Privy Council Appeal 1/72

G. D. QUENSELL (Plaintiff—Appellant)

-v-

HON. MINISTER OF LANDS and

RIECHELMANN BROS. (Defendants—Respondents)

Privy Council. Marsack, C.J. 11th December, 1972.
Section 19(3), Section 36 and Section 103 of the Land Act—Leasehold—Option for renewal—Cabinet thereby committed to approve.
This is an appeal from a decision of the Land Court (Roberts, J) at Nuku'alofa in 1971.

The facts are sufficiently set out in the judgment below.

The Land Court had held that the overiding 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) was applied.

The Privy Council, allowing the appeal, held that Cabinet by approving the original lease containing the option for renewal clause, had already committed itself to give its approval.

Clive Edwards appeared for the appellant.
The Crown Solicitor (J. Fraser) appeared for the Minister of Lands.
S. Fine for the 2nd defendant.

Although the grounds of appeal submitted by the appellant are extremely lengthy, the point in issue lies within a very narrow compass. A lease was granted to the appellant on 24 February, 1948 by the Minister of Lands with the consent of Cabinet. The lease covered an area of 1r 12.5p in Kolofo'ou, Nuku'alofa, and contained a provision for renewal in terms of the Form No. 3 in Schedule VIII to the Land Act Cap. 63. This provision reads:

> "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."

The term granted by the lease expired on 31st December 1969. Before that date the appellant made application to the Minister for a renewal in terms of the clause in the lease quoted above, and paid the survey fee required, $10. In March 1971 the appellant received a letter from the Secretary to the Government to the effect that Cabinet had not approved the application for renewal. On 16th June 1971 the Minister, with the consent of Cabinet,

granted a lease of the lands in question to the second respondent. The appellant brought action in the Land Court praying that the lease to second respondent be declared null and void. The Court held that as Cabinet had not consented to a renewal of the lease to the appellant he could not claim a renewal, and the Minister was then free, with the consent of Cabinet, to lease to another party.

The short question for determination on this appeal is therefore this: was the convenant for renewal contained in the original lease to the appellant binding on the Minister, notwithstanding that Cabinet had, at the expiration of the lease, withheld its approval of the renewal?

There can be no doubt that, in the absence of any statutory provision modifying the terms of the lease, that document contained an unequivocal convenant on the part of the lessor that, if a further lease of the lands were to be granted, the former lessee was to be given the first option of taking the new lease at the rental fixed. In this case the lessor did intend to lease the lands again, and the lessee had given notice that he desired to exercise the option. It therefore becomes necessary to examine the sections of the Land Act in order to ascertain to what extent, if any, they modify or abrogate any of the express convenant of the lease.

The first provision to be studied is Section 103(1) of the Land Act Cap. 63 which reads:

> 103. (1) All leases, sub-leases, transfers or permits shall be in duplicate and in the respective forms thereof contained in Schedule VIII with such variations as circumstances may necessitate.

It is noted that the forms contained in Schedule VIII are to be used "with such variations as circumstances may necessitate." In other words, although the form specified is to be used as far as possible, it should in any event contain the exact terms of the contract between the parties. There is accordingly nothing in section 103(1) to affect the validity of the convenant on the part of the lessor to grant an option for renewal.

The next provision to which attention must be given is section 36 (2) of the Land Act, which reads:

> 36. (2) On the expiration of any lease of land forming part of Government land it shall be lawful for the Minister at the direction of Cabinet after a request in writing so to do by the holder of the expiring lease to grant to such holder of such expiring lease a further lease for a period not exceeding that granted in the expiring lease.

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 the convenant in question binding.

But even if it 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 exercised 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.