

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 44 OF 1992

(High Court Civil Action No. 87 of 1992)

BETWEEN:

LABASA TOWN COUNCIL

APPELLANT

-and-

MORRIS HEDSTROMS LIMITED

RESPONDENT

Dr. Sahu Khan for the Appellant
Mr. H. Lateef for the Respondent

Date of Hearing : 25th November, 1993

Date of Delivery of Judgment : 26th November, 1993

JUDGMENT OF THE COURT

In its skeletal arguments, the appellant in Part B purported to set out what it called "Issues" in this appeal. We will deal firstly with Issue 2. "The Counter-Inflation Act did not apply to land rentals but only in respect of renting of developed properties."

Some might regard this as a preliminary or fundamental argument, since, if valid, it would destroy the respondent's case, result in overturning the judgment below, and ensuring a judgment in favour of the appellant.

Again, some might think it a misnomer to class it as a preliminary point. It was (1) not pleaded either in the Statement of Claim nor in the reply to the defence; (2) not

mentioned in the pre-Trial Conference and thus not one of the two issues agreed by the solicitors for both parties as being what the case was all about; (3) not raised as a ground of appeal in the Notice of Appeal dated 21st September 1992.

It made its first appearance in the skeletal argument referred to above.

It is obvious that if there is merit in this argument for the appellant, large sums of costs have been "thrown away".

We were at first minded to refuse to allow the appellant to raise so belatedly, this point. Alternatively, it could have been more appropriate to remit the case to the trial Judge to complete the hearing. In view of the likelihood that no further evidence would be adduced before the trial Judge on this point, we decided to hear the appellant's counsel.

Mercifully the appellant's contention as set out in the skeletal argument is brief. It is Part E and is as follows:-

"Application of the Counter Inflation Act to Land Rents

Section 12(1) of the Counter Inflation Act provides:-

"Subject to the Provisions of Section 33, but not withstanding the provisions of any other written law, the Board, may with the approval of the Minister, by order, restrict increases of rent in respect of the letting or continued by any person of any Premises under any tenancy". (underlines supplied).

With respect the letting of a premises must refer to a developed property (building, or house or part thereof) and cannot refer to land only. Here the Appellant merely gave a lease of the land. Then the Respondent built its Service Station on the same. The land cannot be regarded as "Premises" (see Hobhouse v Wall (1963) 1 ALLER 701). At pages 703 - 704 UpJohn L.J. stated:

"The Rents Acts are dealing with what are essentially dwelling-houses and protecting the rights of occupants in certain cases. The Rent Acts do not in general deal with large farms which are the subject-matter of the Agricultural Holdings Acts. So when one sees that the section is dealing with a dwelling-house which forms part of premises not being such a dwelling-house, which have been let as a whole on a superior letting. I think, without attempting any definition, that the draftsman or Parliament is here thinking of premises as something in the nature of buildings." (underlines supplied)."

We are of the view that the appellant's contention is without merit. It turns on the interpretation to be given to the word "premises" in s.12 of the Counter-Inflation Act Cap. 73 Rev. 1985 and in the Orders subsequently made thereunder. In particular we refer to the Orders dated 11 December 1981 and 29th January 1986 which are fully discussed throughout the Appeal Book.

In essence the appellant's contention is that "premises" in this legislation does not include land upon which no structure, building or edifice stood when the lease was entered into. (It was not in issue that subsequent to the lease, the defendant constructed a service station thereon).

The appellant's reliance on *Hobhouse v Wall* (supra) is misplaced. The circumstances surrounding the legislation there in question, bears little resemblance to the legislation we are considering. A quick glance at the cases under "premises" in Stroud's Judicial Dictionary pgs. 1999 to 2002, shows that in the context of diverse forms of legislation, the word has been held to refer to land "and indeed, land on which there are no buildings." see Bracey v Read (1962) 3 WLR 1194, a decision turning on a particular section of a Landlord and Tenant Act.

In this appeal it is scarcely necessary to go further than look firstly to the short title of the act itself, the Counter-Inflation Act, and interpret its contents on the basis that it was an urgent attempt to control inflation. If it was an act to control rentals only in the case of buildings, structures etc without land, or land upon which buildings etc were constructed (and not "land" simpliciter), then surely it would have said so. Indeed if "land" was not included, the opportunities for avoiding the consequences of the Act and its orders would be legion, with scant regard for the keeping under control of what was regarded as a problem for the nation, namely excessive inflation.

