NUKU v CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS AND MINISTER OF LANDS

Land Court
Harwood J
Land Case 7/1983

29 June 1984

Land - renewal of lease - lessee must serve on estate holder written request for renewal under s36(1) Land Act
Lease - renewal - cannot be renewed unless lessee serves written request for renewal on estate holder in accordance with s36(1) Land Act

The Church of Jesus Christ of Latter Day Saints was granted two leases of land on the hereditary estates of the noble Nuku, which leases were to expire on 31 March 1983. The leases, which were registered, were renewed in accordance with a decision of Cabinet on 12 April 1983.
The noble Nuku disputed these renewals as he did not wish the leases to be renewed, and no written request for a renewal had been made to him as required by s36 Land Act, and he brought proceedings in the Land Court for possession of the land comprised in the leases and for cancellation of the registration of the renewed leases.

HELD:
Upholding the plaintiff's claim:

(1) Section 36(1) Land Act was not inconsistent with the Constitution and required that a written request for a renewal must be served by the lessee on the estate holder, and no such request had been served.
(2) The renewal provision in the leases themselves did not apply at the time of the expiration of the leases, because the noble Nuku was not willing, and there was no evidence that the Crown or Cabinet was willing, to renew the leases.

Statutes considered
Land Act s36

Counsel for plaintiff: Mr Edwards
Counsel for 1st defendant: Mr Niu
Counsel for 2nd defendant: Mr Taumoepeau

Harwood J

Judgment:

The First Defendant (hereinafter referred to as "the Church") is described in paragraph 2 of the Statement of Claim as the lessee of certain lands on the estate of the Plaintiff, Nuku, at Kolonga which lands are described in leases numbered 2242 and 2243 and registered in the land registry here in Nuku'alofa. These two leases were executed by the two Defendants on 23 September 1964 and under them the Church resumed possession, for about 20 years, of a playground(under 2242) and a church (under 2243). Both deeds of lease were expressed so as to expire on 31 March 1983. In each case the Lessor is described as being the late Queen Salote; the holder of the hereditary title to the lands at the time was the Plaintiff's brother who died in about 1977. The Plaintiff duly succeeded to his title, but of course the running of the leases was in no way affected thereby.

There came a time when understandably the Church began to look ahead to its future at Kolonga, after the expiry of these leases; accordingly Tevita Folau Mahuinga, acting upon instructions of the Church, endeavoured to pave the way towards obtaining their further renewal. Certain evidence on behalf of the First Defendant was given of a meeting between Nuku and Mahuinga in mid-1981, and of a fono held by Nuku in Kolonga possibly at about the same time, but I do not consider any of that evidence to have been of significance in this case so far as the leases are concerned or their renewal. Suffice to say that if the meeting with Nuku did take place as described by Mahuinga it was in my judgment of no consequence, nor was the fono. Mahuinga gave evidence of another meeting with Nuku just before or during March 1982, as a result of which he says he prepared a letter dated 18 March 1982 (Exhibit 4) addressed to the Minister of Lands, but Nuku denies that anything to do with these leases was ever discussed between him and Mahuinga and he further denies both knowledge of the contents of that letter (in the sense of the happenings it describes) and that it was ever seen by him - and he certainly never signed it as was obviously intended by Mahuinga. I am satisfied, particularly from the evidence of Nuku himself and of Mahuinga in early cross-examination, that Nuku never did see that letter. I think it is possible that some sort of meeting may have occurred but, if so, I am satisfied that it was of no consequence so far as the renewal of these leases was concerned and that Nuku never went so far as to discuss, let alone consent to, either their cancellation or renewal. On Mahuinga's own evidence, the time for renewal of the leases had not by any means been reached at that time; and his version of that meeting, if accurate, taken together with Exhibit 4, shows him to have been most keen to prepare Nuku to commit himself which I find Nuku was not prepared to do. Indeed, Mahuinga told me that he had plenty of meetings with Nuku's son, Finau, and Nuku after March 1982 in Finau's guest-house - almost once each month between March and September 1982 but which he qualified by saying that Nuku was present on about three of those occasions. He said that sometimes, on the occasions, Nuku left the room during the discussion. Both Nuku and Finau denied that any such meetings occurred and I do not believe they did occur - but, even if they did, they obviously accomplished nothing and they serve further to emphasize the zeal of Mahuinga to gain the consent of Nuku to a grant of further leases which he was not prepared to give. However, both Finau and Mahuinga spoke of a meeting that took place in Nuku's presence in about late September 1982 at a Church office in Ma'ufanga the details of which Nuku did not deal with because they were not put to him in cross-examination and it transpired that Mahuinga had not in fact supplied

counsel for the Church with any proof of his evidence. But both Finau and Mahuinga testified to the effect that nothing was agreed at that meeting and that Nuku had walked out of the meeting even before it ended without contributing or agreeing to or signing anything.

