IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Civil Jurisdiction

Action No. 153 of 1977

Between

SAKINA & ORS. Plaintiffs

- and -

NADI BAY BEACH CORPORATION LIMITED Defendant

Messrs. Sahu Khan & Sahu Khan Solicitors for the Plaintiffs
Messrs. Munro, Leys & Co. Solicitors for the Defendant

J U D G M E N T

One Gul Mohammed and the third plaintiff bought a lease for twenty-one years of a plot of agricultural land owned by a Mrs. Baxter with effect 1st January, 1956. Gul Mohammed died on 16th December, 1 '5 and the first two plaintiffs are executors and trustees of his estate.

The lease was due to terminate as from 1st January, 1977. In 1970 Mrs. Baxter sold the land to the defendant which had notice of the said lease.

Clause 7 of the lease provided as follows -

> " The tenant shall have a first option of a renewal of the tenancy or a new lease of the said land for a further term of ten years commencing on the expiration of the term hereby granted upon such terms conditions and stipulations as may be then agreed between the landlord and the tenant provided that the land be let for agricultural purposes."

In their pleadings the plaintiffs stated that Mrs. Baxter had verbally agreed to grant a renewal of the tenancy for a further period of ten years. This was denied by the defendant, and the plaintiffs called no evidence on the point. There were no particulars of any such agreement, or terms agreed, and clearly this claim by the plaintiffs cannot be accepted.

The plaintiffs were informed by the defendants in 1976 that no renewal of the lease would be offered to them, as the land was wanted for their own non-agricultural purposes, but nevertheless the plaintiffs, either through their solicitors or by their conduct made it plain that

they wished to enforce their right to a renewal of the tenancy in accordance with the terms of clause 7 of the lease.

The plaintiffs have also argued in this court that clause 6 gave them an absolute right to a renewal of the lease for a further ten years.

But does clause 7 give the plaintiffs such a right? What in fact does clause 7 mean? Why the words "first option", and why the words "provided that the land be let for agricultural purposes?" Supposing the landlord were to decide not to lease the land again, or supposing the landlord decided to lease the land again, but not for agricultural purposes. Then surely, in accordance with clause 7, the plaintiffs would have no right to override the landlord's wishes and demand nevertheless a renewal of the agricultural lease for a further ten years. And the defendant has stated, and there is no reason whatever to doubt this, that the land is required for its own purposes which are not agricultural.

The defendant argues in addition that clause 7 is void for uncertainty since it provides for "terms and conditions to be agreed" and the lease as a whole affords no means or standard by which those terms and conditions can be determined in the absence of agreement.

Kings Motor (Oxford)Ltd. v. Lax [1969] 3AER 665, and Attorney-General v. Barker Bros. Ltd. [1976] 2NZLR 495 are authorities for this proposition. The plaintiffs have not dealt with this aspect at all.

On the construction of clause 7 therefore the plaintiffs' claim to be entitled to a renewal of the lease for a further ten years fails.

But this was agricultural land and the plaintiffs have farmed it since 1956 and section 13(1) of the Agricultural Landlord and Tenant Act (hereinafter referred to as ALTO) provides

> " Subject to the provisions of this Act relating to the termination of a contract of tenancy, a tenant holding a contract of tenancy created before or extended pursuant to the provisions of this Act in force before the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976, shall be entitled to be granted a single extension (or a further extension, as the case may be) of his contract of tenancy for a period of twenty years, unless -
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> (a) during the term of such contract the tenant has failed to cultivate the land in a manner consistent with the practice in good husbandry; or
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> (b) the contract of tenancy was created before the commencement of the Act and has at the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976 an unexpired term of more than thirty years:

" Provided that, notwithstanding the provisions of section 14, a premium equivalent to one year's rent shall be payable in full in advance on the first day of the first year and of the eleventh year of such extension."

