

BARCLAY McCLELLAND WAGNER v. NATIVE LAND TRUST BOARD

A

CHARLES ALFRED CAMERON v. NATIVE LAND TRUST BOARD

[SUPREME COURT, 1976 (Mishra J.), 18th March]

Civil Jurisdiction

*Native land—consent of Board necessary to transfer—whether Board entitled to demand a levy before granting its consent—Native Land Trust Ordinance (Cap. 115) ss. 4(1), 10, 11, 12, 14(1), 33—Native Land (Leases and Licences) Regulations regs. 34 (f), 58—Native Land Trust (Leases and Licences) (Amendment) Regulations 1974 Second Schedule—Property Law Act 1971 s. 94—Interpretation Ordinance 1967 ss. 25(b), 28(1).*

B

Before it was prepared to grant consent to the transfer of native land under Native Land Trust Ordinance s. 12(1), the Board demanded levies based on a percentage of the valuation of the land in question. The Board contended that under s. 12(1), it had a discretion as to whether to grant its consent, and to attach such conditions financial or otherwise as it thought fit. It also contended that s. 12(1) was not restricted in any way by Property Law Act 1971 s.94.

C

*Held:* 1. If a statute was intended to impose a pecuniary charge, it should be expressed in clear and unambiguous language. There was nothing in s. 12(1) ante which made any mention of such a charge, and a charge could not be arrogated by implication.

D

2. Property Law Act 1971 s. 94 applied to all leases requiring consent and included leases under the Native Land Trust Ordinance.

3. Native Land Trust Ordinance s. 33 enabled the Minister to prescribe fees for transactions under that Ordinance. This did not cover a sum of over \$5,000.00 which was more of a penal sum.

E

Cases referred to:

*The Queen v. Barclay* 8 Q.B.D. 306.

*Blackpool Corporation v. Starr Estate Co.* [1922] 1 A.C. 27.

*Attorney-General v. Exeter Corporation* [1911] 1 K.B. 1092.

*McEldowney v. Forde* [1971] A.C. 632; [1969] 2 All E.R. 1039.

F

Action in the Supreme Court for the return of the sums of \$9,000.00 and \$5,958.00 respectively paid to the Board for consent to transfer being granted.

*R. W. Mitchell* for the plaintiffs.

*E. Vula* for the defendant Board.

MISHRA J.: [18th March 1976]—

G

These two actions were, at the request of the parties, heard together. The issues involved in them are those of law alone, there being no dispute as to facts. The issues are basically the same in each case. No evidence was called by either side.

In the case of *Wagner v. the Native Land Trust Board*, the plaintiff Wagner was the owner of a native lease on which he had built a residential property. He applied to the defendant Board for its consent to the transfer of this lease required under section 12 of the Native Land Trust Ordinance. The Board had the property valued and demanded a levy of \$9,000 before it would give its consent. On 8th May 1974 this

H

A amount was paid to the Board, under protest, and consent to the transfer granted. By this action the plaintiff Wagner claims the return of the sum of \$9,000 and certain other reliefs.

B In the case of *Cameron v. the Native Land Trust Board* the plaintiff Cameron also was the owner of a native lease with a residential property on it. In 1975 he decided to sell the property for \$102,500 and applied to the defendant Board for its consent under section 12 of the Native Land Trust Ordinance. The Board had the property valued and assessed the profit to the plaintiff from the sale at \$13,240 and demanded 45 per cent of this amount "for the benefit of the native land owners" before it would give its consent to the proposed transfer. On 14th July 1975 the plaintiff Cameron paid, under protest, \$5,958 the amount so demanded and the Board gave the necessary consent. The plaintiff Cameron now, by this action, claims, among other reliefs, the return of the sum of \$5,958.

C Counsel for the defendant Board concedes that the agreed terms of the two leases do not require the payment of such a sum and that the authority for the charging of these sums must be found in the law itself. The Native Land Trust Board was created by the Native Land Trust Ordinance enacted in 1940. Section 4(1) of the Ordinance states:

"The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners."

D Section 8 empowers the Board to grant leases or licences of portions of native land not required for the use maintenance or support of the Fijian owners "for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed".

Section 12 of the Ordinance is in following terms:

E "12(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

F Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September 1948, to mortgage such lease.

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee."