If there were other meetings concerning the renewal of the leases (which Nuku did not attend and about which he knew nothing) it seems clear to me that they took place because not only was the Church (through Mahuinga) most anxious to conclude the question of its future tenure but also Finau was in need of money.

However I am quite certain that Finau did not have any authority to out on behalf of his father at any time, and I am equally certain that Mahuinga knew that such was the position. I do not believe that Nuku ever told Mahuinga, as the latter alleged, that he had given such authority to his son or that he told the latter to deal with Finau. I am not at all impressed by the letters Exhibits 5, 6 and 7 that were produced in support of the Church's case; they are written by 'T. Manu' who signed them as though he were counsel for Nuku when in fact the evidence clearly establishes that he was not, and the contents of those letters cannot possibly or properly be regarded as reliable. Just for example, when cross-examined, Finau told the Court that some of the suggestions recorded in the letter Exhibit 5 were his own and not those of Nuku, and that 'T.Manu' was acting for him, Finau, when the letters were written and not under any instructions or other authority from Nuku. I am satisfied that Finau was telling the truth about this. Furthermore I entirely accept the evidence of Nuku when he told me that he never gave instructions to, nor otherwise authorised, 'T. Manu' to write any letters, nor authorized Finau to act as his agent. I believe the evidence of Finau when he said that it was he who gave instructions to 'T. Manu' and that Nuku never authorized him (Finau) to enter into any negotiations regarding the leases. As to the letter dated 28 October 1982 (Exhibit 3), which Finau thought was written after the meeting in the Church office at Ma'ufanga, it was written and signed by Finau without the knowledge or consent of Nuku and was never shown to him.

I am satisfied beyond doubt that during 1982, after it became clear to Mahuinga and Finau that Nuku was not willing that these two leases should be renewed, the two of them made determined efforts to conclude an agreement that might not only satisfy the Church's desire to obtain a renewal of both leases at the lowest possible 'premium' but also satisfy Finau's pressing desire for a sum of money for himself from the Church - and I suspect that their efforts were implelled by a matual hope that once an agreed 'package' was settled between them it could be presented to Nuku, probably by Finau, with some expectation that Nuku himself would also find it acceptable from his point of view. But no agreement was ever reached between Finau and Mahuinga, let alone between the Church or Mahuinga and Nuku whose disinclinahon for renewal of these leases never diminished. As Finau said, in effect, in his evidence - he wanted money urgently and was trying to reach an agreement with the Church for his father to sign, but he never told Nuku about the discussion let alone any details of them nor showed him any of the letters (and, had he done so, it seems highly probable that Nuku would have been very angry indeed).

Accordingly, in my judgment no question of estoppel (as argued) under section 103 of the Evidence Act - even if pleaded - could possibly arise in fact or in law;I reject the averments of fact contained in paragraph 8 of the amended defence of the First Defendant and I am quite satisfied that the letter of 18 March 1992 (Exhibit 4) was neither a request for the purposes of section 36(1) of the Land Act nor was it ever served on the Plaintiff

as required by the second proviso to that subsection.

I have gone into some detail concerning the events of 1982 because they illustrate the state of affairs that endures right up to 31 March 1983 when these two leases expired, and because the Plaintiff, Nuku, contends that without a request in writing for a further grant - as is required by section 36(1) of the Land Act - they cannot be renewed. He further contends that, despite his unwillingness that the Leases should be renewed, the Minister of Lands purported to renew them both, under the authority of a Cabinet Decision No.511 seemingly made on 11 and recorded on 12 April 1983. The letter dated 19 April 1983 (Exhibit 2) from the Minister to the President of the Church makes this clear. On the other hand both Defendants have argued to the effect that in respect of lease number 2243 the Plaintiff's consent - i.e. willingness - is unnecessary, and that in respect of lease number 2242 the Plaintiff was willing and consented to the renewal. They rely basically upon the relevant renewal provisions in the leases themselves and the First Defendant further says that section 36 of the Land Act has no application to this case. If, of course, section 36 does apply in respect of these leases then, by reason of the facts as I have found them and of the second proviso to section 36 (1), clearly they could not lawfully be renewed. I turn therefore to a consideration of that section which falls within Part III of the Land Act entitled "Hereditary Estates", Division I entitled "Rights of Holders". And, incidentally, it is worth remarking that section 36 is exactly the same as section 36 of the Land Act (Cap.45) in the 1947 Revised Edition of the Law of Tonga.

