

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO ABU0019 OF 2002  
(High Court Civil Action No. HBC 400 of  
1997S)

BETWEEN: MOHAMMED TAHIR  
(f/n Babu Raza) of Nausori

*Appellant/Original Plaintiff*

AND: WING ZOING WAH AND COMPANY  
LIMITED having its registered office  
at Manoca, Nausori

*Respondent/Original Defendant*

Coram: Reddy, P  
Kapi, JA  
Sheppard, JA

Hearing: Wednesday, 26 February 2003, Suva

Counsel: Mr A. Khan and Ms M. Mua for the Appellant  
Mr H. Lateef for the Respondent

Date of Judgment: Friday, 28 February, 2003

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## JUDGMENT OF THE COURT

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This is an appeal from the judgment of the High Court (Scott J.) given on 21 December 2001.

On 11 February 1993, the Appellant entered into a Tenancy Agreement with the Respondent to lease a portion of its commercial building situated on piece of Native Land in Nausori Town for a term of 5 years, retrospectively commencing on 1 January 1992.

The Tenancy Agreement contained the following clause:

***“11. If the Lessee shall during the said term pay the rent hereby reserved and observe and perform the conditions on the part of the Lessee herein contained and implied up to the expiration of the said term and shall have given notice in writing to the Lessor at least three calendar months before the expiration of this Agreement then the Lessor will grant an option to the Lessee for a renewal of the tenancy for the said premises for a further period of three years on the same terms and conditions except rental which shall be mutually agreed between the parties and failing such agreement the matter shall be referred to Arbitration pursuant to the Arbitration Act.”***

The facts are not in dispute, and fully set out in the judgment of Scott J. By the time this case came up for hearing before Scott J., on 27 November 2001, there was only one issue requiring adjudication, the remaining issues having been resolved or overtaken by events. In their joint statement of agreed facts and issue the Appellant and the Respondent formulate that issue as:-

*“Was there an option for only one renewal or more than 1 renewal under the terms and conditions of the said lease agreement?”*

Scott J., posed for himself the question, somewhat differently, as follows:-

*“... does an option to renew “on the same terms and conditions except rental” mean that the renewed lease itself contains a renewal option; in other words that the lease is, at the option of the lessee, perpetually renewable?”*

The learned Judge answered the question as follows:-

*“The answer is that a lease may indeed contain a term or condition allowing perpetual renewal but the Court will not give a term or condition this effect unless the intention in that behalf is clearly shown (Baynham v. Guy’s Hospital (1796) 3 Ves. 295, 298). A provision that a new lease shall be on the same terms and conditions as the old lease does not entitle the lessee to have the renewal option inserted in the renewed lease unless the original provision expressly includes “the present term” or words to that effect (Parkus v. Greenwood [1950] Ch 644). The intention to grant an option to renew perpetually must be clear in the language of the lease (Brown v. Tighe (1834) 2 Cl. & Fin 396, 419). The fact that several renewals have been granted is not admissible to explain the intention of the parties to the lease (Baynham v. Guys Hospital ).*

*While for reasons already given I make no finding as to the Plaintiff’s present status in my opinion clause 11 of the lease does not grant the lessee an option for perpetual renewal and therefore whether or not the Plaintiff in fact purported to renew in 1999 the result is the same : the lease contains only one option to renew and that option has already been exercised.”*

The Appellant appeals to this Court from that conclusion on the grounds

that:-

***"1. The Learned trial Judge erred in law and failed to consider the full contents true meaning and effect, of Clause 11 of the agreement in which an option to renew is given.***

.....

***8. The Learned trial Judge erred in fact in determining that the lease expired in January 1999."***

Neither of the grounds, have any merit.

The task before Scott J. was to construe clause 11, in the light of the surrounding circumstances. In our view he construed it correctly. The clause itself talks of the grant of "an option" "on the same terms and conditions". We agree with learned Counsel for the Respondent that those words indicate that the parties contemplated a single renewal and not a lease in perpetuity.

In Swinburne v Milburn (1884) 9 App. Cas. 844, at p. 850 Lord Selborne said:-

***" I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind ; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."***

In Re Hopkins Lease [1972] 1 All ER 248 at p.251 Russell LJ said:-

***"...The approach to the question whether a lease is perpetually renewable is not in doubt. The language used must plainly lead to that result;***

*although the fact that an argument is capable of being sustained at some length against that result does not of course suffice.*

*As a matter of history, when a covenant by a lessor conferred a right to renewal of the lease, the new grant to contain the same or the like covenants and provisos as were contained in the lease; the courts refused to give literal effect to that language, which if taken literally would mean that the second lease would contain the same covenant (or option) to renew, totidem verbis, and so on perpetually. The reference to the same covenants was construed as not including the option covenant itself. This limited the tenant's right to one renewal."*

It is settled law that general expressions in a covenant for renewal, such as those used in clause 11, do not confer a right to perpetual renewal. To confer such right the covenant must include words which make it clear that the parties contemplate a lease in perpetuity. Generally, such a result is achieved by including words such as "including this present covenant" in the covenant for renewal, or some other plain and unequivocal indication that the parties intend that the covenant for renewal should be inserted.

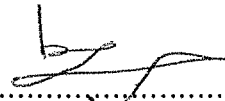
Halsbury's Laws of England (4<sup>th</sup> Edition) Vol. 27, para. 360 at p.280 states:-

*"...A provision that the new lease is to contain the same covenants as the old lease does not entitle the tenant to have the covenant for renewal inserted, so as to give perpetual renewal unless the provision expressly includes "this present covenant" or some other plain indication of the parties' intention that the covenant for renewal should be inserted."*

On 26 September 1996, the Appellant exercised the option under Clause 11, and the Respondent accepts that the lease was validly renewed for a further period of 3 years expiring on 31 December 1999.

ORDER

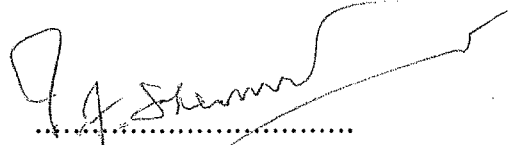
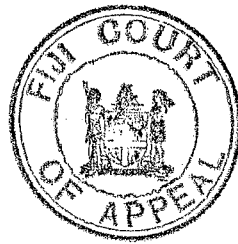
We uphold the decision of Scott J., and this appeal is dismissed with costs to the Respondent, which we fix at \$750.00.



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Reddy, P



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Kapi, JA



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Sheppard, JA

Solicitors:

Messrs Khan & Co., Suva for the Appellant  
Messrs Lateef & Lateef, Suva for the Respondent