G Section 33 of the Ordinance empowers the Minister for Fijian Affairs to "make regulations not inconsistent with this Ordinance prescribing all matters which are required or are permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance, and for prescribing the fees to be paid for any matter or thing done under this Ordinance and more particularly for all or any of the following purposes". Thirteen purposes are then stated which refer generally to the control and management of the land, comprised in the leases or licences. Regulation 58 of Native Land (Leases and Licences) Regulations made under these powers is in following terms:

H "58(1) The fees which the Board shall charge and collect for the preparation of any lease or licence granted under these Regulations shall be those set out in the Second Schedule to these Regulations.

- (2) The Secretary shall charge and collect—
- (a) a fee of £1 1s. 0d. on each application for written consent required in respect of a lease by section 12 of the Ordinance;
  - (b) a fee of 10s. 6d. on each application for written consent required in respect of a licence by regulation 55 of these Regulations.”

Until 23rd July 1974 the Second Schedule to these Regulations was as follows:

“

**SECOND SCHEDULE**

(Substituted by regulations 7th July 1959).  
(Regulation 58)

**FEES**

	£	s.	d.	
1. On application for a lease .....	1	0	0	
2. Preparation of lease inclusive of issue of approval notice but exclusive of plan, provided that where special clauses are required this fee may be increased by an amount not exceeding £3 3s. 0d. at the discretion of the Secretary .....	3	0	0	C
3. Preparation of extension of variation of lease .....	2	10	0	
4. Preparation of licence (exclusive of plan) .....	1	10	0	
5. Plan fee if plan drawn on lease or licence .....	5	5	0	
6. Plan fee if photostat copies of plan are attached to lease or licence .....	2	2	0	D
7. Certified copy of lost or destroyed licence including plan .....	2	0	0	”

Wagner's application for consent was dealt with on 8th May 1974. On 23rd July 1974 the Second Schedule was revoked and replaced by the following Schedule:

“

**SECOND SCHEDULE**

**FEES**

(Payable to the Native Land Trust Board)

	\$	c	
(1) On application for a lease or licence .....	10.00		
(2) On issue of approval notice for a lease or licence .....	35.00		F
(3) On processing to enable registration of a lease .....	20.00		
Provided that the Board may, in special circumstances waive the fees prescribed in paragraph (1), (2) or (3) or charge for the actual work done in processing the lease which charge shall not be more than 25% of the first year's rent in which event the Board may require the applicant to make an advance payment of the charge to be incurred.			
(4) On extension or variation of lease—			
on application .....	10.00		
on consent .....	5.00		
(5) On mortgage of leasehold interest—			
on application .....	10.00		
on consent .....	5.00		H
(6) On transfer of land—			
on application .....	20.00		
on consent .....	10.00		

		\$ c
A	(7) On subletting of land—	
	on application .....	20.00
	on consent .....	10.00
B	(8) Valuation fee as may legally be charged by a qualified valuer instructed by the Board but subject to a minimum of .....	20.00
	(9) On subdivision of land—	
	on application—	
B	such fee as may legally be charged by a qualified valuer or engineer instructed by the Board but subject to a minimum of .....	50.00
	on consent .....	10.00
Provided that the Board may make a charge of not more than 50% of the net profit, calculated in accordance with the appropriate formula advised from time to time by the Board, arising out of any transaction concerning the land.		
C	(10) Search fee .....	1.00
	(11) On any service of notice of arrears of rent after six months have elapsed after rent has become due .....	10.00 "

Cameron's application for consent was dealt with after this Schedule had come into operation.

D The Native Land Trust (Leases and Licences) (Amendment) Regulations, 1974 which replaces the Second Schedule did not, however, amend regulation 58(2) of the Native Land Trust (Leases and Licences) Regulations. This was an obvious omission on the part of the draftsman but, as a result of this omission, a new set of fees was prescribed for the Board's consent to dealings in native leases and licences while the old set of fees for such consent still remained in force.

E The Property Law Act, 1971 which came into operation on 1st August 1971 also has provisions which deal with leases generally. Among these is section 94 of the Act which is in following terms:

F "94. In all leases containing a covenant, condition or agreement that the lessee shall not, without the licence or consent of the lessor, assign, underlet, part with the possession or dispose of the demised premises or any part thereof, that covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of any such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent."

