Privy Council Appeal 3/64

LISIATE POHAHAU (Plaintiff/Appellant)

v.

'ASELI NIU'ILA (Defendant/Respondent)

Privy Council. Hammett, C.J. 25th October 1966.

Section 81—Failure of widow or heir to lodge claim thereunder.

This is an appeal from a decision of the Land Court (Roberts J) at Nuku'alofa in 1964.

The Land Court had held that although the widow (Plaintiff/Appellant) occupied and paid rent for her late husband's allotment neither she nor the heir or son of the heir (plaintiff) made any representation under Section 81 and that, accordingly, the land having reverted to the Crown as holder, plaintiff had no right of title in law or equity.

The Privy Council, allowing the appeal, held that as Section 81 does not require the claim of the widow or heir to be in writing or to be made in any particular form a claim made orally by or on behalf of a widow is sufficient notification to comply with the Section.

Judgment: The Plaintiff—Appellants claim in the Land Court was for the tax allotment named "Tu'utu'u" on Crown Land in Niutoua.

The facts were as follows:—

Lisiate Filimoemaka was the registered holder of the allotment when he died on 27th March, 1959. He was survived by his widow Mele Hei'one Filimocaka and three sons namely Sione Pohahau, Sione To'imoana and 'Aseli Niu'ila the Defendant—Respondent. His eldest son Sione Pohahau died on 21st March, 1960. Lisiate Pohahau the Plaintiff—Appellant is the son and heir of Sione Pohahau.

On the death of Lisiate Filimocaka, his son in law Sione Hemaloto went to the office of the Minister of Lands on behalf of the widow Mele Hei'one Filimoemaka. He made an oral report of the death of Lisiate Filimocaka the last registered holder and said that he was paying the rent of the allotment for the widow.

He was issued with a receipt for the rent, dated 30th November, 1959, in the name of Lisiate Filimoemaka and was told that the widow would have to call personally to effect a transfer of the registration. Although he told the widow this and she could have complied with this request she was aged and unwell and never went to the Minister of Lands as requested before her death on 14th June, 1964. In the meantime the rent for the allotment was paid every year up to the end of 1963 and receipts continued to be issued in the name of the deceased registered holder Lisiate Filimoemaka.

On 17th March, 1964, which was before the death of the widow Mele Hei'one Filimoemaka, the Defendant— Respondent applied for

and was registered as the holder of the allotment. On 26th June, 1964, the Plaintiff—Appellant claimed the allotment and learned that it had already been granted to the Defendant. The Plaintiff—Appellant, who is the grandson of Lisiate Filimoemaka, is his heir, and under the provisions of Section 76(iii) of the Land Act claims he is entitled to the allotment.

His claim was dismissed by the Land Court on the ground that the widow had not "claimed" her deceased husband's allotment within the 12 months of his death, as provided in Section 81 of the Land Act, by swearing and filling with the Minister of Lands the form of affidavit provided for the purpose. For this reason it was held that the allotment had reverted to the Crown in 1960 and was properly granted to the Defendant in 1964.

Against this decision the Plaintiff has appealed on the ground that, on these facts, the allotment was claimed on behalf of the widow as required by Section 81 of the Land Act and she paid the rent as is required of her by Section 59.

As was pointed out by the learned Judge of the Land Court this case turns on whether, on these facts the widow did sufficiently comply with the requirements of Section 81 of the Land Act in claiming this allotment.

The section is silent as to when the direction of Cabinet must be given. It seems to us that once Cabinet has approved the grant of a renewal, that approval holds good until the time has come for the signature of the formal document. In the present case Cabinet must be deemed to have approved the lease to the appellant in the precise form which bears the Minister's signature, including the granting of an option for renewal. If it had not been intended to include such a term, then this could have been ommitted from the form set out in Schedule VIII; Section 103(1) of the Land Act makes this clear. In the result it could properly be held that the necessary consent of Cabinet had been given, and nothing more was required to make convenant in question binding.

But even if it is held that a further direction from Cabinet is needed prior to the signing of a renewal of the lease to the appellant, then this should follow automatically. Cabinet by approving the original lease containing the option for renewal clause, has already committed itself to give its approval. There is nothing in the lease itself, or in the Land Act, empowering Cabinet to change its mind, or to refuse to carry out an obligation it has freely undertaken. The Minister, with the approval of Cabinet, executed a lease containing a clause granting an option of renewal. Neither the Minister nor Cabinet can now be heard to say that the formal document setting out the terms of the Minister's agreement did not mean what it said.

Crown counsel submitted that the insertion of a convenant to grant a renewal in the lease amounted to a surrender of the discretion, vested to Cabinet by Section 36(2) of the Land Act, to direct

that a renewal be granted. In support of his argument he quotes from Wade and Phillips on Constitutional Law, 6th. Ed. p. 611:

> "Nor may a discretion be surrendered, whether the surrender takes the form of contracting in advance to exercise it in a particular way or of pre-judging the way in which it shall be exercised."

The passage refers to the actions of an authority to which the exercise of discretion has been entrusted by statute. But that principle applies, as the examples cited in the text-book make clear, to an undertaking, given in advance, to carry out a policy in a particular way, before all the facts are known or all interested parties have been heard. Here the circumstances are entirely different, and concern the terms of a legal contract entered into with full knowledge of the facts and understanding of the consequences.

It may be that there has been a practice of signing a form of lease as set out in Schedule VIII without a full realisation of what is meant by the provision in that form concerning the grant of an option for renewal. If that is so, it means that more care will have to be excercised in the future; but it cannot, in our view, affect the due interpretation to be put on the terms of the formal lease at issue in this present case.

For these reasons the appeal must be allowed. As there are not sufficient facts before us to enable us to decide exactly what consequences should follow the allowing of the appeal—whether it should involve the cancellation of the lease to the second respondent and the grant of a lease to the appellant, or compensation to the appellant in the form of damage, or possibly negotiation between the parties, for example—the judgment in the Court below is set aside, and the case remitted to that Court to make such order as shall be found proper on the basis of the ruling in this judgment. The Court may if it think fit hear the parties before making its order. No order as to costs.