IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 14 of 1982

Between:

RAGHO PRASAD s/o Ram Nath — Appellant

and

1. GOHIL BROTHERS
2. LUM LOU WAH — Respondents

G.P. Shankar with A.K. Narayan for the Appellant
B.C. Patel for the First Respondent

Date of Hearing: 10th November, 1982
Delivery of Judgment: 26th November, 1982

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from a judgment of the Supreme Court at Lautoka in an action in which the appellant claimed possession from the respondents, Gohil Bros., of the ground floor of a building standing on Lot 4 on deposited plan 2818, comprised in Certificate of Title No. 11446. One Lum Kou Wah was originally made a defendant but the action was discontinued against him and he is not a party to the appeal. In essence the respondents claimed the right to remain in possession of the premises by virtue of a written tenancy agreement dated the 1st December, 1969, for a term of ten years but

containing an option for renewal for a further term which the respondents claimed had been exercised. The respondents counterclaimed for a declaration of entitlement to a renewal of tenancy for ten years from the 1st November, 1979.

By his judgment dated the 5th February, 1982 and now the subject of this appeal, the learned Judge in the Supreme Court dismissed the appellant's claim for possession, allowed the Counterclaim and awarded costs to the respondents.

The short history of the matter is as follows. One Lum Hing was in 1969 the owner of the premises in question and entered into the agreement abovementioned date the 1st December, 1969, with "Nagindas (father's name Vallabh), Ishwarlal (father's name Nagindas) and Mohanlal (father's name Amritlal) all of Varoka, Ba, merchants, trading as 'Gohil Bros.' in Ba (hereinafter together with their executors, administrators and assigns called the 'Tenant')". The agreement was for ten years from the date of possession. The rent and other details are not material, but paragraphs 5 and 12 read as follows :

> "5. The tenants shall have the right of renewal subject to reassessment of rents to be made at the current value of rents payable in respect of similar buildings at the time of renewal.
>
> 12. The tenants shall not transfer assign or part with the possession of the premises without the prior consent of the Landlord first had and obtained in writing but they may sublet the premises to any sub-tenant for any trade or legitimate purpose other than for a restaurant, milk bar or cafe. Subletting for the above three purposes is absolutely prohibited. "

Lum Hing disposed of the property to Lum Kou Wah and the latter in turn assigned his interest to the appellant by an agreement in writing dated the 9th September, 1975. Present when this document was signed were Mr. K.P. Mishra, a solicitor, Lum Kou Wah, the appellant and Ishwarlal, representing the respondent firm, Gohil Bros.

There is a finding by the learned Judge that the appellant was aware of the renewal clause in the tenancy agreement and this has not been challenged on appeal. The respondents thereafter paid the rent to the appellant.

It is the respondents' case that they exercised the option for renewal contained in paragraph 5 of the agreement by their solicitors' letter dated the 17th May, 1979, which was in the following terms :

"

17th May, 1979.

Mr. Ragho Prasad f/n Ram Nath,
c/o Metro Theatre,
BA.

Dear Sir,

re: Tenancy Agreement dated
1/12/69 with Gohil Bros.
(Satish Emporium)

We are acting for your tenant, Satish Emporium.

We are instructed to notify you that our clients hereby exercise their right to renewal of the tenancy granted by the above-mentioned Agreement for further 10 years as from 1st December, 1979.

In compliance with the provisions of the Agreement will you please advise what rental you seek for the extended term of 10 years.

Yours faithfully,
STUART, REDDY & CO.

Per:

"

The respondents were not able to prove strictly the timeous delivery of this letter of which the only evidence was that of the appellant himself. He said he received it on the 2nd November, 1979. At any rate his solicitors wrote the following letter of that date :

"

2nd November, 1979.

Messrs. Stuart Reddy & Co.,
Barristers & Solicitors,
LAUTOKA.

Dear Sirs,

re: Tenancy Agreement dated
1.12.69 with Gohil Bros.
(Satish Emporium)

We act for Ragho Prasad son of Ram Nath, and refer to your letter dated 17th May, 1979, which our client received today.

Our client is not prepared to grant any renewal. The provision in the Agreement for renewal is void for uncertainty.

