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ISHWARLAL AND OTHERS

NATIVE LAND TRUST BOARD

[SUPREME COURT, 1976 (Williams J.), 5th March]

Civil Jurisdiction

B

Native land—lease of native land subject to regulations for reassessment of rent at intervals of 25 years—subsequent amendment in regulations providing for reassessment at intervals of 10 years—whether such regulations operated retrospectively—Native Land Trust Ordinance (Cap. 115) ss.10(1), 33—Native Land (Leases and Licences) Regulations 1940 as amended by Native Land (Leases and Licences) Regulations 1968 regs. 20(8), 21(1), 27—Interpretation Ordinance 1967 ss. 18(3), 22—Landlord and Tenant Act 1954 (2 & 3
C *Eliz. 2, c.56) (Imp).—Law of Property Act 1969 (17 & 18 Eliz. 2, c.59) (Imp.) s.11.*

Interpretation—regulations—whether retrospective; in operation—Native Land (Leases and Licences) Regulations 1940 as amended by Native Land (Leases and Licenses) Regulations 1968 regs. 20(8), 21(1), 27—Interpretation Ordinance 1967 ss. 18(3), 22.

D The plaintiff had leased certain native land from the Board since 1941. The original Native Land (Leases and Licences) Regulations 1940 reg. 20(8) provided that the rent should be reviewed every 25 years. An amendment to these regulations in 1968 altered this period to one of 10 years. The Board increased the appellant's rent from 1st January 1976 under the new regulations.

Held: Neither the Interpretation Ordinance nor the amended regulations con-
E tained anything to show that these provisions were retrospective. The new regulations could not affect any lease created prior thereto, and, therefore, the Board's actions in increasing the rent were illegal.

Per curiam: 1. Regulation 21 provided for a valuer to be appointed when the rent was to be assessed. The Board had completely ignored this provision in any
F event.

2. Even if the Board's contentions had been correct, the rent was not due for reassessment until 1st July 1976, the previous reassessment having been on 1st July 1966.

Cases referred to:
G *14 Grafton Street, In re* [1971] 1 All E.R. 1; [1971] 2 W.L.R. 159.
Turnbull v. Forman (1885) 15 Q.B.D. 234.
Smith v. Callander [1901] A.C. 297.

Action in the Supreme Court by way of originating summons for a declaration that the Board was acting ultra vires in increasing the rent under the terms of the
H plaintiff's present lease.

J. R. Reddy for the plaintiff.
E. Vula for the defendant Board.

WILLIAMS J: [5th March]—

In this action there was no oral evidence. It was commenced by way of originating summons filed by a tenant of native land and supported by his affidavit. The contents of the affidavit are not disputed by his landlord, the Native Land Trust Board, (defendant). It shows that the plaintiff is the registered owner of a lease of native land amounting to 22.2 perches. It is in the business centre of Nadi and is no doubt regarded as a valuable site. A

The Memorandum of Lease exhibited with the affidavit shows that the Board leased the land as a commercial lease for 75 years, at an initial rent of $10.00 per annum from 1st July 1941. The first condition incorporates Reg. 20(8) of the Native Land (Leases & Licences) Regulations 1940 by providing for the rent to be re-assessed on the 25th and 50th years but so as not to exceed 6% of the unimproved value of the land. It seems that in 1966 the rent was increased to $134 per annum. B

On 1st October 1975, the Board notified the plaintiff that the rent would be increased to $3,678 per annum. The notice reveals that the increase purports to be made in accordance with The Native Land (Leases & Licences) Regs., rr. 20(8) & 21(1) as amended by L.N. No. 1 of 1969. It also states that the rent would be reviewed every 10 years under the said amended regulations. C

The originating summons requests that:—

1. The notice be declared invalid, ultra vires, contrary to the lease and void and of no effect. D
2. The Board is not entitled to increase the rent under the said Regulations prior to the date contained in the lease.
3. The Board cannot increase the rent until 1991 under the terms of the existing lease.
4. The rr. 20(8) and 21(1) of the Native Land (Lease & Licences) Regulations as amended by L.N. No. 1 of 1969 are not retrospective. E

The Board's power of creating leases of native land arises under the N.L.T. Ordinance, Cap. 115. S. 10(1) which states that all leases of native land shall be subject to such conditions and covenants as may be prescribed.

