

Land Case No. 27/71

G. D. QUENSELL -v- 1. MINISTER OF LANDS  
2. RIECHELMANN BROS.

Land Court. Roberts J., Hon. Luani, Assessor, Nuku'alofa, 13th and 17th December, 1971.

Section 19(3), Section 36 and Section 103 of the Land Act—Leasehold—Option for renewal—Powers of Cabinet.

A lease granted to plaintiff by the Minister of Lands with consent of Cabinet in the form provided in the Schedule to the Lands Act contained an option for renewal. Pursuant to the powers of Cabinet provided in Section 36(3) Cabinet refused renewal and subsequently a lease of the area was granted by the Minister with consent of Cabinet to the 2nd defendant. Plaintiff asks the Court to order that the lease granted to 2nd defendant is null and void. The details are fully set out in the judgment.

Held that the overriding powers of Cabinet to grant or refuse a lease or renewal of a lease, being statutory powers, cannot be waived by Cabinet as Cabinet is a public body and the said statutory powers are for the benefit of the public. *Re McIntosh (1892)* applied.

Clive Edwards for the Plaintiff.

S. Fine for the 2nd Defendant.

Minister of Lands in Person.

ROBERTS, J: In this case plaintiff asks the Court to order that a Lease granted on Crown Land by the Minister of Lands to second defendant with the consent of Cabinet on 16.6.71 is null and void. As an alternative to such an order plaintiff asks for judgment against the first Defendant, the Minister of Lands as a representative of Government, in the sum of \$50,000 for breach of his covenant with the plaintiff. The facts are as follows:—

A lease was granted on 24 February 1948 to plaintiff by the then Minister of Lands with the consent of Cabinet pursuant to Section 19 sub-section (3) and Section 103 of the Land Act. This lease granted to plaintiff covers an area of 1r 12.5p on the corner of Salote and Fatafahi Roads in Kolofou, Nuku'alofa, and is in Form No. 3 of Schedule VIII of the Act which with such variations as circumstances may necessitate is the form of such a lease prescribed by the Act. This lease contains a provision at the end of the Deed granting the lessee an option of renewal as follows:—

"And it is hereby agreed by these presents if the Lessor shall be willing or his successors at the expiration of the term of this lease, to again lease this land, and the Lessee is willing or his heirs or representatives to pay the same rent which may be obtained by the Lessor or his successors from any other person or persons, the first offer shall be given to the Lessee, his heirs or representatives to lease the piece of land recorded in this Deed."

This lease of plaintiff expired on 31.12.69. On 19.2.68 plaintiff by letter from his attorney applied for a renewal in terms of his option. There was no reply to this. On 11.7.69 a further application was sent to the Minister signed by the wife of plaintiff and by his attorney asking that the lease be extended for another 25 years, the new rent to be at the discretion of the Minister.

Plaintiff paid at the same time \$10 as Survey fee and received a receipt of the same date worded "Survey fee—Application for renewal of lease at Kolofo'ou". I will say at this stage that this receipt the working of which means "Survey fee re application for renewal" cannot be interpreted as a promise by Government to renew so as to act as an estoppe against the Crown.

In March 1971 plaintiff received a letter from Secretary to Government dated 3.3.71 informing him that on 24.2.71 Cabinet had not approved of plaintiff's application to renew; no reasons were given nor have any reasons been disclosed. Nevertheless we may assume that Cabinet had adequate reasons for their refusal.

On 16.6.71 the Minister with approval of Cabinet granted a lease of the said area to Riechelmann Bros., plus an adjoining area already held by the 2nd defend. This lease is for a period of 50 years.

It has been stated by 2nd defendant that the deed of lease was withheld from defendant by the Minister who had expressed the wish that all negotiations between 2nd defendant and plaintiff should be amicable. On 27.9.71 2nd defendant wrote to plaintiff a somewhat apologetic letter giving the main reasons for defendants application for the lease and asking plaintiff to discuss the matter. A discussion took place some two weeks after the date of this letter on a Sunday when, states defendant as witness, he offered to give all assistance possible to plaintiff and to help him financially to the sum of \$2-\$3,000.

It is submitted that this agreement or understanding having been made on a Sunday, is contrary to the Constitutional provisions relating to the Sabbath, and therefore null and void. I agree with this submission this means that such an agreement cannot be enforced. It does not exist except in the minds and conscience of the parties. Such an offer of financial aid and time in which to vacate made by Carl Riechelmann 2nd defendant cannot legally be enforced but that does not mean to say that the 2nd defendant does not intend to abide by his promise. Plaintiff, if he had wished could have asked this agreement to be ratified or shall we say made legally on the following Monday or any other week day. Instead the plaintiff, unwilling to forgo the removal of his lease, instituted these proceedings.

Learned Counsel for the plaintiff has put a great deal of work into the preparation of his case and the Court appreciates the thoroughness of his presentation.

This cases Counsel has cited, however, are not relevant to the case now before this Court which has to consider an option to renew and the force or validity of a statutory provision limiting the exercise of that option. These are the particular circumstances of this case. I will, however, deal with counsel's reference to Halsbury Vol. 7 p. 188 on the powers and duties of government. It is stated quite definitely and clearly that the law is the sole source of governmental powers and duties and that the existence or non-existence of a power or duty is a matter of law and not of fact, and so must be determined by reference to some enactment or reported case.