Our client's Cheque for $2,000.00 being refund of deposit is enclosed herewith.

Yours faithfully,
G.P. SHANKAR & CO.
Per:

encl. Chq. $2,000.00 "

The learned Judge dealt with this matter in his judgment as follows :

"But whilst there was no clear evidence when the letter was seen by the plaintiff, there was evidence, by the plaintiff himself, that he had heard from Ishwarlal before the expiry date that he was asking for a renewal of the lease, and there was evidence that possibly even as early as May 1979 the plaintiff was seeking a copy of the agreement embodying the renewal clause from the first defendant. Certainly in October 1979 he was seeking a copy c the agreement from Mr. Mishra's office. The only reason for seeking a copy of the agreement must have been to check on the renewal clause. No specific method of exercising the option of renewal is spelled out in the agreement, so there can be no objection to verbal notification, and no such objection was stated in the pleadings. Admittedly the original defence relied on the written notice of renewal,but when it became clear that the plaintiff was relying on his assertion that the written notice was not seen by him till

2nd November, 1979 the defence was with leave formally amended to include verbal notification. The plaintiff could have applied to amend his reply to the defence but did not do so. "

As to the partnership Gohil Bros., at the time of signing the agreement of 1st December, 1969, the partnership consisted of the three persons named therein as tenants, though of them only Ishwarlal signed the agreement "For Gohil Bros.". Nagindas, who was the father of Ishwarlal, died in 1970, leaving Ishwarlal as his executor and trustee. Thus, on the 9th September, 1975, when the appellant took over as landlord Nagindas had been dead for some years, and once again Ishwarlal signed the agreement of that date for Gohil Bros. That handwritten agreement appears to have been annexed to the agreement of the 1st December, 1969, and its terms are not without interest. They read :

"I Lum Kou Wah of Ba Merchant hereby assign and transfer all my right and interest within this agreement unto Ragho Prasad F/N Ram Nath of Ba Theatre Proprietor and I Ishwarlal F/N Nagindas hereby will look forward to the said Ragho Prasad as the landlord paying all future rents to him on the same terms and conditions as contained in the within agreement and I Ragho Prasad admit to have received $2000.00 deposit from Lum Kou Wah as required by paragraph 3 of this agreement.

Dated at Ba this 9th day of September 1975.

Witness after Interpretation

K.P. Mishra
Solicitor
Ba

Lum Kou Wah
Ragho Prasad

For Gohil Bros.
Ishwarlal "

It was the evidence of Ishwarlal (who incidentally was called as a witness by the appellant) that Gohil Bros., though it remained in existence as a firm, did not trade after the end of 1974. Satish Emporium, consisting of his wife and himself carried on business on the premises.

There are findings made by the learned Judge in his judgment on matters once in issue but which are not challenged on this appeal. We set them out here in order to limit our references to the pleadings to matters remaining relevant. Firstly, the learned Judge held that though the option for renewal in clause 5 did not specify any particular period, it implied a further term of ten years. Secondly, that the clause conferred a right of only one such renewal. Thirdly, that all the other terms of the renewal tenancy would be the same except as to rental and fourthly, that the clause did not infringe against the rule against perpetuities. As we have indicated these matters are no longer in issue.

As to the pleadings, the respondents were sued as Gohil Bros., a firm carrying on business at Ba. They had been served with notice to quit. Their interest (if any) by virtue of the agreement of 1st December, 1969, entered into by the appellant's predecessor in title had expired by effluxion of time. Clause 5 of that agreement (i) was void for uncertainty and (ii) was inoperative and frustrated by the Counter-Inflation Act, 1973. There was a plea that the appellant had an indefeasible title under the Land Transfer Act, 1971, but this does not appear to have been argued and the appellant stated in evidence that he did not have a registered title.