We turn now to the real issues involved in this appeal.

The appellant/plaintiff is the lessor and the respondent/defendant the lessee, of a piece of land in Labasa Township upon which is situated the Mobil Service Station owned and operated by the Respondent Company.

The lease document (Registration No. 146026) dated 30 January 1974 (but effective from 1 July 1969) contains in Clause 1 the following provision for payment of rent:

"The lessee shall pay rent in respect of the said land calculated at the rate of six (6) per centum of the rating valuation of the said land as fixed by the Lessor upon the valuation for the time being affecting the said land which valuation shall be made and re-assessed at six yearly intervals as is the practice of the Lessor provided that notwithstanding any such valuation the Lessee shall pay a minimum rent of \$900.00 (NINE HUNDRED DOLLARS) per annum in the even that such computation of rent as aforesaid shall be less than the said sum of \$900.00 per annum."

On about 16 January 1987 the appellant advised the respondent that a revaluation of the land had been carried out pursuant to the Local Government Act and that the unimproved capital value of the land had increased from \$51,000 to \$310,000 effective from 1 January 1987. The appellant further advised the respondent that it had sought the approval of the Prices and Incomes Board to increase the rental to \$18,600 with effect from the same date, 1 January 1987. In fact the plaintiff did not apply to the P.I.B. until 3 February 1987.

On 24 July 1987 the P.I.B. advised the appellant that the rent could not be increased because of the Public Emergency (Rent Increase Prohibition) Regulations 1987. Paragraph 2 of the 1987 Regulations provided:-

"A person may not charge a rent, in respect of the letting or continued letting of any premises to which the Counter-Inflation Act

applies, which exceeds the rent applicable to those premises on 13 May 1987."

The 1987 Regulations were uplifted on 11 August, 1989. From 12 August, 1989 the Respondent has been paying rent at the rate of \$18,600 per annum.

In May, 1991 the Appellant issued a writ against the Respondent claiming \$77,700.06 being balance of rent following alleged underpayments for the period 1 January, 1985 to 11 August, 1989. (Details appear in paragraph 7 of the Statement of Claim at p.10 of the Record.) The claim was based on clause 1 of the lease which we have already quoted. The rating valuation of the land in question was carried out at six yearly intervals and the Respondent had been paying rates on that basis until 1985.

The Respondent filed a defence to the claim denying any liability. It invoked various Orders made under the Counter-Inflation Act (Cap 73). The relevant Orders were:

"(b) The Counter Inflation (Notification of Proposed Increases in Rent) Order 1981 (LN 136/81).

(c) The Counter Inflation (Rents) (Control) Order 1986 (LN 10/86).

(d) The Public Emergency (Rent Increase Prohibition) Regulations 1987 (LN 49/87)."

The two issues to be determined before the High Court (Scott J.), were (1) whether the Plaintiff is restricted from

implementing the provisions of re-assessment of rent as contained in Clause 1 of the lease having regard to the provisions of the Counter-Inflation Act and the Regulations and Orders made thereunder and (2) whether the Counter-Inflation Regulation and or Orders were validly made.

The defences raised by the Respondent in respect of various rental periods between 1 January, 1985 and 11 August, 1989 are dealt with by the trial Judge at pages 4 and 5 of his judgment.

After considering the oral and written submissions made and having dealt with certain specific points raised the learned Judge came to the following conclusion in his reserved judgment delivered on 3 August, 1992:

"The answer to the first issue is yes, with the exception of an increase of 2.25% with effect from 1 May 1987. The answer to the second issue is that the Orders were validly made but that the validity of the 1987 regulations does not affect the matters in dispute between the parties.

The result of my findings is that the Defendant owes the Plaintiff increased rent of \$68.85 per annum for the period 2 May 1987 to 11 August 1989. This I calculate to be approximately $(\$68.85 \times 2) + (\$68.85 - 4) = \$154.91$. There will be judgment for the Plaintiff in that amount or such more accurate calculation on the sum due on the basis set out above as Counsel may agree."

It is from this judgment that the appellant has appealed to this Court on the following grounds:-

" 1 THAT the Learned Trial Judge erred in law and in fact in not properly construing the Counter Inflation Act and the relevant Orders made thereunder.