S. 33 enables the Minister to make regulations prescribing all matters necessary for carrying out and giving effect to the Ordinance. F

The Ordinance came into force in 1940, and the Native Land (Leases and Licences) Regulations were made in the same year. R. 20(8) states as follows:—

"20. (8). Leases for a longer period than 25 years, other than tramway leases, shall be subject to re-assessment of the rent at the 25th, 50th and 75th years of the lease."

The lease was created in 1941, and by s. 10(1) of the Ordinance, the provisions prescribed by r. 20(8) were automatically included as a condition or term of the lease, and in fact the first term of the printed conditions in the lease repeats r. 20(8). G

The Native Land (Leases and Licences) (Amendment) Regulations 1968, published in L.N. 1/69 on 3rd January 1969 amended reg. 20(8) by substituting the following— H

"(8). Subject to the provisions of any other Ordinance for the time being in force, leases for a longer period than 20 years other than tramway leases shall be subject to re-assessment of the rent at each 10th year of the term of the lease."

A The Board have purported to act under r. 20(8), as amended above, to increase the rent of the plaintiff's commercial lease, along with the rents of numerous other commercial leases.

Mr Reddy, for the plaintiff, argued that the Board were altering the terms of the plaintiff's lease and that the regulations did not give them power so to do. He maintained that the regulation 20(8), as amended, could only apply to leases created after the amendment became effective, i.e. after 3.1.69 and cannot act B retrospectively so as to alter the terms of existing leases.

He points out that there is nothing in the amended r. 20(8) which suggests that it is to have retrospective effect and argues that if it did purport to be retrospective it would be ultra vires the powers of the Minister.

Mr Reddy submitted that the plaintiff had vested rights under the lease and there is a presumption that the legislature does not intend to override vested C rights unless it specifically says so in the terms of the regulation or unless such an intention arises by necessary implication. He says that there is nothing which would justify the taking away of existing rights. He drew attention to s. 18(3) *(c)* of the Interpretation Ordinance Cap. 11/67 which states:—

"(3) Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not:— D

(a) .....

(b) .....

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed."

Mr Vula for the Board relied upon s. 22 of the Interpretation Ordinance which provides that susidiary legislation can be made to operate retrospectively back to the E date of the Ordinance under which the subsidiary legislation is made, provided no person shall become liable to a penalty for an act he committed prior to the date on which the subsidiary legislation is published.

Mr Vula also referred to reg. 27 which sets out special conditions which shall attach to commercial leases and says they are in addition to any other conditions which the Board may impose. He contended that reg. 20(8) was simply procedural F and that as such it would necessarily be retrospective. He argued that as a matter of public policy the tendency was towards shorter leases combined with more frequent reviews of the rents than had formerly been the case.

S. 22 of the Interpretation Ordinance, Cap. 11 of 1967, says that subsidiary legislation may be made to operate retrospectively, but provides that it cannot impose a penalty for any act done prior to the coming into force of the subsidiary G legislation. Thus if a regulation makes it an offence to deposit litter it cannot be made to operate retrospectively against persons who had deposited litter before the regulation was made. A regulation penalising persons for not paying rates or taxes on the due date cannot be made to operate retrospectively so as to include delays in payment which arose prior to the making of the regulations. Mr Reddy argued that if the regulation in question were to be construed as retrospective, it would be impos- ing a penalty upon the plaintiff by causing him to pay a greatly enhanced rent each H year for about 15 years before it should be re-assessed. He said this was contrary to s. 22 of the Interpretation Ordinance. It is, I think, evident from the wording of s. 22 that Mr Reddy's argument does not apply. The section clearly refers to a penalty

incurred by a person contravening new regulations. In the case before me there is no contravention by the plaintiff of anything in r. 20(8) so as to incur in retrospect or prospectively any penalty under r. 20(8). Section 22 makes it apparent that regulations cannot impose obligations in retrospect and penalise a person for not having complied with a law which did not exist at the relevant time. Where rights are acquired under regulations which are subsequently repealed the situation is governed not by s. 22 but by s. 18(3) *(c)* of the Interpretation Ordinance which says that a repealing law shall not, unless a contrary intention appears, affect rights, privileges etc. accrued under the law which is repealed.