A good deal of the Statement of Defence was taken up with matters no longer in issue. The respondents relied upon their agreement, the right of renewal and the exercise of the option. They denied uncertainty as to the new rent, and said that in any event re-assessment was governed by the provisions of the Counter-Inflation Act, 1973. The only portion of the Counterclaim still relevant is the claim for a declaration of entitlement to a new lease. In a reply the appellant introduced the two following matters:

"3. That .....
the plaintiff further says :

(a) That in any event the purported right of renewal (which is denied) was granted in favour of one Nagindass father's name Vellab, Ishwarlal father's name Nagindass and Mohanlal father's name Amrit Lal and all the purported grantees did not properly and lawfully exercise the purported right of renewal (which is denied);

(b) That in any event the Defendant had not complied with the covenants in the purported tenancy agreement dated the 1st day of December, 1969 at the time of the purported exercise of the purported right or renewal (which is denied) and more particularly the Defendant had parted with the possession of part of the premises and/or sublet part of the same contrary to the provisions of the purported tenancy agreement dated the 1st day of December, 1969. "

There was also a Statement of Defence to the Counterclaim which does not contain anything which remains relevant.

The original notice of appeal contained five grounds but only Ground 2 and portion of Ground 1 were argued by Mr. Shankar. The two grounds read :

"1. THAT the learned trial Judge erred in law and in fact in holding that the option clause 5 to renew was not void for uncertainty, and that it did not infringe the rule against perpetuities.

2. THAT the learned trial Judge erred in law in holding that the option to renew had been properly and validly exercised, when in fact the evidence showed that it had not been exercised by the 'tenant' and no evidence that it had been properly exercised at all. "

As we have indicated above, the matter of the rule against perpetuities was not argued by Mr. Shankar. At the opening of the appeal application was made to add two more grounds as follows :

"1. (a) THAT the learned trial Judge erred in not holding that because the tenancy in question and the option to renew was granted to a partnership firm, such

partner hip firm had been dissolved, the option to renew was not lawfully or properly exercised nor had it been assigned by Gohil Brothers;

(b) THAT since evidence was adduced without objection, and counsel addressed the Court whether the purported exercise of the option by Gohil Brothers was lawfully or properly exercised, the learned trial Judge erred in law and in fact in not holding that Gohil Brothers could not in law exercise the option, although the appellant did not specifically plead that point. "

The Court queried this application on the ground of its lateness and Mr. Patel objected on the ground that it sought to raise a new point which might well involve new evidence. We reserved our ruling on that while permitting argument de bene esse. Mr. Narayan, who argued this aspect of the matter for the appellant, did not, in fact, advert to Ground 1(b) of the application at all.

Arguing Ground 2 of the original grounds Mr. Shankar relied upon the terms of the letter of the 17th May, 1979 (set out above) in which the "tenant" was referred to as "Satish Emporium" though in the heading there was some implication that they were one and the same thing. It was argued on the authority of a New Zealand case Taita Hotel Ltd. v. Spalman /1963/N.Z.L.R. 206 that the expression "Tenants" in clause 5 should be construed strictly and the clause conferred an option to renew only on the original tenants. So far as the case of Taita Hotel Ltd. is concerned its effect is limited by the wording of the particular lease in that case. The condition relied upon read " - That if at the expiration of the term hereby created the lessee shall still be the lessee of the demised premises ..... the lessor will execute in favour of the lessee a further lease ..... " The premises were licensed hotel premises and the reason for the strict wording of the clause is apparent.

There is no such wording or reason in the present case. Paragraph 12 restricts assignment without prior consent but not, except in three specified cases, subletting.

However, the facts as found by the learned Judge do not disclose any assignment to Satish Emporium. At the most he contemplated the possibility of a legitimate substenancy. He said :

> "But it is nonsense to say that Ishwarlal was speaking only for Satish Emporium when he sought renewal. There was no way Satish Emporium could exercise any right of renewal, it was only as 'Gohil Bros.' cou_d Ishwarlal apply for renewal. There was nothing to stop 'Gohil Bros.' from subletting to Satish Emporium according to the terms of the lease once the lease was renewed.
>
> As Ishwarlal said he was interested in renewal in both capacities. It is to be noted that in the pleadings the plaintiff never raised this question.
>
> The finding of the Court therefore is that the option to renew was properly and validly exercised."