2 THAT the Learned Trial Judge erred in law and in fact in holding that the clause 1 in the lease agreement entered into between the Appellant and the Respondent on the 30th January, 1974 was covered by the Orders made under the Counter Inflation Act to the extent that of the relevant periods the rents were fixed by amounts rather than based on the valuation of the land in question as was agreed under the said clause.

3 THAT the Learned Trial Judge erred in law and in fact in not holding that the Appellant was entitled to demand the rent in accordance with clause 1 of the lease agreement and that the Orders under the Counter Inflation Act did not apply to the same."

Although the Appellant has chosen to formulate 3 separate grounds of appeal grounds 2 and 3 are in fact particulars of the 1st ground of appeal.

It is worth noting right from the outset that neither the validity of the Orders made under the Counter-Inflation Act nor the 1987 Regulations is in issue now. What is in issue is the applicability of the Orders only.

The appellant's counsel Dr Sahu Khan contends -

1. That the Contractual rights of the parties under the 1974 lease are not affected by the 1981 or 1986 Orders, having particular regard to clause 1 of the said lease.

2. That the Counter-Inflation Act did not apply to land rentals but only to renting of developed properties.
3. That even if the 1981 Order and/or 1986 Order applied, the rent of \$18,000.00 (EIGHTEEN THOUSAND DOLLARS) per annum was properly payable from 1st day of May 1987 in view of the 12 weeks notice given in compliance with the 1981 Order.

We have already dealt with contention No. 2 (above) relating to the definition of "premises".

In order to deal with the remaining two issues raised it is necessary to look at not only the Orders but also the relevant provisions of the Counter-Inflation Act Cap 73. This Act came into force in 1973 and its purpose was to establish a Prices & Incomes Board, and give it powers of control over prices, charges, remuneration, dividends and rents. Section 1(2) reflects the far-reaching powers of the Act when it lays down:-

"Save as expressly provided by the provisions of this Act, this Act shall prevail over the provisions of any written law which relates to prices, charges or remuneration, dividend and rents".

The definition of "rent" in Section 2 also casts a wide net.

It reads as follows:-

"rent", in relation to the letting or continued letting by any person of any premises under any tenancy, includes-

(a) any sum payable to that person under that tenancy, notwithstanding that such sum is designated as a payment additional to the rent; and

(b) any goods or services to which that person is entitled under that tenancy if the value of such goods or services has been quantified in terms of money; but shall not include any sum attributable to any rates or charges levied under the Local Government Act, Electricity Act, Water Supply Act, Sewerage Act or Drainage Act and paid or payable by that person in respect of, or in connection with, those premises; (Inserted by Act 12 of 1981, s.2.)"

Section 12(1) gave power to the Board to restrict increase of rent. It reads as follows:-

"Rents

12.-(1) Subject to the provisions of section 33, but notwithstanding the provisions of any other written law, the Board may, with the approval of the Minister, by order, restrict increases of rent in respect of the letting or continued letting by any person or class of persons (including the Crown) of any premises under any tenancy. (Amended by Act 19 of 1975, s.10.)"

The expression "the letting or continued letting" is not without significance.

Far-reaching powers are given to the Board under Section 12(2) to exclude, adopt or modify any written laws when making any orders under Section 21(1).

The full text of Section 12(2) is as follows:-

"(2) Any order made under subsection (1) may include provisions excluding, adapting or modifying any provisions contained in, or having effect under, any written law which relates to rent, and in the exercise of any power to make subsidiary legislation under any such written law regard may be had to matters connected with the operation of this section."

Section 13(1) empowers the Board with the approval of the Minister to make provision for requiring at least 12 weeks notice to be given in respect of any proposed increase in rent etc. The whole of Section 13 provides as follows:-

"Power to require notification of increases

13.-(1) The Board may, with the approval of the Minister, in any case or class of case as appears appropriate, by order, make provision to require that at least twelve weeks' written notice is given to it by any person of any proposed increase in any price, charge, remuneration, dividend, or rent in time to consider whether the Board should exercise the powers conferred by this Act in order to restrict those increases. (Amended by Act 19 of 1975, s.10 and 12 of 1981, s.3.)