I should point out here that s. 18 refers to "written law" and written law is defined as all acts, ordinances and all subsidiary legislation.

The rights of the plaintiff which were acquired under the repealed r. 20(8) include the right to have his rent stabilised for a period of 25 years by assessing it only once at the end of each 25 years. Under s. 18(3) *(c)* of the Interpretation Ordinance that right cannot be affected by the re-enacted r. 20(8), unless a contrary intention appears. There is certainly nothing in the wording of r. 20(8) which says that it is retrospective.

In Re 14 Grafton St., [1971] 2 All E.R. 1, the learned judge reviewed a number of authorities dealing with the retrospective effect of statutes. At p. 7 he quoted from the judgment of Sir Balliol Brett M.R., in *Turnbull v. Foreman,* (1885) 15 Q.B.D. 234 at 236.

> ".....unless the language used is clear to the contrary, an enactment effecting rights must be construed prospectively only and not retrospectively so as to affect rights accrued before the Act passed."

At pp. 7 & 8 he also quoted from the judgment of Bowen L.J. in the same case,

> "Where the legislature meant to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose they would use clear language for the purpose of doing so..... A converse rule is that, where the legislature is dealing with matters of procedure as distinguished from substantive rights, the same presumption does not apply. It is not unreasonable to suppose that, in regard to mere matters of procedure, the legislature does intend to alter the procedure even where past transactions come in question, because no person who sues or is sued on a cause of action which existed before the enactment as to procedure has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect, and therefore has altered; and it may, therefore, well be supposed that the legislature intend to apply the new and more perfect procedure universally.

Mr Vula argued that reg. 20(8) is simply procedural and is therefore retrospective. He did not fully explain what he meant by procedural. Regulation 20(8), as amended, says that the rent will be re-assessed every 10 years, and as I see it that provision is not a matter of procedure but is a condition inserted in a lease. It is a term of the contract between landlord and tenant. The meaning to be given to 'procedure' is indicated in the passage quoted (supra) from the judgment of Bowen L.J. where he refers to procedure in relation to litigation, suggesting that it is a step to be taken before a cause can be litigated or as a step in the proceedings after the action has been instituted. That approach to the meaning of 'procedure' was adopted by

Brightman J. in *Re 14 Grafton St.* (supra), which also concerned a commercial lease. The lease was due to expire on 29th September 1969, but would nevertheless continue until terminated under the Landlord and Tenant Act 1954, which gave the tenant a measure of protection by requiring the landlord to take certain steps to end the tenancy. Under that Act the landlord on 26th September 1969 served notice to terminate the tenancy on 1st April 1970. This statutory form of notice gave the tenant 2 months in which to notify the landlord whether they would give up possession. The tenant could then apply to the court for a new tenancy but only if he had served the said notice on his landlord. If the court was precluded on the statutory exceptions from granting a new lease the tenant would receive compensation for the loss of his tenancy; but he could only receive the compensation if he had applied for a new tenancy preceded by serving the notice aforesaid on his landlord. Therefore the tenants had until 27th November 1969 in which to say they would not give up possession; however in October they stated that they were willing to give it up. Under the 1954 Act they forefeited any right to compensation. On 1st January 1970, s.11 of The Law Property Act amended the 1954 Act, by providing that a tenant should receive compensation although he had failed to apply to the court for a new tenancy, but there was nothing in the amending legislation to show that it was retrospective. On 11th February 1970, the tenant claimed compensation from the landlord.

It was held that after 27th November the landlord had acquired an indefeasible right to possession because the tenant had not served any notice on him. The landlord's right to possession without paying compensation had arisen more than a month before the amending legislation had been enacted. It was also held that the section was not procedural but simply extinguished conditions which had to be filled by the tenant before compensation could be claimed.

The learned judge stated at p.9 g—

> "The 1969 Act cannot properly be described as procedural, in my view, for the following reasons. S.11 did not alter any time limit or other rules which previously regulated litigation. It extinguished conditions which had to be fulfilled as a pre-requisite to the emergency of a right to compensation. It had nothing whatever to do with procedure in litigation. To put the matter shortly, under the 1954 Act, litigation commenced after a specified notice and within a certain limit of time was a pre-requisite to the emergence of a right to compensation. The 1969 Act did not modify any procedural requirements of that litigation."