We are in agreement that the evidence as a whole supports this conclusion. The impression given is that the relationship between Gohil Bros. and Satish Emporium was in the nature of a family affair and we note the following passages in the evidence of the appellant, given in re-examination :

> " (a) Defendant never asked to transfer tenancy to Satish Emporium, and
>
> (b) To me it made no difference who paid rent. I accepted Gohil as my tenant. "

Mr. Shankar also submitted that the evidence of the oral communications between the parties was too vague to base a finding that the option had been exercised in that way. We agree that the evidence is not specific in its terms but the learned Judge heard and saw the parties and the witnesses and had to assess their evidence in the

light of the pleadings from which the appellant had departed in some material matters. We quote one passage from the evidence of Ishwarlal :

> " I spoke to Ragho Prasad prior to May 1979 about renewal of lease. After notice was given Ragho Prasad came to me in search of agreement. He said he couldn't find agreement. He said that when he had chance to read agreement we could go ahead and renew. He never objected to renewal. He said he was happy to renew. I gave him copy of agreement. That was before October 1979.
>
> I never mentioned Satish Emporium at that time. That never arose. "

Having regard to the evidence as a whole we are unable to agree that there was no sufficient evidence to justify the finding that the option was validly exercised. This ground fails.

Before proceeding to Mr. Shankar's argument that clause 5 was void for uncertainty, we will deal with the submission put forward by Mr. Narayan on the new Ground 1(a). Because, he says, the tenancy in question was granted to the firm of Gohil Bros., and because Nagindas, one of the partners, died in 1970, the partnership firm had been dissolved and did not exist in a form that could exercise the option for renewal. He relied upon section 34(1) of the Partnership Act (Cap. 248) which provides that "subject to an agreement between the partners every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner". This point was apparently taken in the Supreme Court though the learned Judge commented that it was not reflected in the pleadings. He dealt with it in this passage :

> " There was no evidence to suggest that there had been no agreement that the partnership should not be dissolved automatically on the death of a partner. And there was evidence that the partnership did continue actively for four years after the death of Nagindas, and was recognised by the plaintiff as continuing.

The 1975 assignment by Lum Kou Wah to the plaintiff was signed by Ishwarlal for 'Gohil Bros.'. In this action the plaintiff is citing 'Gohil Bros.' as the first defendant, in fact the plaintiffs pleaded cause of action would fall flat if there were no such entity as 'Gohil Bros.'. According to Ishwarlal, Gohil Bros. has never been dissolved, it traded actively till 1974, and although it ceased trading actively in that year it continued in existence if only for the purpose of its asset - namely the tenancy of the premises claimed by the plaintiff. "

What the learned Judge is really saying there is that if the appellant wishes to assert that there is nobody who is entitled to the assets of the Gohil Bros. partnership and that an exercise in the name of Gohil Bros. of a right or option vested in that partnership is void, the onus is upon the appellant to demonstrate that, after proper pleading and proof. The agreement for tenancy was made with the three then partners "trading as Gohil Bros." described, with their executors, administrators and assigns as the tenant. It was clearly competent for the partners to have made an agreement to cover the contingency of death, and section 34 of the Act in this respect at least, is designed to regulate matters as between the partners inter se; if a person outside the partnership wishes to rely upon it the onus is upon him.

There is a further factual point not mentioned by counsel. The death of Nagindas took place in 1970 and the appellant acquired his interest in 1975. Rent was paid in the intervening years. It appears to be a reasonable assumption that any consequent modification or variation of the partnership took place and was accepted by the landlord for the time being well before the appellant signed the agreement of the 9th September, 1975. This again illustrates the necessity for adequate and proper pleadings. This ground of appeal also fails.

The last ground is that clause 5 is void for uncertainty by reason (and this argument now stands alone) of the lack of adequate provision for the rent of the renewed term. The learned Judge relied upon Sudbrook Trading Estate Ltd. v. Eggleton /1981/ 3 All E.R. 105 and said :

> " What emerges quite clearly is that where the option clause stipulates a method of calculating the new rent, e.g. by means of valuers or assessors appointed by the parties, and one of the parties refuses to appoint a valuer then except in certain circumstances the clause is void for uncertainty. The court will not - except in very special circumstances - substitute its own method for assessing rent - e.g. by appointing its own assessor. But where no method is specified, where the clause merely refers to - for instance 'a rent to be fixed having regard to the market value of the premises at the time of exercising the option' (See Brown v. Gould /1971/ 2 E.R., 1505) or 'at a reasonable valuation' (See Talbot v. Talbot /1967/ 2 A.E.R. 920) the Courts would be prepared to 'step in and lend its benevolent aid'.
>
> The terms of the option in this case are very much in line with the wording in the two cases cited. There is a formula for determining the rent, and if the parties cannot agree on a rent, the Deputy Registrar of the Court or some other capable person can be asked to determine what it should be.
>
> The clause is therefore not void for uncertainty and the plaintiff is bound by it. "