I can find nothing whatever that is inconsistent between clauses 104, 105 and 106 of the Constitution and section 36 of the Land Act as alleged in paragraph 9 of the amended defence of the First Defendant. It is said that section 36(1) is ultra vires those clauses because it "seeks to impose a further restriction or condition in leases which is not contained in the forms of deeds of leases". Under clauses 104 it is provided that a lease of land must be "in accordance with this Constitution"; clauses 105 goes on to provide that "Cabinet shall determine the terms for which leases shall be granted and the Cabinet shall determine the amount of rent for all Government lands"; and clauses 106 prescribes the forms. None of these provisions can possibly have the effect of rendering section 36(1) ultra vires. In particular, lest there should be any misunderstanding, I draw attention to the wording of clauses 105 "the terms for which" meaning periods of time and not "the terms on which" meaning the various possible covenants or restrictions. Moreover I do not believe that it is either the purpose or effect of these clauses of the Constitution to give Cabinet the absolute right - to the entire exclusion of consideration of the the wishes of the Nobles - to control the grant or renewal of leases of their hereditary estates. It seems to me that section36(1) is a purposeful and very necessary provision giving a Noble, as it does alessee the right to be positively informed of a request for renewal and time in which to protest it if he wishes. For example, it might well be that an estate holder would wish to protest to Cabinet by showing that the holder of an expiring lease was in arrears of rent, or had failed to observe or perform other terms and conditions of his expiring lease; and in that case section 36(3) should operate to prevent a further grant. It is true that, under section 36(1) if properly followed, the estate holder may be overruled by Cabinet but, of course, the law implies that Cabinet will reach its decision judicially. In this case the requirement of the second proviso was clearly not complied with by the Church, for some reason unknown, yet the facts of the case in my opinion afford a classic example of the sort of case for which the subsection was designed. I have no doubt of the applicability

of section 36(1) in respect of both leases here - moreover I consider that the wording of that subsection coupled with its position in Part III, Division I, makes this absolutely clear.

As regards the wording of the renewal provisions in the leases themselves I must say that nowhere in the Land Act of any period have I been able to find the form of lease number 2243, let alone the wording of subclause (7). No point has been taken nor evidence adduced in this regard by either side. But I am satisfied that subclause (7) does not assist the Defendants because there is no evidence of any timeous application made to Cabinet for a further lease, and there was certainly no further lease granted, "at or before the termination of this deed of lease"; and in any event subclause (7) even if in proper form cannot, in my judgment, be taken to override the provisions of section 36. So far as lease number 2242 is concerned, there is an option granted to the lessee in a form that has the approval of, and is required to be inserted therein by, the legislature, as follows -

> "And it is hereby agreed by these presents if the Lessor shall be willing or her 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 otained by the Lessor or her 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".

According to the lease, the Lessor was "Her Majesty Salote Tupou, Queen of Tonga" who leased "for himself and her successors to the Lessee" the playground at Kolonga L.D.S. Mission. Nuku has a hereditary life interest in accordance with section 4, 5, 9 and Schedule I of the Land Act and has the rights therein conferred by Part III, Division I, including the right to receive rent. The submissions of counsel for the Plaintiff and the First Defendant with regard to this option formula have plainly been put on the basis of the question whether Nuku was or was not willing to again lease the land concerned, and I consider that theirs is the correct approach. In no circumstances under the Law of Tonga is it possible for the Sovereign alone to be the lessor of this land and for this reason I find the description of the Lessor in both the leases as being the Queen rather strange to say the least. I do not know whether, at the expiration of lease number 2242, the Lessee was then willing to pay the same rent that might be obtained from any other person - because there has been no evidence about such things in this case. It seems to me, however, quite clear that the option could not possibly have been applied on 31 March 1983; Nuku was then certainly not willing to again lease the land, and there is no evidence that the Crown or Cabinet was then willing. In any event, the provision regarding this option cannot in my judgment, be taken to override the provisions of section 36. And indeed it appears that Cabinet, in approving the grant of further leases to the Church in this case (as evidenced by Exhibit 2), must have been exercising what it thought was its right to do so under section 36(1), possibly in the mistaken belief that the necessary request in writing had been duly served on Nuku; in the alternative Cabinet may have been led to believe, quite wrongly, that Nuku was willing to again lease the land.