(2) Any order made under the provisions of subsection (1) may provide that, until the end of the period given for consideration of the proposed increase by the Board, any implementation of the increase constitutes a contravention of the order."

We now turn to the relevant provisions of the 2 Orders. It will be noted that both the 1981 and the 1986 Orders are made pursuant to Section 13 of the Counter-Inflation Act. The 1981 Order came in force on 11 December, 1981. Clause 2 of this Order provides:-

"At least 12 weeks' written notice shall be given to the Prices & Incomes Board of any proposed increase in rent in respect of the letting or continued letting by a person or a class of persons (including Crown) of any premises under any tenancy to which the Act applies."

Clause 3 makes it a contravention to implement the proposed increase before the expiry of the notice.

The 1986 Order came into operation on 1 January, 1986.

Clauses 2, 3, 4 and 5 of this Order read as follows:

"Prohibition on increase in rent"

2. Subject to clause 5, a person shall not charge in respect of the period starting 9 November 1984 and ending 31 December 1985 rent in respect of the letting or continued letting of premises under a tenancy in excess of the rent applicable to those premises on 9 November 1984.

Restriction on increase in rent

3. After 31 December 1985 a person shall not charge rent in respect of the letting or continued letting of premises under a tenancy at a rate which is more than 2.25% more than the rate applicable to those premises on 31 December 1985.

Provision of Order to prevail

4. Subject to clause 5, the provisions of this Order shall prevail over any contract insofar as that contract governs the payment of rent after 8 November 1984 and any such contract shall be deemed to be amended so that the rent payable after that date shall not exceed the rent permitted under this Order.

Exception

5. Clause 2 does not prevent an increase in the rent charged by a person in accordance

with a determination made by the Board in respect of a proposed increase of rent of which due notice was given to the Board under the Counter-Inflation (Notification of proposed increase in rent) Order, 1981 before 9 November 1984."

It is important to note that clause 6 specifically preserves the operation of the 1981 Order. We have reviewed the relevant legislation in some depth in deference to the very full argument by counsel for the appellant. All of the relevant questions raised by both counsel were fully and carefully dealt with by the learned trial Judge. He systematically and in our opinion, correctly reviewed the evidence and counsels' submission in relation to each of the rental periods:-

from 1 January 1985 to 31 December 1985;

from 1 January 1986 to 1 May 1989;

from 2 May 1989 to 23 July 1987; and

from 23 July 1987 to 10 August 1989.

He drew the following conclusions:-

"Imposing the above findings on the agreed facts and particularly bearing in mind (i) that the 1987 Regulations only purported to prevent increases beyond the rent payable on 14 May 1987 (ii) that the 12 week period beginning on 3 February 1987 expired on 1 May 1987 and (iii) that there was no subsequent application to increase the rent, it is clear that the 1987 regulations have no application to the computation of the rent due by the Defendant to the Plaintiff and accordingly it does not fall to me to decide their validity. I would however refer in passing to Section 168 of the present Constitution and to the fact that the 1987 Regulations did not purport to replace either the 1981 or the 1986 Orders.

I have set out in detail the Plaintiff's submission as to the effect of the Act and the Orders on the rental agreement between the parties. With the exception of the period 23 July 1987 to August 1989 where I exclude the 1987 Regulations from the reckoning I accept those submissions as being correct and therefore do not propose to repeat them.

The answer to the first issue is yes, with the exception of an increase of 2.25% with effect from 1 May 1987. The answer to the second issue is that the Orders were validly made but that the validity of the 1987 regulations does not affect the matters in dispute between the parties.

The result of my findings is that the Defendant owes the Plaintiff increased rent of \$68.85 per annum for the period 2 May 1987 to 11 August 1989. This I calculate to be approximately $(\$68.85 \times 2) + (\$68.85 \div 4) = \$154.91$. There will be judgment for the Plaintiff in that amount or such more accurate calculation on the sum due on the basis set out above as Counsel may agree."

We have given due weight to the careful and detailed submissions of Dr. Sahu Khan but find ourselves unable to be persuaded that any ground has been raised before us which indicates that the learned Judge was in error. Accordingly the appeal will be dismissed with costs if not agreed to be taxed.

Michael M. Helsham

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

Moti Tikaram

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Sir Moti Tikaram
Resident Justice of Appeal

E. S. Williams

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Sir Edward Williams
Justice of Appeal