of Killowen C.J. at p. 823 said :

> "The term 'implied covenant' is often used in a two-fold sense; first, as denoting a covenant which is to be gathered from the four corners of the instrument, or from words or phrases not generally used in law to express a covenant, and in this sense an implied covenant is for all legal

> purposes the same as an express covenant; but, secondly, it is also used to denote a covenant in law - that is, a covenant attached by the law - apart from any expressed intention of the parties."

It is with covenants and conditions in this latter sense that we are concerned in this appeal.

Turning now to the use of the word "shall" in section 9(1) we are satisfied after examining the Act; looking at the circumstances in which it was enacted; the purposes that it was intended to serve, that this word is used in a mandatory or imperative sense. Further, as we have said the lease is included within the words "every contract of tenancy of an agricultural holding subsisting at.....the commencement of the Act".

The section then says that in relation to such a contract of tenancy "the rent" shall be liable to be re-assessed. The word "rent" is not qualified in any way and in our view the language of the section makes it plain that the word "rent" means the amount payable under the lease by way of remuneration to appellant unqualified in any way and without any gloss thereon.

Mr. Sahu Khan argued that as there was a provision in this lease for "reassessment of the rent in 1988" then the word rent should be qualified, or be read, as if the words "if there is no right of reassessment of rent contained in the lease" were interpolated after the word "rent". In our view the word "rent" refers to the rent payable under the lease or contract of tenancy whether it be a flat rent; a rent not subject to review; or a rent which may be reassessed by the terms of the lease on one or more occasions.

It is clear that by the express statutory direction, the "rent" is liable to be reassessed on the application of either the landlord or the tenant upon the giving of the requisite notice; this is a right given by statute to each party to the lease - not only the landlord but also the tenant. It is possible that neither party under the lease

may seek a reassessment of rent under section 9(1)(g)(ii) and the lease will carry on subject to the provisions of the Act. The respondent may avail himself of the provisions of section 9(1)(g)(ii) and give notice that he requires the rent assessed notwithstanding the provision for reassessment in the lease.

We reject Mr. Sahu Khan's argument that we should import into the reading of section 9(1)(g)(ii) after the word "rent" the additional words "if there is no right of reassessment of rent". We see no reason to vary the plain meaning of the words used. It is true the section affects existing rights as between existing lessors and lessees, but that, to us, seems to be one of the purposes and objects of the Act. As we have pointed out under the terms of the section either party to the lease may apply for reassessment of the rent.

Section 9(1)(g)(ii) is complete in itself and should be construed according to its own terms and in our opinion the plain language of the section creates an insurmountable obstacle to the contention advanced by counsel for respondent; this section is a clear case of a statutory direction which must be applied and which prevails notwithstanding the terms of the negotiated lease; the section clearly states that in all subsisting contracts of tenancy of agricultural land as at 29th December, 1967, the rental is liable to reassessment by either landlord or tenant upon due notice being given in the terms set out in this section.

On the ordinary rules of construction we are satisfied that the section cannot be classed as retrospective; it is prospective for it speaks only of an event which may or may not happen in the future - namely the giving of a notice by either party that it is desired to have the rent payable under the lease reassessed.

In addition section 9(1)(g)(i) and (ii) imports many other conditions and covenants into every contract of tenancy of agricultural land subsisting at or created after the commencement of the Act some of which are for the benefit of the tenant and some are for the benefit of the landlord.

These conditions and covenants are engrafted by statute upon existing contracts of tenancy of agricultural land.

The instant lease is an agricultural lease drawn in accordance with the provisions of the Native Land Trust Act (Cap. 134) and the Regulations thereunder including the Native Land (Leases and Licences) Regulations. Section 10 of the Native Land Trust Act deals with the form of all native leases and the covenants and conditions that may be prescribed therein.

It is expressly provided by section 59 of the Act that section 10 of the Native Land Trust Act together with sections 7, 8, 9, 11 and 12 of the latter Act and all regulations made thereunder are subject to the provisions of the Act.

We are satisfied that the other sections of the Act mentioned by Mr. Sahu Khan in his argument do not avail him; the provisions of section 9(1)(g)(ii) are not ambiguous with, nor are they repugnant to, other sections of the Act. The words of section 9(1)(g)(ii) are clear and explicit; we are obliged in construing the section to give effect to their plain meaning.

For the reasons which we have given we are satisfied that this appeal should be allowed and the declaration made in the Court below set aside.

Accordingly the appeal is allowed, the judgment given in the Court below is set aside and we declare that it is lawful for the Native Land Trust Board to reassess the rent payable under Lease No. 12513 in accordance with the provisions of section 9(1)(g)(ii) and the other appropriate provisions of the Act.

We allow costs in this Court and in the Court below to the appellant to be taxed if not agreed.

.....
Vice President

.....
Judge of Appeal

.....
Judge of Appeal