The lease to plaintiff was granted on 24.2.48. The provisions of the present Land Act relating to leases, namely Section 19, 26 and 103 were then in force. Section 103 sub-section (1) provides that the forms of leases shall be those contained in Schedule VIII "with such variations as circumstances may necessitate. Section 19 sub-section (3) and Section 36 provide that the Minister of Lands shall grant leases but it is clearly provided in Section 19 that no lease shall be granted without consent of Cabinet. Section 36(3) provides that it shall be lawful for the Minister to grant a renewal "at the direction of Cabinet". It follows from this that such direction may be given or withheld. Thus Cabinet has a statutory power to approve a renewal or not and if not so approved no such renewal may be given. Form 3 of the Schedule which is the form of plaintiff's lease provides, as I have stated, an option for renewal without any mention of the powers of Cabinet. This is the lease granted to plaintiff and it appears from this that the lessee, George Quensell, plaintiff in this case, has an absolute right of option of renewal subject only to a provision as to rent. Now it was established in *Dean -v- Green* (1882) referred to in *Maxwell's Interpretation of Statutes* 10th Edition on page 163 that the mere wording of a specimen form in a Schedule to an Act cannot restrict or enlarge a provision in the Act itself." This means that whatever conditions are in the form of lease in the Schedule must be subject to the provisions in the main body of the Act. This is quite clear.

If we look at the lease in question we find that it is a Deed or Lease executed by the Minister of Lands in the name of His Majesty, pursuant to Clause 110 of the Constitution, between His Majesty, as lessor, and the lessee. Thus the lease is between the Crown and the lessee and the Minister signs the lease on behalf of His Majesty. The question now arises does His Majesty in granting such a lease with provision for renewal waive the statutory right of Cabinet to withhold their approval. Clearly not, for His Majesty is bound by His Coronation Oath Clause 34 to govern in conformity with the laws of Tonga.

Therefore there can be no waiver by His Majesty of the statutory powers of Cabinet. It is equally clear that the Minister has no power to waive such statutory powers of Cabinet. Any such waiver would

be null and void, Countersignature of another Cabinet Minister would make no difference. No Minister has power to waive a statutory right of Cabinet.

The next question, however, which I must consider is whether Cabinet, by approving the lease granted to plaintiff with the option of renewal, waived their own statutory power to refuse such renewal, and, if Cabinet did so waive, have they the power to do so?

There was no express waiver nor can I see that this was implied in view of the fact that permissions to renew or refusals to renew leases identical to the one in question are frequently exercised by Cabinet. It is the usual and accepted procedure and, to my knowledge, this is the first time such right of Cabinet, in relation to this provision for renewal, has been challenged.

However, we will consider the next point namely, has Cabinet, the power to waive their statutory right? With regard to waiver of a statutory right it is stated in Maxwell's Interpretation of Statutes 10th Edition on page 388 as follows "Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, as a matter of public policy, to have a more extensive operation." This principle was followed in *Re McIntosh* in which it was ruled that "a public body such as a local authority which is authorised to make by-laws cannot dispense with them in particular cases, the by-laws not being for its benefit but that of the public".

It is clear that the power of Cabinet to control the issue and renewal of leases in view of the somewhat unique land situation in Tonga is a statutory power for the benefit of the State or the Community and thus it is a matter of public policy.

I find that not only was there no express waiver by Cabinet of their statutory powers of refusal but I can read into the fact no implied waiver for the reasons I have stated. Even if there were either one form of waiver or another I hold that such waiver, in view of the ruling of the authority I have quoted, would be ultra vires.

What can the provision of renewal in the lease then mean?

It can mean only that the lessee shall be given the opportunity of offering or refusing to pay the same rent as that offered by another intending leases and that if the existing lessee makes such an offer the Minister shall thereupon submit the proposed renewal for consideration of Cabinet. And if Cabinet withhold their direction to renew the lease is terminated.

This may seem hard on the existing lessee but it is the only possible interpretation of the law. and if the disappointed lessee comes to Equity the circumstances of this case are such that Equity must follow the Law.

It would appear that plaintiff was not given the opportunity to raise his rent to that offered by 2nd defendant but if this Court ordered that plaintiff be given this opportunity of bidding, the negotiations would be recommenced and no purpose would be served, for Cabinet could again apply the statutory power of refusal. However harsh this may appear to be in certain cases, including this present case, I can see many reasons why this overriding power is given to Cabinet. The uses to which land is put, especially in town areas, is a most means of control, including control of leases and lease renewals, in view of the expanding population and rapid development.

I repeat that Cabinet's refusal in this case seems hard on the plaintiff lessee, especially in view of the term of only 21 years he has enjoyed. However, for the reasons stated, Cabinet have acted within their powers and, therefore, this Court finds for the defendants

**Editor's Note:** The Plaintiff appealed. On the 11th December 1972 the Privy Council (Marsack A.C.J.) allowed the appeal (See page 49)