

ET OLDEHAVER & COMPANY LIMITED

v

ATTORNEY-GENERAL ON BEHALF OF
THE MINISTER OF LANDS

Supreme Court Apia
19 May, 17 June 1977
Nicholson CJ

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 - Overholding 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.

Held: that the claim for specific performance must be rejected in that there was uncertainty as to the covenants and conditions of the alleged renewal agreement, and the giving of notice pursuant to the terms of the Lease was a condition precedent to conclusion of a contract for renewal, which had not been waived by the Lessor since there can be no waiver which is not intentional or deliberate;

that the overholding and the acceptance of rent did not constitute part performance, but simply evidenced lack of attention to the question of renewal of the Lease by both parties; moreover, by virtue of s 105 of the Property Law Act 1952 (NZ) the Lessee became a tenant at will subject to one month's notice to quit which had in fact been duly given by the Lessor; and the approval of the renewal by one of the beneficial owners had little significance with respect to the question of part performance;

that the claim for relief against forfeiture under s 120(3) was absolutely barred after expiry of three months from the date of refusal to renew: Reporoa Stores Limited v Treloar [1956] NZLR 359, Vince Bevan v Findgard Nominees [1973] 2 NZLR 290 applied.

ACTION claiming specific performance of right of renewal of Lease and, alternatively, relief against forfeiture.

Counterclaim for an order for possession of land.

Judgment for defendant on both claim and counterclaim.

Order made for possession with direction that enforcement be suspended for three months.

Drake for plaintiff.

Sapolu for defendant.

Cur adv vult

NICHOLSON CJ. The plaintiff claims from the Attorney-General on behalf of the Minister of Lands an order for specific performance of a right of renewal contained in a Lease. Alternatively the plaintiff seeks relief against forfeiture. The defendant denies the claim and at the same time counterclaims for possession of the premises the subject of the Lease.

The evidence before me shows and I find as facts that 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 plaintiff Company to lease a parcel of Samoan customary land for a period of ten years at a yearly rental of four hundred pounds (£400.0.0). This sum was subsequently transformed by a change of currency to eight hundred tālā (\$800.00) per annum. The Deed of Lease provides inter alia as follows:-

And it is hereby mutually agreed and declared by and between the parties hereto . . . (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.

The Lease expired on the 30th April, 1975. On the 22nd of October, 1975, in response to reminder as to arrears of rent sent by the Public Trustee, who was collecting agent for the Government of Western Samoa, Messrs Jackson & Clarke, solicitors for the plaintiff, wrote to the

Public Trustee indicating that they would arrange for payment of the rent due and also for the preparation of a renewal of the Lease. No action was taken to give the required notice in writing in terms of the conditions of the Lease, although the evidence indicates that Mr Jackson on the plaintiff's behalf did have conversation with the then Director of Lands, Mr Hunter, on the subject of the proposed renewal. Finally, on the 18th of October, 1976 a formal Application in writing for renewal of the Lease of customary land was forwarded to the Minister of Lands in Apia by Messrs Jackson & Clarke on behalf of the plaintiff. On the 23rd of October, 1976 the same firm resubmitted the Application at this time duly signed by one Leafaitulagi, a beneficial owner of the land. On the 29th of October, 1976 two letters from the Ministry were sent to Mr Jackson, one of which was under the hand of the Acting Director of Lands indicating that the beneficial owner of the land had withdrawn her agreement to the proposed renewal, and stating the need for one Seumanutafa, the person holding the "pule" over the land, to join in any application for the Lease. The second letter under the hand of the Secretary to the Minister confirmed that rent had been paid up to the 30th of April, 1977 (which date I am satisfied is incorrect and that rent was in fact paid to the 30th of April, 1976) and further stated that the Application for renewal had been referred to the Acting Director "for perusal and final recommendation to the Minister for execution if found to be in order." On the 17th of November, 1976 the Secretary to the Minister of Lands wrote again that Leafaitulagi had indicated her wish to withdraw her approval of the renewal of the Lease to the plaintiff, and drawing attention to the fact that because formal application in writing for renewal had not been given in accordance with the terms of the Lease, it seemed that the Lease had expired. The letter went on to say that the Minister of Lands had instructed the processing of the application to lease the area to a Mrs Meredith. According to a handwritten endorsement on this letter, it was received by Mr Jackson on the 18th November, 1976. As a result of that letter, Mr Jackson has told the Court of his efforts to interview the Minister of Lands, and of his writing a letter on the 26th November, 1976 formally recording the events as he saw them, and expressing his concern. On the 4th March, 1977 the plaintiff issued proceedings for specific performance, and on or about the 20th of April, 1977 filed an Amended Statement of Claim seeking relief against forfeiture. Receipts produced by the plaintiff showed that the defendant accepted rent from the plaintiff in respect of the leased premises for the period from the 1st of May, 1975 to the 30th of April, 1976 which twelve months after the expiry of the Lease.