The plaintiff's claim that they are therefore entitled to an extension of their lease for a further twenty years. The Ordinance's long title states that it is "to provide for the relations between landlords and tenants of agricultural holdings and for matters connected therewith," and was clearly intended to give farmers a measure of security on the land they farmed. It was enacted in 1966 and according to section 3(1) applied to all agricultural land in Fiji except certain lands such as - holdings of less than 2½ acres, tenancies held by embers of a registered cooperative society where the society is the landlord, all native land within a native reserve and in paragraph (c) "agricultural holdings which are, or become, zoned for an agricultural purposes under the provisions of the Town Planning Ordinance and which are, or become, situated within the boundaries of any city, town or township."

Now the land the plaintiffs have been farming was without question agricultural land and until 1973 was without question outside the boundaries of any city, town or township. No evidence was produced that it was zoned for non-agricultural purposes.

One other provision of the Ordinance which is significant is section 57(g) which in 1966 provided that the then Governor in Council might make regulations -

"exempting any agricultural land or contracts tenancy of such land or classes of such land or contracts, with or without conditions, from all or any of the provisions of this Ordinance."

In 1970, at the time of Fiji's Independence "Governor in Council" was amended to 'Minister" which must mean the Minister for the time being responsible for lands. The Agricultural Landlord and Tenant Ordinance was one of nine Ordinances considered so important that they were given a specially entrenched position in the 1966 Constitution and by Section 66 of the Independence Constitution so that they can now only be amended by a majority of 75% in both Houses of Parliament and only if supported by the votes of six of the eight specially elected members of the Senate appointed under 45(1) of the Constitution. So it can be seen that the provisions of the Ordinance are not lightly to be tampered with, and this is of some significance considering the history of this case.

By Legal Notice 10 of 1973 the then Minister for Urban Development, Housing and Social Welfare purported to alter the boundaries

of Nadi Township under the Local Government Act, 1972, so as, inter alia, to include the land subject of this action. The land in question was not contiguous with any part of the then existing boundary of Nadi Township and I'm sure one of the factors which influenced the decision to add it to Nadi Township was that there were plans to develop the site for tourists and people who wished to settle there and thus would yield high Township rates. This is the basis for a further argument by the plaintiff questioning the validity of the order altering the boundary.

But first I will deal with other arguments raised by the plaintiffs. On the basis that Legal Notice 10 of 1973 was valid, and on the basis of the original section 3 of the Agricultural Landlord and Tenant Ordinance as abovequoted, then there would be no question but that the land would come within the boundaries of Nadi Town. However by Ordinance 21 of 1967 section 3(1) was significantly amended, deleting paragraph (c) and all reference to agricultural land within the boundaries of any city, town, or township, and without replacing this with any other provision.

I don't know whether it was thought that the Governor in Council's powers to make regulations under Section 57(g) were sufficient for this purpose should this be necessary, but if that were so one might well ask why the special provision was originally included in section 3(1). Does not the deletion of section 3(1)(c) raise a presumption that such lands were no longer intended to be excluded from the operation of the Ordinance? If the powers to make regulations under section 57(g) were intended to be used so as to exclude such lands one would have expected to have this spelt out rather more carefully and section 57(g) would have been amended accordingly. In fact if this were the thinking behind the deletion of section 3(1)(c) of the Ordinance, why not delete all the exceptions in section 3(1) and leave it to the Governor in Council to provide for their exclusion in regulations? Looked at in this light the deletion of section 3(1)(c) assumes greater significance.

However that may be, in 1967 the Agricultural Landlord and Tenant (Exemption) Regulations (which I shall henceforth call the Exemption Regulations) were enacted under section 57(g) and regulation 4 provided

> "The provisions of sections 6, 7 and 13 of the Ordinance shall not apply to any agricultural land -
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> a) situated within the boundaries of any city, town or township;
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> b) situated outside such boundaries which the Director of Lands may, by notice published in the Gazette, declare to be land required for non-agricultural purposes;

"c) situated within any area outside the city of Suva and the town of Lautoka delineated on Plan No. PP41 and Plan No. PP42 held by the Director of Lands;

d) approved by the Subdivision of Land Board for subdivision for residential, industrial or commercial purposes."