G The issues for the consideration of this court have been formulated as follows:

- (a) Does the proviso appearing immediately after item (9) in the Second Schedule to the Native Land Trust (Leases and Licences) (Amendment) Regulations 1974 as contained in Legal Notice No. 136 of 1974 apply to items (4), (5), (6), (7), (8) and (9) of that Schedule?
- (b) Is the making of the proviso to item (9) in the Schedule to the Native Land Trust (Leases and Licences) (Amendment) Regulations 1974 within the powers given to the Minister for Fijian Affairs by Section 33 of the Native Land Trust Ordinance Cap. 115?

H

- (c) Does Section 94 of the Property Law Act apply to Native Lease Number 13417? A
- (d) Does the Native Land Trust Ordinance Cap. 115 take precedence over the Property Law Act 1971?
- (e) Does Section 12 of the Native Land Trust Ordinance Cap. 115 give the Native Land Trust Board the power to impose conditions, requiring payment of substantial sums of money on the granting of its consent to a dealing or does the Native Land Trust Board only have power to either grant or withhold such consent? B

In brief, the plaintiffs complain that there was no legal authority for charging the two sums the Board demanded and received from them for giving its consent to the transfer. Issues (a) and (b) do not apply to the Wagner case as the Second Schedule referred to in them was not in force when Wagner's application for consent was dealt with.

With regard to the Wagner case learned counsel for the Board relies entirely upon section 12 of the Native Land Trust Ordinance. He contends that section 12, as it stands, empowers the Board to annex any condition to the granting of its consent to the transfer of a lease. This power, he says, does not depend upon any schedule of fees prescribed by regulations made under section 33 of the Ordinance. The amended schedule of fees made in 1974, he says, is not essential to the exercise by the Board of its power to impose a charge upon an applicant for its consent under section 12 of the Ordinance. He does not know why the Minister for Fijian Affairs should have considered it necessary to amend the Second Schedule. For this reason I will deal with issue (e) first. C

Section 12 of the Ordinance makes it unlawful for a lessee to transfer his lease to anyone without first obtaining the consent of the Board, and the section states that "the granting or withholding of consent shall be in the absolute discretion of the Board". Counsel for the Board submits that this "absolute discretion" gives the Board the power to attach conditions to the granting of its consent, even conditions which may be in the nature of a financial charge upon the applicant. The only limit imposed upon the exercise of the Board's discretion, say counsel, is contained in section 4(1) of the Ordinance which reads: D

"4(1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners." E

If his submission is correct the Board may attach to the grant of its consent any condition whatsoever which it considers to be "for the benefit of the Fijian owners". F

This, to me, seems a rather novel proposition. The general rule governing construction of statutes is that the intention of imposing a pecuniary charge ought not to be inferred unless such an intention has been expressed by the Legislature in clear and unambiguous language. Section 12 of the Ordinance contains no words whatever, let alone "clear and unambiguous" words from which the Legislature's intention to impose a charge may be inferred. "It is a very well established rule for the construction of statutes that, if they impose a charge on the subject, they must be strictly construed as against the party in whose favour the charge is imposed." (*The Queen v. Barclay* 8 Q.B.D. 306 at 312). As I have already said, there are no words in section 12 which may be regarded as authorising the imposition of a charge on the lessee and the power to impose such a charge may not be arrogated by implication. G

A As for section 4(1) of the Ordinance it does no more, in my view, than state the duty which the law imposes upon trustees generally to deal with the trust property for the benefit of the beneficial owners.

B Clear and unambiguous words do, however, appear in sections 10 and 11 of the Ordinance authorising the Board to make a pecuniary charge in respect of leases and licences but under those sections they may lawfully charge only "such fees as may be prescribed". The power to prescribe fees is given to the Minister under section 33 of the Ordinance. In my view, therefore, section 12 of the Ordinance, standing by itself, gives no power to the Board to impose a "levy" upon the lessee as the price of its consent.

C The next issue is whether section 94 of the Property Law Act, 1971 applies to native leases issued under the Native Land Trust Ordinance. Learned counsel for the Board submits that the Native Land Trust Ordinance deals with a special subject, i.e. native land, and that it being the earlier piece of legislation must not be regarded as having any of these provisions repealed or curtailed by the Property Law Act unless the intention to curtail or repeal can be clearly inferred from the words used in the Act of 1971. Since there are no such words in that Act, counsel says, the "absolute discretion" given by section 12 of the Native Land Trust Ordinance cannot in any way be restricted by section 94 of the Property Law Act, 1971. This would undoubtedly be true if the Native Land Trust Ordinance had, by clear and unambiguous words, given the Board the power to make a pecuniary levy for its consent to the transfer of leases issued under that Ordinance. As Viscount Haldane said in *Blackpool Corporation v. Starr Estate Co.* ([1922] 1 A.C. p. 27 at 34):

E "We are bound.....to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises the presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A mere general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to."

