ET OLDEHAVER & COMPANY LIMITED

v

ATTORNEY-GENERAL ON BEHALF OF
THE MINISTER OF LANDS

Court of Appeal Apia
25, 27 October 1977
Henry P, Donne and Coates JJ

PROPERTY LAW (Lease for term of years with right of renewal) - Government Lease of customary land pursuant to s 4 of the Alienation of Customary Land Act 1965 - Failure to give written notice of desire to renew required to be given prior to expiration of term - Over-holding and acceptance of rent - Lessee claiming constructive notice and waiver of requirements as to notice under Lease - Action by Lessee for specific performance of contract of renewal based on part performance - No agreement concluded as to covenants and conditions of renewed term as required by Lease - Necessary approval of application for renewal by beneficial owners not obtained - Claim for specific performance (or damages in lieu thereof) rejected - Lessee becoming tenant at will pursuant to s 105 of the Property Law Act 1952 (NZ) - Claim for relief against forfeiture under s 121(1) of the Property Law Act 1952 (NZ) barred by effluxion of time.

The plaintiff's Government Lease of customary land was for a term of ten years expiring April 30, 1975 with a right to renew for a further ten years at the same annual rental, but subject to "such covenants and conditions save this present right of renewal as the Lessor and the Lessee shall then mutually agree". The Lessor failed to give the three clear months' notice of its desire to renew required to be given before the expiration of the term, but remained in possession for some eighteen months after the expiry date and paid rent for an additional year. Although conversations and written communications took place following the expiry date between the Lessee's solicitor and the Government relating to the renewal, which led the former to expect the Lease would be renewed, it was not until some eighteen months thereafter that a formal application for renewal was submitted; whereupon the Government informed the Lessee's solicitor that an application had been made by the beneficial owners of the land for a lease to another person, and pointed out that as the required notice had not been given under the Lease it had expired. The Lessee commenced action for specific performance claiming a contract for renewal had been concluded by the Lessee's possession of the land for some eighteen months after the expiry date, the acceptance of rent for a period of twelve months thereafter, constructive (if not actual) notice of the Lessee's desire to renew and waiver of the requirements as to notice under the Lease, and the approval by one of the two beneficial owners to the renewal as witnessed by her signature on the formal application for renewal submitted: Later, by Amended Statement of Claim, the Lessee also claimed relief against forfeiture. Both claims were dismissed by the learned Chief Justice.

Held, affirming the decision of the learned Chief Justice, that the Government had not waived the provisions for notice in the Lease since there was no evidence of any intentional waiver with full knowledge, and the case of Bartlett v Bain [1922] 41 NZLR 790 did not assist the appellant as it applied only to a lease where there was no requirement

that the notice be given at any particular time;

that a letter from the Lessee's solicitor to the Public Trustee some six months after expiry of the Lease stating that arrangements were being made for preparation of the renewal could not amount to either actual, or constructive notice as required by the Lease;

that the "nub" of the matter was that there was never a completed contract capable of specific performance since the covenants and conditions to be embodied in the renewal were never agreed on by the parties, and ss 106 and 107 of the Property Law Act 1952 cannot be invoked to imply terms where the contract between the parties requires them to agree on them;

that the Court agreed with the submission of the Attorney-General that by reason of his statutory function it is incumbent on the Minister of Lands to have regard to the desires and interests of the beneficial owner of the customary land in such matters as renewal or waiver, both of which affect his rights and interests; and

that the appellant's claim for relief against forfeiture was made well outside the time permitted for an application for such relief by s 121 of the Property Law Act 1952 (NZ) and was therefore absolutely barred: Vince Bevan v Findgard Nominees [1973] 2 NZLR 298 followed.

APPEAL from the Judgment of Nicholson CJ, ante p. 124.
Appeal dismissed.

Drake and Mrs Drake for appellant.
Attorney-General and Sapolu for respondent.