Likewise the amended reg. 20(8) has nothing to do with any procedure in litigation. It does not mention anything about instituting or conducting proceedings in any court. It simply modifies the term formerly included in leases by reducing the period of reassessment of rent from every 25 years to every 10 years. Accordingly it cannot be regarded as retrospective on the ground that it is purely procedural.

Mr Vula referred to *Smith v. Callander* [1901] A.C. 297 to the judgment of Lord Ashbourne at p. 305 where he observed:

> "Of course, if is obviously competent for the legislature, if it pleases, in its wisdom to make the provisions of an Act retrospective; but before giving such a construction to an Act one would require that it should either appear very clearly in the terms of the Act or by necessary and distinct implication."

He relied on the statement that retrospective effect could arise by necessary and distinct implication. However, he produced no forceful argument to show that r. 20(8) as amended distinctly implied that jit should be restrospective and that it was

necessary to so apply it. Surely it could only be necessary if the regulation could not properly operate unless it were retrospective. R. 20(8) applies to leases of native land. Such leases are being regularly created, re-newed, transferred, and so forth. It clearly applies to all leases created and re-newed after the amended regulation came into effect on January 1st 1969. The amended regulation is effective in regard to all leases created after the amendment; it does not have to be retrospective in order to operate. No doubt condition one of all leases created after January 1st 1969 will now state that the rent shall be re-assessed every 10 years. Clearly r. 20(8) does not have to rely upon any retrospective effect arising from necessary implication.

I find that r. 20(8) as amended does not apply to the plaintiff's lease nor to any other lease of a similar nature which was created prior to the enactment of the amending legislature.

It follows that the plaintiff is entitled to the declarations he seeks including a declaration that the Board cannot increase his rent except under the terms contained in his existing lease i.e. at the end of each 25 years.

It is perhaps worth pointing out that even on the Board's own interpretation of the regulation the reassessment of the rent as from 1.1.76 was 6 months premature. The last reassessment was 1.7.66 and even if the Board could have re-assessed each 10 years the fresh period of reassessment could not have commenced prior to 1.7.76.

Moreover, reg. 21 sets out the procedure to be followed by the Board when the rent is re-assessed. A valuer has to be appointed and his valuation submitted to the tenant. It is a provision that the Board completely ignored or else overlooked.

Perhaps the Board would find it helpful to obtain legal advice before trying to put into effect its own interpretation of its powers under any statute or subsidiary legislation. The result of the Boards's attempts to make r. 20(8) retrospective has resulted in numerous actions being filed by aggrieved tenants, of which this action is to be treated as a test case setting out the true effect of the regulation.

After all, the lease is a contract between two parties, the tenant and the landlord. In that respect the Board is in exactly the same position as any other person and it is bound in the same way by its own contract. One term of the contract relates to the duration of the lease; another term provides for a periodical re-assessment of the rent which term is specifically drafted and worded by r. 20(8) for inclusion in the lease. No landlord is entitled to say to his tenant that he is proposing to increase the rent already agreed upon and the Board is no different in that respect from any other landlord. However, as indicated above the agreement itself may give the landlord power to increase the rent periodically, but this does not mean that he can by his own whim increase the rent outside of those periods. If he could do so the tenant's rights under the contract would be worthless.

If the contract provides that the rent shall be increased every 25 years the tenant enters into possession and incurs expenses by way of improvements on that basis. Were the landlord able to say in a year's time that he proposed to double the rent every year then the tenant's predicament would be such that he would be forced to vacate and sacrifice the capital invested on improvements.

The Board being a creature of legislation only has the powers derived from that legislation. It does not have the power to include in fresh leases its own ideas as to how often rents can be re-assessed, because the frequency of re-assessment is con-

tained in the reg. 20(8). If the legislature chooses to alter the frequency of re-
A assessment in all new leases the Board must adhere to the altered term. The Minister would be unlikely to try and alter the frequency of re-assessment so as to empower the Board to alter existing contracts by imposing conditions which had never been agreed to by the tenants. Any attempt to do so would be observed by Parliamentarian and would no doubt be the subject of controversy.

There will be judgment for the plaintiff in actions 194—199, 206—213 of 1975 in
B addition to the action the terms hereinbefore explained. The Board will pay the plaintiff's costs incurred in all the said action.

Judgment for the plaintiff.