F But the fact that Native Land Trust Ordinance deals specifically with native land is not enough. To bring the principle of construction stated above into operation there must be clear words, apt and sufficient in this regard, to place leases issued under the Ordinance distinct and apart from leases generally. (See *Attorney General v. Exeter Corp.* [1911] 1 K.B. 1092). No such words appear in that Ordinance. In my view, therefore, section 94 of the Property Law Act, 1971 applies to the leases issued by the Board in the same manner as it applies to the leases of Crown Land issued under the Crown Lands Ordinance or to any other lease given by any other person. G The words of this section are clear and unambiguous. They are made to apply to "all leases" requiring consent. No saving clause has been inserted to exclude leases issued under the Native Land Trust Ordinance. Such a clause would have been so simple to insert if the Legislature had intended such exclusion.

H Lastly, is the proviso appearing immediately after item (9) in the current Second Schedule to the Native Land (Leases and Licences) Regulations valid? This proviso is in the following terms:

"Provided that the Board may make a charge of not more than fifty per cent of the net profit, calculated in accordance with the appropriate formula advised

from time to time by the Board, arising out of any transaction concerning the land." A

From the manner in which the Schedule has been drafted and the place where this proviso is inserted it is not at all clear what exactly is intended to attract this charge. It would, however, appear absurd to hold that it could be for anything except the Board's consent where such consent is required. The difficulty is that the Schedule relates only to regulation 58(1) which states:

"58(1) The fees which the Board shall charge and collect for the preparation of any lease or licence granted under these regulations shall be those set out in the Second Schedule to these Regulations." B

The fees for consent, on the other hand, are separately prescribed in regulation 58(2) which has not been revoked. Unless, therefore, regulation 58 were re-drafted the inclusion of fees for consent in the Second Schedule would appear to make no sense. To lend some sense to the fees prescribed for consent in the Second Schedule, regulation 58(2) would have to be completely disregarded. Additional words will also have to be read into regulation 58(1) to validate the inclusion of fees for consent in the Second Schedule. If this is the only way to avoid an absurd situation a court, in my view, should be prepared to following that way. I will therefore treat the Second Schedule as properly including fees for consent as well as for the preparation of leases and licences. I will also disregard regulation 58(2) of the Regulations which was no doubt intended to be revoked. D

"A by-law may be treated by the Courts as ultra vires and unenforceable. That is to say, if a power exists by statute, charter, or custom, to make by-laws, that power must be exercised strictly in accordance with the provisions of the statute, charter, or customs which confers the power."  
(*Craies on Statute Law*: 4th Edn. 271). E

Learned counsel for the Board submits that section 33 of the Ordinance gives the Minister unfettered powers to make any regulations whatever which are "not inconsistent with this Ordinance" and that anything done for the benefit of the Fijian owners cannot be so inconsistent. I am unable to accept this submission. The expression "not inconsistent with this Ordinance" is found in most Acts and Ordinances which give power to make regulations. Section 41 of the Crown Lands Ordinance, for instance, is in very much the same terms. Such language cannot be construed to give unrestricted power to impose obligations of a pecuniary nature. The phrase "not inconsistent with this Ordinance" has a restrictive meaning. It does not enlarge regulation-making powers; it restricts them to the purposes of the Ordinance. Any regulation repugnant to the Act under which it is made will be invalid. F

The only power that the Minister has under section 33 of the Native Land Trust Ordinance to impose charges of a financial nature on applicants and lessees is that of prescribing "the fees to be paid for any matter or thing done under this Ordinance". The Second Schedule which contains the impugned proviso is also headed "FEES". Learned counsel for the Board does not seriously contend that \$5,958 received in Cameron's case can be regarded as "fees". In fact, paragraph 5 of the statement of claim clearly suggests that what the Board required Cameron to pay was 45 per cent of what it described as "the extraordinary capital gains". This would appear to be more in the nature of a tax or a penal sum. H

A Could such a charge have been in the contemplation of the Legislature when the Ordinance was enacted? Apart from the "fees" to be prescribed by the Minister the only other sums contemplated to be received under the Ordinance would appear to have been "rents and premiums" referred to in section 14(1) of the Ordinance. I cannot, therefore, read into section 33 of the Ordinance any words which might empower the Minister to make regulations authorising the Board to charge a fine or part of the profit on sale for giving its consent to the transfer of a lease. Such a sum would not be a "fee".