Dealing first with the plaintiff's claim for specific performance, Mr Drake for the plaintiff has cited a number of authorities on the doctrine of part performance, in a submission that there was a concluded contract for renewal in spite of the lack of formal application for renewal within the specified time. The matters upon which he relies appeared to be:-

- (1) The initial consent to renewal by Leafaitulagi, which was later withdrawn;
- (2) The fact that no action was taken to regain possession until at least eighteen months after expiration of the term of the Lease;
- (3) The acceptance of rent for a period of twelve months after the Lease expired; and
- (4) The letter from the Secretary to the Minister dated 29th October, 1976, which Mr Drake submits suggests that the renewal was in fact in the process of being granted.

Mr Sapolu for the defence has raised a plea that the plaintiff is seeking an equitable remedy when it is "without clean hands" in that it has failed to comply with the conditions of notice for renewal.

The "clean hands" argument is not appropriate I find. I refer to 14 Halsbury's Laws at p. 530, where in para. 1000, it is observed, "A court of equity refuses relief to a plaintiff whose conduct in regard

to the subject-matter of the litigation has been improper." The learned authors then referred to examples such as fraud and misrepresentation on a plaintiff's part. Later, the authors continue, "This, however, does not mean that equity strikes at depravity in a general way; . . . it must be depravity in a legal as well as in a moral sense." From this passage it is clear that a mere negligent omission to apply for renewal does not come within the purview of the depravity at which the "clean hands" maxim is aimed.

However, I find the claim for specific performance does face two difficulties. To begin with the provision for renewal in the Lease I find to be uncertain as to its general terms. It provides for "such covenants and conditions save this present right of renewal as the Lessor and the Lessee shall then mutually agree." This uncertainty creates a major difficulty for the Court in ordering specific performance. The only certain matters appeared to be the amount of rent and the length of the term of renewal.

The second difficulty to which I refer is somewhat akin to the "clean hands" argument advanced by Mr Sapolu. I refer again to 36 Halsbury's Laws (3rd Edn.) at p. 310, where the learned authors in considering the remedy of specific performance state, "The plaintiff must show performance or fulfilment of conditions precedent . . . since until such performance or fulfilment the contract has not become absolute and the plaintiff is not entitled to enforce it." A number of authorities cited by the learned authors in support of this proposition are not available in the Court library in Western Samoa but I have no hesitation in accepting this proposition as a correct statement of the law. I find that the giving of the requisite notice was a condition precedent which the plaintiff has failed to fulfil and is thus unable to avail itself of the remedy as no absolute contractual obligation has arisen.

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.

Moreover, the elements of the alleged part performance fall short of proof to the required standard of a concluded contract of renewal. I accept Mr Jackson's evidence that originally one beneficial owner was willing to renew, but on the evidence I must hold that this was insufficient. Section 2 of the Alienation of Customary Land Act 1965 contains the definition of a beneficial owner. It is as follows:-

"Beneficial owner", in relation to any customary land or any interest therein, includes any Samoan who is entitled in equity to occupy the same or to share in the occupation thereof or to have the income therefrom or a share in that income paid to or held in trust for him, or who is entitled in equity to any such benefit contingently or in any reversion; and does not include any Samoan who holds any such land or interest only by way of trust, mortgage or charge.

The Land and Titles Court of Western Samoa in a decision delivered on the 28th September, 1955 under number L.C. 1430 found that -

- (1) The pule of the land in question was vested in the holder or holders of the title Seumanutafa of Apia.
- (2) The proper persons to appear as lessors in the lease to one Lealaitafea Ene are Seumanutafa Pogai and Seumanutafa Loligi and the lease may if Leafaitulagi so desires be approved by her.
- (3) As the present holders have agreed that within the family, Leafaitulagi shall be regarded as having a life interest in the land, the rent payable under the lease shall be payable

- to Leafaitulagi during her lifetime.
- (4) If Leafaitulagi shall die during the currency of the lease then as from the date of her death the rental monies shall be payable to the holder or holders of the title Seumanutafa for the time being.

The effect of that decision, in my view, is to demonstrate quite clearly that the present holder of the title Seumanutafa must be regarded as a beneficial owner within the terms of the Alienation of Customary Land Act 1965. At the very least he is entitled in equity to the income of the property in reversion upon the death of Leafaitulagi, but it also appears to me that he has a right to occupy the land in question subject to any lease. I conclude, therefore, that the signing of the application for renewal by Leafaitulagi was insufficient, and that Seumanutafa was required to join in the application. From the point of view of an argument based upon part performance, Leafaitulagi's signature alone has little significance.