Cur adv vult

HENRY P, DONNE AND COATES JJ. This is an appeal from a judgment of Nicholson C.J. delivered on the 17th June, 1977 refusing the appellant's claim for an order for specific performance of a right of renewal contained in a certain Deed of Lease or alternatively seeking relief against forfeiture.

The relevant facts have been fully set forth in the judgment under appeal and are summarised as follows:-

1. On the 20th December, 1965 the Government of Western Samoa acting under section 4 of the Alienation of Customary Land Act 1965 entered into a Deed of Lease with the appellant of a parcel of customary land for a period of 10 years commencing on the 1st May, 1965 at a yearly rental of $800.
2. Clause 7 of the said Deed of Lease provides as follows:-

> 7. THAT if the Lessee shall during the term hereof pay the rent hereby reserved and observe and perform the covenants and conditions on the part of the Lessee herein contained and implied up to the expiration of the said term and shall have given to the Director of Lands of Western Samoa on behalf of the Lessor before the expiration of the said term three clear months' notice in writing of its desire to take a renewed lease of the premises hereby demised the Lessor will at the cost in all things of the Lessee grant to the Lessee a renewed lease of the said land and premises for a further term of ten years at the same rent as is hereby reserved and subject otherwise to such covenants and conditions save this present right of renewal as the Lessor and the Lessee

shall then mutually agree.

3. The Lease expired on the 30th April, 1975 at which stage no notice in writing of its desire to take a renewed lease in terms of Clause 7 had been given by or on behalf of the appellant.
4. On the 22nd October, 1975 the appellant's solicitors wrote to the Public Trustee who was acting as Lessor's agent for the collection of rent, indicating that they would arrange for payment of the rent due and for the preparation of the renewal of the Lease.
5. On the 18th October, 1976 the appellant's solicitors for the first time forwarded to the Minister of Lands at Apia a formal Application in writing to lease this customary land and requested the Minister to obtain the signature of a Mrs Leafaitulagi thereto whom they described as "the beneficial owner".
6. On the 23rd October, 1976 the appellant's solicitors again wrote to the Minister of Lands enclosing two copies of an Application to lease the land this time duly executed by the appellant and Mrs Leafaitulagi.
7. On the 29th October, 1976 the Acting Director of Lands Mr Soon wrote to Mr Jackson, who was acting as solicitor for the appellant, stating that as the "pule" of the land was in the holders of Title Seumanutafa, that Title holder and not Mrs Leafaitulagi should nominate the lessee.
8. On the same day, i.e., 29th October, 1976 the Secretary to the Minister of Lands wrote to Mr Jackson stating the rent had been paid to the 30th April, 1977. The learned Chief Justice was satisfied that this date was incorrect and the rent was in fact paid to the 30th April, 1976. We are not prepared to hold that he was wrong in so finding.
9. On the 17th November, 1976 the Secretary to the Minister of Lands notified by letter Mr Jackson (inter alia) as follows:-

> 3. While appreciating the above decision, Seumanutafa who is the sole surviving pule of the land in question, wrote to a lawyer on 9 October, 1976 that he wished the land to be leased to Mrs Meredith. He followed this up by a formal application dated 1 November, 1976 to lease the land to Mrs Meredith.
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> 4. The last lease to Oldehaver was the one for 10 years from 20 December, 1975 with a right of renewal to be exercised by notice in writing to be given within 3 months of the expiration of that period of 10 years (that is, before 20 December, 1975). There is nothing in our file to show that Oldehaver has exercised this right, and it seems therefore that the lease has expired.
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> 5. Assuming that you take into consideration the points outlined above and accordingly I have been instructed to advise that the Minister of Lands has proposed to approve the application by Seumanutafa to lease this area of customary land to Mrs Meredith.

Clearly a perusal of the Lease shows that the expiration date mentioned in paragraph 4 of this letter is incorrect, the correct expiry date of the Lease being 30th April, 1975.