B Counsel for the Board has referred me to the case of *McEldowney v. Forde* (1971) A.C. 632. That case deals with emergency regulations made by the Minister for the maintenance of peace and order during a period of political violence in Northern Ireland. The regulations so made were to be laid before Parliament before they came into operation and could be annulled by a resolution of the House. The issue there was whether or not the wording of the impugned regulation was too imprecise and vague. The case had nothing to do with imposing a pecuniary burden on the subject and I do not think any assistance can be derived from it in construing section 33 of the Native Land Trust Ordinance and the Second Schedule to the Regulations. In my view the impugned proviso in the Second Schedule could not be made by the Minister unless there were clear and unambiguous words in section 33 of the Ordinance empowering the Minister to make provision not only for charging fees

C but also for the charging of part of the profit made by a lessee on a sale. The provisions of section 28(1) of the Interpretation Ordinance, 1967 which deal with fees and charges that may be imposed by subsidiary legislation do not, in my view, cover the charging of 45 per cent, or any other percentage, of the net profit on a sale. The sum of \$5,958 demanded from Cameron for the Board's consent was clearly "a sum of money in the nature of a fine" for the purposes of section 94 of the Property Law Act, 1971.

D Section 25(b) of the Interpretation Ordinance 1967 makes the following provision:

E "25. Where an Act confers power on any person or authority to make or issue subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of such subsidiary legislation:

F (a) .....

(b) no subsidiary legislation shall be inconsistent with the provisions of any Act."

G Regulation 34(f) of the Native Land Trust (Leases and Licences) Regulations makes it a condition of every lease issued under the Ordinance that the lessee shall not transfer it without the prior written consent of the Board. The impugned proviso in the Second Schedule to these Regulations provides for the charging of a sum of money in the nature of a fine for the Board's consent to a transfer. This is obviously inconsistent with section 94 of the Property Law Act, 1971 which prohibits the charging of such a sum. There is nothing in the Native Land Trust Ordinance, or the Property Law Act, 1971, from which a "contrary intention" referred to in section 25 of the Interpretation Ordinance, 1967 may be inferred. The proviso, therefore, contravenes that section.

H For the foregoing reasons I find that the impugned proviso was made beyond the powers of the Minister and has no legal effect. The rest of the provisions of the Second Schedule are severable from the proviso and are not affected.



In view of the decision I have arrived at on issue (b) formulated by counsel, it is not necessary for me to advert to issue (a). Whether in any special case, for instance, where land is to be developed by subdivision, the Board has the power, by agreement, to insert "an express provision to the contrary" and exclude the operation of section 94 of the Property Law Act, 1971, is not an issue before me for consideration. Such an issue would, in any case, be irrelevant to the circumstances of these two cases.

The Board is a creature of statute and has no powers other than those conferred upon it by statute. If, owing to changing circumstances, these powers are now found to be inadequate the Board must go back to the Legislature and seek additional powers. There is no other legal way of acquiring them.

In the Wagner case the Board, in its absolute discretion, could have given or refused its consent to the transfer of the lease. The only charge it could, however, legally make was \$2.10 prescribed by regulation 58(2) of the Regulations, whether or not the consent was granted.

Similarly in the Cameron case the only charge that the Board could legally make was that prescribed in the Second Schedule to the Regulations which came into force on 23rd July 1974: \$20 for processing the application and \$10 more if the necessary consent was granted.

There was no legal authority in either case for demanding part of the net profit as the price of consent.

There will be judgment for the plaintiff Wagner in the sum of \$9,000.

There will also be judgment for the plaintiff Cameron in the sum of \$5,958.

No evidence was called, or submissions made, in respect of the claim for interest or for damages and these claims, in each case, are disallowed.

The plaintiff, in each case, will have the costs of the action which will be taxed in default of agreement.

*Judgment for the plaintiffs.*