The Regulations purported to be made by the Governor's Deputy in Council and were published under the hand of the then Secretary of the Council of Ministers.

The plaintiff argues that these Regulations are ultra vires on two grounds.

In the first place they purport to be made by the Governor's Deputy in Council and not the Governor in Council. Who was the Governor's Deputy in Council?

There was no such post defined in the Interpretation and General Clauses Ordinance, 1967. The only mention of a deputy to the Governor's Deputy was in the definition of "Governor" in section 2(1) which states -

"Governor means the Governor and Commander-in-Chief of Fiji and includes the officer for the time being administering the Government of Fiji, and, to the extent to which the deputy for the Governor is authorized to act, that deputy."

The 1966 Constitution of Fiji, however, provided for a Deputy to the Governor to be appointed by the Governor "to perform on his behalf such of the functions of the office of Governor as may be specified in that instrument", so it is clear that a Deputy to the Governor only filled the shoes of the Governor to the extent that the Governor authorised him to act on his behalf, but within that authorisation the Deputy was for most intents and purposes the same as the Governor. There has been no challenge to the proper appointment of the Deputy, or the extent of his authorisation and it must be presumed that he was properly authorised by the Governor to make rules and regulations as Governor or Governor-in-Council under laws enacted by the then Legislative Assembly.

Counsel for the Plaintiff has relied on section 30(3) of the Interpretation Ordinance (11 of 1967) as authority for his argument that the Governor or Governor-in-Council had no power to delegate any power to make rules or regulations. However section 30 relates to the Governor or Governor-in-Council's power to delegate to "Ministers or persons holding public office or any other office". The Governor does not delegate to his Deputy or authorize his Deputy under the Interpretation Ordinance. He does so under the 1966 Constitution which contains no restriction relating to the power to make rules or regulations. So that argument by plaintiff's counsel fails.

The second ground argued by the plaintiff's counsel has considerably more merit. This argument is that the Exemption Regulations are ultra vires the power to make regulations under section 57(g) and there are two legs to this argument. The first leg is that section 57(g) does not and never was intended to give the Governor in Council (now the Minister) power to exempt land within city, town or township boundaries. This exemption was originally given in section 3(1)(c) and when that provision was deleted by the then Legislative Council it could only be restored by Parliament. It was argued that the wording of section 57(g) read in the context of the whole Ordinance makes it clear that the power to exempt certain lands or contracts was not a sweeping power, but one to be used sparingly with regard to specific pieces of land or classes of land. There is considerable force to this argument. If it were otherwise the whole purpose of the Ordinance so carefully entrenched by the Constitution could be defeated without Parliament being consulted. To take an extreme example the Minister could make regulations exempting all lands in Fiji from the provisions of the Ordinance.

I'm sure the Minister would not do such a thing, but that is not the point. The point is that there should be no question of any such possibility occurring unless Parliament in clear precise language authorised such an eventuality.

There must be limits to the powers of the Minister and a court must construe section 57(g) very strictly to ensure that the Minister's power to by-pass Parliament and exempt lands from the provisions of the Ordinance are kept to the minimum necessary, or the minimum expressly authorised by Parliament.

One restriction on the powers of the Minister that must arise from a careful reading of section 57(g) is that the lands and classes of lands referred to must be lands and classes of lands actually identifiable at the time of making the regulation not lands or classes of lands that might be added or included within that class at a subsequent date. And this leads to the second leg of counsel's argument which goes under the principle "delegatus non potest delegare". Unless expressly authorised in clear language in the Ordinance the Minister's powers may not be delegated to anyone else. The Minister may not for instance delegate to anyone else his powers to make regulations. And in the context of this Ordinance the Minister may not delegate to anyone else his power to exempt lands from the provisions of the Ordinance. But what does regulation 4 of the Exemption Regulations purport to do? It purports in paragraph a) to exempt any agricultural land within the boundaries of any city, town or township. It doesn't specify that it is referring to such lands within such boundaries as at the date of the Regulations, and presumably is meant to cover lands which may in the future be included within the boundaries of any city, town or township. But another Minister has the power to alter the boundaries of cities, towns and

townships so the effect is that this other Minister without being so authorised by the ALTO can exempt land from the operation of the Ordinance simply by including it within the boundaries of a city, town or township.