The holding over by the plaintiff and the acceptance of rent by the defendant after expiration of the Lease I do not find particularly compelling evidence of acts of part performance. Indeed, I am satisfied looking at the evidence as a whole, that they are merely two of the symptoms of the somewhat lackadaisical approach by both parties to this important question of a prompt renewal. The significance of the payment of rent, I feel, is further eroded by the terms of Section 105 of the Property Law Act 1952 of New Zealand which Act is for reasons I will later mention in force in Western Samoa. It provides as follows:-

No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy it shall be deemed in the absence of proof to the contrary to be a tenancy determinable at the will of either of the parties by one month's notice in writing.

The Ministry of Lands no doubt acting in terms of that section gave one month's notice to quit to the plaintiff on the 20th of January, 1977. I conclude that the argument of proof of the concluded contract based upon part performance must fail and that the claim for specific performance or indeed for damages in lieu of specific performance must be rejected.

I turn now to the application for relief against forfeiture. This is based upon the provision of Section 120 of the Property Law Act 1952 of New Zealand and under subsection (3) of that Section, it provides:-

- (3) Where -
- (a) By any lease to which this section applies the lessor has covenanted or agreed with the lessee, that subject to the performance or fulfilment of certain covenants, conditions, or agreements by the lessee, the lessor will -
- (i) On the expiry of the lease grant to the lessee a renewal of the lease or a new lease of the demised premises; or
- (ii) . . . ; and
- (b) The lessor has refused to grant that renewal or that new lease or to assure that reversion, as the case may be, on the ground that the lessee has failed to perform or fulfil the said covenants, conditions, and agreements, or any of them,

the lessee may in any action (whether brought by the lessor or the lessee and whether brought before or after the commencement of this Act), or by proceeding otherwise instituted, apply to the Court for relief.

By subsection (4) of the Act the Court is empowered to grant renewal on such terms in relation to the costs, expenses, damages, compensation,

penalty or otherwise as the Court may think fit. The New Zealand Property Law Act 1952 is in force in Western Samoa as a result of -

- (a) Article 114(a) of the Constitution of Western Samoa which provided that the existing law at Independence until repealed by Act continued in force on and after Independence Day and,
- (b) Section 370 of the Samoa Act 1921 of New Zealand which made applicable in its fourth schedule certain Acts of New Zealand including the Property Law Act 1952.

Section 121 of the Property Law Act 1952 places a limitation of time on applications for relief in requiring under subsection (1) that any application for relief against forfeiture may be made at any time within three months after the refusal of the lessor to grant a renewal of the lease has been first communicated to the lessee.

In Reporoa Stores Limited v. Treloar [1956] N.Z.L.R. 359 Stanton J. of the New Zealand Supreme Court held that failure to apply for relief within that three month period was an absolute bar. In Vince Bevan v. Findgard Nominees [1973] 2 N.Z.L.R. 290, the New Zealand Court of Appeal confirmed that no application made after three months from the date of a refusal to renew can be entertained.

In the instant case, I have no hesitation in concluding that the letter of the 17th November, 1976 under the hand of the Secretary to the Minister of Lands, which was apparently received on the 18th November, 1976 by the plaintiff's solicitor was a clear refusal to grant a renewal, and the grounds for refusal were clearly set out therein, namely, that the beneficial owner Leafaitulagi wished to withdraw her agreement to the Application for renewal, and that the required three months' notice for a renewal had not been given in time. Under these circumstances, I conclude that the three month period of limitation against applying for relief against forfeiture commenced to run from the 18th November, 1976 and since no application for relief against forfeiture was made until the Amended Statement of Claim dated the 20th April, 1977 was filed, I conclude that the application for relief against forfeiture is time barred.

I note that the pleadings of the plaintiff in the Amended Statement of Claim include an allegation that the Statement of Defence and Counterclaim was the first notice which the plaintiff had had that the right of renewal no longer existed because it had expired. However, the letter of the 17th of November, 1976 from the Ministry of Lands states that the view of the Ministry was that the Lease had expired. In paragraph 4, the letter states, "the last lease to Oldehaver was the one for 10 years from 20th December, 1965 with a right of renewal to be exercised by notice in writing to be given within three months of the expiration of that period of 10 years (that is before 20th December, 1975). There is nothing in our file to show that Oldehaver has exercised his right and it seems therefore that the lease has expired." The letter then goes on to inform the plaintiff's solicitor of the intention to lease the land to Mrs Meredith. I consider this is a clear statement that the grounds of refusal include the fact that the Lease had expired and that the time for applying for renewal had run out.

For the reasons I have given the claim for an order for relief against forfeiture must be refused. There will be judgment for the defendant on both the claim and counterclaim with an order that the plaintiff deliver up possession of the land. Having regard to the circumstances of the plaintiff Company, I direct that any warrant to enforce this order for possession will be suspended until the expiry of three months from the date of judgment. The plaintiff will pay costs on both the claim and counterclaim as fixed by the Registrar.

NOTE

This Judgment was affirmed by the Court of Appeal 27 October 1977, post p. 159.