10. By letter dated 26th November, 1976 Mr Jackson wrote at length to the Minister of Lands giving a history of the transaction and his personal dealings in connection with it. The significance of this letter is that Mr Jackson acknowledged that a written application for renewal had not been made within the time specified in Clause 7 of the Lease and also that the Lease had not been and was not to be renewed because the right to

apply for renewal had expired.

11. In December, 1976 the Minister of Lands granted a lease of this customary land to Mrs Lucy Meredith.
12. On the 20th January, 1977 the Minister of Lands gave written notice to the appellant to vacate the land as it had failed to exercise the right of renewal in terms of the Lease.
13. On the 4th March, 1977 the appellant issued proceedings for specific performance and on the 20th April, 1977 added in an Amended Statement of Claim an application for relief against forfeiture.

It is obvious, therefore, that written notice of a desire to renew the said Lease has not been given within the time prescribed by Clause 7 thereof. The appellant, however, contends that there has been waiver of that requirement by the respondent. As an alternative, he submits that even if waiver as to the need to give written notice is not established, there has been waiver as to the time within which such notice should be given. In this regard, he referred to Bartlett v. Bain (1922) 41 N.Z.L.R. 790, in which there was no requirement in the lease for notice of renewal to be given at any particular time. The Court held on the facts that notice could be given after the expiry of the lease so long as there was established a lawful holding over by the lessee and the notice had been given at any time prior to the determination of the monthly tenancy thereby created. This case does not help the appellant. The present case is essentially different as there is an express requirement in the Lease, for notice to be given before the expiry of the terms of the Lease and this was not done.

As we understand it, in support of his submission as to waiver, Mr Drake relies upon the following points:-

1. A letter dated the 22nd October, 1975 from Mr Jackson to the Public Trustee in which it was stated that arrangements were being made for preparation of a renewal of the lease which, in his submission, amounted to constructive, if not actual, notice to the Lessor of the appellant's intention to renew the Lease. He endeavoured to "couple" this letter with the oral discussions which had earlier taken place between the former Director of Lands and Mr Jackson, but the letter itself contains no reference to any such discussions. In any case, this letter cannot be relied on by the appellant as giving constructive, or actual notice, of intention to renew because the Lease had expired some six months previously.
2. The discussions between the then Director of Lands and Mr Jackson as to the intention of the appellant to renew.
3. The payment of rent and continued possession of the premises by the appellant for a period subsequent to the 30th April, 1975 when the lease expired.

But for acts of waiver to be effective against the Lessor they must be both intentional and given with full knowledge. After careful consideration of the submissions and the evidence we find no reason to disagree with the finding expressed by the learned Chief Justice who said at page 4 of his judgment:-

> I have considered the possibility that the defendant could be said to have waived the notice requirement by its conduct, but again, Halsbury's Laws, supra, on the same page 310 observes that such waiver must be intentional and with full knowledge. I cannot find on the evidence that there was an intentional waiver with full knowledge on the defendant's part. There was negligence on the defendant's part in failing to clarify the renewal position promptly but nothing in the nature of a deliberate waiver.

However, in our view, the nub of the matter is that the appellant has never been in the position where it could claim it has a completed contract to lease capable of performance. It is manifestly clear from Clause 7, supra, that the new lease must contain not only provision for

the rental and term provided therein, but also "such covenants and conditions save the present right of renewal as the Lessor and Lessee shall mutually agree". The appellant contends that, notwithstanding the Lessor and Lessee had failed to agree on some terms (which fact he concedes to be correct), there remained the essential terms of an agreement for lease. These, he says, can be found in the old Lease, which identifies the Lessor, Lessee, the premises, and the commencement of the term, as well as fixing, in the renewal clause, the duration of the term of the new lease and the amount of the rental therefor. He cites 23 Halsbury's Laws (3rd Edn), para. 1039, pp. 440-1 which reads:-

> 1039. Essential terms of agreement - The essential terms of an agreement for a lease are (1) the identification of the lessor and lessee; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent or other consideration to be paid. If the matters just mentioned are ascertained to be offered and accepted, this is sufficient. If any other terms are mentioned by one party, these also must be unconditionally accepted by the other party in order that there may be a concluded contract. As long as the necessary terms, indicated above, have not been agreed to, or any additional term has been mentioned on one side and not unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract. New terms may be added to an offer, or the offer may be withdrawn at any time, as long as it is has not been accepted. On the other hand, as long as an offer remains open, the other party may withdraw any term which he has sought to introduce and accept the offer unconditionally.