Paragraph b) of the Exemption Regulations in effect purports to give the Director of Lands power in the future to exempt lands from the operation of the Ordinance by publishing a notice in the Gazette declaring that the land is required for non agricultural purposes.

Paragraph c) in effect purports to give the Sub-Division of Land Board power to exempt land from the operation of the Ordinance by approving such land for subdivision for residential, industrial or commercial purposes.

There may be very good reasons for all these provisions, but surely there can be no question that they are all contrary to the purpose and spirit of the Ordinance. That is that except for the limited powers of exempting lands given to the Minister, Parliament itself must decide what lands are to be exempted from the provisions of the Ordinance and to what extent they are to be so exempt, and the full effect of the entrenchment provisions in the Constitution must be insisted upon before such lands can be exempted.

Geraghty v. Poster [1917] N.Z.L.R. 554 and F. E. Jackson & Co. Ltd. v. Collector of Customs [1939] N.Z.L.R. 582 are cases very much on all fours with the present case in considering whether regulation 4 of the Exemption Regulations are ultra vires, and for the reasons I have given above I find that it is so ultra vires. It is specifically ultra vires in so far as it purports to exempt land within city, town and township boundaries, which is what I am asked to decide in this case. From what I have said it follows that I consider it totally ultra vires, though it is not necessary for me to decide this in the present case.

Having decided that the regulation exempting agricultural land situated within city, town and township boundaries is ultra vires, it follows that the land occupied by the plaintiff remains agricultural land subject to the provisions of ALTO and under section 13 of that Ordinance the plaintiff is entitled to a statutory renewal of his lease for a further twenty years.

Plaintiff's counsel also argued that Legal Notice No. 10 of 1973 issued by the Minister for Urban Development, Housing and Social Welfare was ultra vires the powers conferred on the Minister by section 5(1) of the Local Government Act, 1972 to "make such order with regard to the definition or alteration of" the boundaries of Nadi Town. The argument was that Legal Notice No. 10 of 1973 did not alter or redefine the boundaries, but took an area of land outside the existing boundaries, and not contiguous with them and in effect declared that land to be part of Nadi Town, ignoring the intervening land which remained and remains outside the Town boundary. I think there is some merit in this argument, L.N. 10 of 1973 goes someway beyond merely adjusting or altering the existing

boundaries, which is all section 5(1) seems to authorise. But I do not think I need make a finding on this point in view of the decision I have come to on the validity of Regulation 4 of the Exemption Regulations. Whether the area remains inside or outside the boundaries of Nadi Town it remains agricultural land subject to ALTO with all that that entails, or at least the plaintiff's land so remains. It must be rated as agricultural land, for instance, not as land for development (which I presume is why Nadi Town Council wanted it within its boundaries).

Incidentally I should mention that considering the potential importance of the issue to the Government of Fiji, I asked the Deputy Registrar to invite the Attorney-General's chambers to make submissions to the Court as an amicus curia. After a lapse of about a month without responsen in spite of several reminders, and in view of my own impending departure from Fiji for at least 3-3½ months, I am obliged to assume that the Attorney-General has no interest in making submissions.

Accordingly I give judgment for the plaintiffs in accordance with prayer (b) in the Statement of Claim and declare that the plaintiffs are entitled to a statutory renewal of his lease under the provisions of section 13 of the Agricultural Landlord and Tenant Ordinance.

The plaintiffs put in a prayer for damages, but there was no evidence justifying such an award.

The plaintiffs are to have their costs to be taxed if not agreed.

LAUTOKA,
13th May, 1981

(sgd.) G. O. L. Dyke
Judge