In conclusion, I am entirely satisfied that any grant of a further lease made by the Minister of Lands to the Church must be contrary to section 36(1) because I hold that in

respect of both leases section 36(1) applies and I find that (a) Nuku was never willing nor agreed to consent to any such grant, and (b) no request in writing for a new lease was ever made by the Church and served on Nuku. Accordingly, both leases having expired on 31 March 1983, no further grant could lawfully be made by the Minister of Lands. In addition the renewal of neither of the leases was appropriate under the relevant renewal provisions thereof.

At a very late stage of the hearing of this case - in fact after counsel for the First Defendant had begun his final address - the Plaintiff's counsel realized that neither of the leases when executed in September 1964 was countersigned or sealed by a Cabinet Minister as required by clause 110 of the Constitution and by section 103(4) of the Land Act - and undoubtedly that is so. The Plaintiff claimed to include a prayer for a declaration that the leases are, for that reason null and void. At the request of all concerned I adjourned the hearing. All the pleadings were eventually amended and filed with leave when the hearing was resumed. No further evidence was called and all three counsel continued by addressing the Court on this additional matter as well as on the case as it originally stood. The additional point was met by both Defendants with pleas of limitation under section 148 of the Land Act, estoppel, the conclusiveness of registration, and other averments.

I do not propose to explore or give judgment upon the effect of this late discovery in the case. Having regard to my previous findings, which must result in the giving of judgment for the Plaintiff, I consider it unnecessary. Whether the Church was a true lessee or a licensee on the same terms seems to me immaterial now.

I turn therefore to the question of the relief which should be granted to the Plaintiff. Relief is claimed in paragraphs (a) to (i) inclusive of the Statement of Claim in its unamended form. As to (a) it is not necessary or desirable that I should declare the obvious, namely that leases numbered 2242 and 2243 have expired. The Church however is still in possession and under (b) the Plaintiff prays for an order of eviction. I am not prepared to make such an order because on the expiry of lease number 2242 the Church was entitled "to remove all house and improvements which may have been built on the said land", and under lease number 2243 "may at or have before the termination of this deed or of any further lease thereof remove all houses buildings and other erections on the said land belonging to them". For these reasons clearly the Plaintiff is not entitled to an order as prayed in paragraph (c). As regards eviction, or more aptly I think the making of an order of possession, I shall require to hear the submissions of counsel for the Plaintiff and the First Defendant and possibly even further evidence. It seems to me that the Church could not be blamed for thinking that it has a right of possession even maybe up to the present time, and I am prepared to assume that, at least unless and until I have reason to come to a contrary conclusion. I do not know whether further leases have in fact been granted. The Church must I think be entitled to a reasonable time in which to remove things and yield up possession, but I know nothing about the extent of the task. The prayer for punitive damages at paragraph (d) cannot be sustained because it has not been sufficiently pleaded and, in any event, in different proceedings in this Court between the Plaintiff and the First Defendant, Mr Justice Hill appears to have made an order on 6 April 1983 that the Church should be at liberty to remain on the land until those proceedings were disposed of. Those proceedings have never in fact been disposed of to this day. With regard to (e) such an order as prayed is not necessary since I propose to make an order for possession albeit suspended for a period. As to (f) and (g), which are alternative, I have

not been informed of the position and, rather than make an order in alternative or conditional terms, I shall require the assistance of counsel for the Second Defendant to enable me to decide an appropriate formula though I say at once that I feel sure that an order as prayed in (f) will not be necessary and that a formal undertaking, if appropriate, would suffice.

For present purposes I therefore give judgment for the Plaintiff with costs against the First Defendant, to be taxed if not agreed, and I order that the First Defendant do give to the Plaintiff vacant possession of the lands comprised in leases numbered 2242 and 2243 such order to be suspended pending a further order thereon of this Court. I grant to 310 the Plaintiff and the First Defendant liberty to apply to the Court and be heard regarding the date of the giving of vacant possession. I direct that the Second Defendant shall cancel forthwith the registration of any further lease granted to the First Defendant consequent upon the expiry of leases numbered 2242 and 2243 and I require counsel for the Second Defendant to address this Court as soon as is practicable concerning the appropriateness of this order and such other order as the Court has power to make or undertaking that the Second Defendant may be prepared to give to prevent any such registration.