We would add that Sudbrook v. Eggleton (supra) has since been overruled by the House of Lords but not in any respect which affects the opinion expressed by the learned Judge on the particular wording of paragraph 5. The House of Lords held that even in a case where a price was to be fixed by the parties' valuers, the Court would, if the machinery broke down for any reason, substitute its own machinery to ascertain a fair and reasonable price.

Brown v. Gould and Talbot v. Talbot the two cases mentioned in the last quoted passage, are dealt with by

Templeton L.J. in the Court of Appeal in Sudbrook's case, at pages 113-4 :

" In Talbot v. Talbot /1967/ 2 All ER 920, /1968/ Ch 1 a testator gave two of his sons the option of purchasing the farms in which they lived together 'at a reasonable valuation'. There was no provision in the will for the mode of valuation of the farms and the Court of Appeal affirmed the decision of Burgess V-C that the court itself would undertake the task and direct a special inquiry as to what was a reasonable price for the farms. Harman L.J. referred to Milnes . Gery, where the testator had directed a valuation by two arbitrators and an umpire, and continued (/1967/ 2 All ER 920 at 922-923, /1968/ Ch 1 at 11-12) :

' Those means broke down and Sir William Grant came to the conclusion that the court, where the means pointed out by the testator had broken down, would not create others as that would be something which the court had no jurisdiction to do, but that, where the matter was left open, as Sir William Grant said, and no machinery was provided, there is no reason why the court should not step in and lend its benevolent aid. That seems to me to be good sense and good law ..... Therefore there is good authority for saying that an option to purchase 'at a fair valuation' or 'at a fair price' is an option which the court will enforce ..... '

In the present case there is no reference to 'a fair valuation'. Counsel for the tenants submitted that in the context of the lease the parties intended that there should be a fair valuation resulting in a fair price on the footing of a bargain between the landlords owning the reversion and willing to sell, and the tenants owning the leasehold interest and willing to buy the freehold reversion. The implication of a fair valuation does not however relieve counsel of the difficulty that in this case, as in Milnes v. Gery, express provision was made for the ascertainment of a fair valuation by two arbitrators and an umpire.

In Brown v. Gould /1971/ 2 All ER 1505 at 1057, /1972/ Ch 53 at 56 Megarry J upheld the validity of an option to renew a lease -

'for a further term of Twenty one years at a rent to be fixed having regard to the market value of the premises at the time of exercising this option taking into account to the advantage of the Tenant any increased value of such premises attributable to structural improvements made by the Tenant .....'

Megarry J held, conssistently with Talbot v. Talbot, that, where an option is expressed to be exercisable at a price to be determined according to some stated formula without any effective machinery in terms provided for working out that formula, the court has jurisdiction to determine it. In the present case the parties themselves have provided the machinery. "

In the House of Lords Lord Fraser said at p. 325 :

" While that is the general principle it is equally well established that, where parties have agreed to sell 'at a fair valuation' or 'at a reasonable price' or according to some similar formula, without specifying any machinery for ascertaining the price, the position is different. As Grant M.R. said in Milnes v. Gery, 14 Ves. Jun. 400, 407 :

' In that case no particular means of ascertaining the value are pointed out: there is nothing therefore, precluding the court from adopting any means, adapted to that purpose. '

The court will order such inquiries as may be necessary to ascertain the fair price: see Talbot v. Talbot /1968/ Ch. 1. "

We agree with the learned Judge in the Supreme Court as to which side of the line the present case falls and counsel's endeavours to draw any material distinction on the wording of the clause have been without avail.

Vague reference was made at one stage of the argument to the Counter-Inflation Act (Cap.73) but no applicable argument was developed upon it.

In the result the appeal as a whole is dismissed with costs.

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Vice President

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Judge of Appeal

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Judge of Appeal