Having obtained these "essential terms", appellant would then resort to sections 106 and 107 of the Property Law Act 1952, to provide implied terms necessary to perfect the lease. However, the Property Law Act 1952 can be invoked to imply terms only where there are no expressed terms provided in the contract. Implied terms cannot be substituted for covenants and conditions when the contract between the parties requires them mutually to agree on them. Here the contract between the parties especially provides for them to agree on the general covenants and conditions, other than those relating to rental and the term thereof, and until they so agree, there is no completed contract.

Consequently, as there is no completed contract, the appellant cannot succeed in his claim for specific performance. Notwithstanding, we feel we should refer to the submission of the Attorney-General addressed to the matter of the "pule" of the land which we consider to be sound. His submission is that the Minister of Lands is Trustee vis a vis the "pule" of the land Seumanutafa Pogai, who has not been made a party to the alleged renewal commitment to the appellant. Nor was he in any way concerned with the alleged waiver. We are satisfied, as was the learned Chief Justice, that he is a "beneficial owner" within the meaning of section 2 of the Alienation of Customary Land Act 1965. The Minister must have regard to the desires and interests of the beneficial owner in the granting of a lease (section 4). In our view, it follows that because of his statutory functions it is incumbent upon the Minister also to have regard to the desires and interests of the beneficial owner in such matters as renewal or waiver, both of which affect his rights and interests.

Turning now to the application for relief against forfeiture, we do not propose to consider this at length since clearly it is filed out of time. We do not accept the submission of the appellant that time runs from the filing of the Statement of Defence. We are satisfied the letter of the 17th November, 1976, supra, under the hand of the Secretary to the Minister of Lands addressed to the plaintiff's solicitor and received by him the following day was a clear refusal to grant a renewal and contained a statement of grounds therefor. The appellant submitted the Secretary was not empowered to give this notice since the Minister could not lawfully delegate his authority to his Secretary. We do not consider this submission tenable. It seems to us that a letter

under the hand of the Secretary to the Minister on ministerial letterhead is an official communication by that Minister written with his implied authority. In any case, it is established by Mr Jackson's letter to the Minister dated the 26th November, 1976 that the former was well aware of the refusal and grounds for it. The application for relief was not made until the 20th April, 1977 and is well out of the time prescribed by section 121 of the Property Law Act 1952. This constitutes an absolute bar to relief as was stated in Vince Bevan v. Findgard Nominees (1973) 2 N.Z.L.R. 290 by Turner P. at p. 298 (lines 31 to 45, inclusive):-

> Once the jurisdiction of this Court is established, as I would hold in this case that it has been established, the only question left is that of limitation under s 121. This was the principal point argued before this Court, and was the one upon which the Chief Justice, in the Supreme Court, decided for the lessor. Section 121(1) provides:-
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> > "Application for relief in accordance with the last preceding section may be made at any time within 3 months after the refusal of the lessor to grant a renewal of the lease or to grant a new lease or to assure the reversion, as the case may be, has been first communicated to the lessee."
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> Though this subsection is expressed in permissive, rather than in restrictive phrases, it is perfectly clear by implication - see subs (2) in this regard - that its effect is as a limitation provision, and that no application may be entertained which is made more than three months after a refusal to which subs (1) refers.

For the reasons given, we are satisfied that the judgment of the Court below should be affirmed and the appeal is accordingly dismissed with costs to the respondent in the sum of $200.00.

Solicitors for the appellant: Jackson & Clarke, Apia.
Solicitors for the respondent: Office of the Attorney-General, Apia.