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MEDIUM PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 145/87

Under the Declaratory Judgments Act 1908

BETWEEN MACKAY FARMS LIMITED

Appellant

AND COMMISSIONER OF CROWN LANDS for the Land District of Otago

Respondent

Coram: Cooke P.
Richardson J.
Bisson J.

Hearing: 17 March 1989

Counsel: C.S. Withnall Q.C. for Appellant
K. Robinson for Respondent

Judgment: 23 March 1989

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal from a judgment of Tompkins J. given in an action for declarations under the Declaratory Judgments Act 1908. The case was argued before the Judge on the following agreed statement of facts:

> For the purposes of these proceedings only, the following facts are agreed between the Plaintiff and the Defendant:
>
> 1. By transfer registered in the Land Transfer Office on 24 June 1970, the Plaintiff became the Lessee pursuant to renewable lease registered as Volume 362, Folio 164 (Otago Registry).
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> 2. Such lease was granted under the Land Act 1948 for a term of 33 years plus some days odd expiring on 30 June 1984...

3. The Defendant requested a valuation for the purposes of renewal of the lease on 12 October 1984 but without there being then or at any time thereafter, any requirement so to do from the Plaintiff.

4. Such valuation was made on 11 March 1985 after a visit to the property on 8 March 1985, but was reflective of the period between 1 July 1981 and 30 June 1982 and was made as at 1 October 1981.

5. The Notice of Renewal Values was sent by the Defendant to the Plaintiff on 2 October 1985 and was received by the Plaintiff on 7 October 1985.

6. By notice dated 24 March 1986 and received by the Defendant on 3 April 1986, the Plaintiff elected to have the value of land exclusive of improvements fixed by the Land Valuation Tribunal.

7. During the period from 1 October 1981 to 11 March 1985 fluctuations occurred in values of farm land which may have resulted in a difference in the value of the land exclusive of improvements if a valuation had been made as at 11 March 1985.

With regard to paragraph 6, counsel for the lessee (the plaintiff and appellant) informed us that when electing to have the value of the land fixed by the Tribunal the lessee also gave notice that it desired a renewal lease.

For the purposes of this judgment there is no need to distinguish between the Land Settlement Board and the Commissioner of Crown Lands, nor between the Land Valuation Tribunal and the Administrative Division of the High Court (or this Court on appeal therefrom by leave).

It is common ground that the case is governed by the provisions of the Land Act as they stood before amendments

in 1970. Section 63 provides that a renewable lease under the Act shall be for a term of 33 years with a perpetual right of renewal for the same term; but the actual machinery for renewal is contained in Part VIII of the Act. Sections 131 and 132 are particularly material:

> 131. **Valuation for calculation of renewal rent** -
> (1) Not earlier than three years and not later than two years before the expiry of a renewable lease the Board shall cause the following values to be ascertained:
> (a) The value of the improvements which are then in existence and unexhausted on the land included in the lease, and which have either been put on the land by the lessee or his predecessors in title during the continuance of the lease or have been purchased by the lessee or his predecessors in title as existing at the commencement of the lease.
> (b) The value of all other improvements which are then in existence and unexhausted on the land included in the lease.
> (c) The value of the land included in the lease exclusive of the said improvements:
> Provided that the sum of the values under paragraphs (a), (b), and (c) of this subsection shall not exceed the capital value of the land.
> Provided also that where all the improvements on the land included in the lease have either been put on the land by the lessee or his predecessors in title during the continuance of the lease or have been purchased by the lessee or his predecessors in title as existing at the commencement of the lease, the Board may cause only the value of the land exclusive of the said improvements to be ascertained.
>
> (2) For the purposes of the last preceding subsection, the expression 'capital value' means the sum which the land and improvements thereon might be expected to realize at the time of valuation if offered for sale, unencumbered by any mortgage or other charge thereon, on such reasonable terms and conditions as a bona fide seller might be expected to require.
>
> (3) In respect of the improvements referred to in paragraph (b) of subsection one of this secton the lessee shall, at his option, either -

(a) Purchase the improvements at the value determined either for cash or by instalments, together with interest at such rate as may be fixed by the Minister of Finance, over such period not exceeding thirty years as may be determined by the Board; or

(b) Pay interest at such rate as may be fixed by the Minister of Finance on the value so determined, in the same manner as rent.

(4) The rental value of the land for the term of the new lease shall be the value of the land as determined under paragraph (c) of subsection one of this section, and where the lessee elects pursuant to the last preceding subsection to pay interest on the improvements referred to in paragraph (b) of subsection one of this section, shall include the value of those improvements as determined under that paragraph.

(5) The yearly rent for the term of the new lease shall be such proportion as may be fixed by the Minister of Finance of the rental value as defined in subsection (4) of this section.

(6) As soon as possible after the values have been ascertained under subsection one of this section, and not later than eighteen months before the expiry of a renewable lease, the Commissioner shall deliver to the lessee a notice in writing informing him of those values, and requiring him to elect whether he will accept a renewal lease at the rent based on those values, and to make his election in respect of improvements in accordance with subsection three of this section.

(7) If the Board omits to cause the said values to be ascertained, or the Commissioner omits to deliver the said notice to the lessee within the prescribed times, the lessee may require the values to be ascertained and notice to be given at any time thereafter so long as he remains in possession of the land, whether the term of his lease has or has not expired, and his right to a renewal of the lease shall not be affected by any such omission or delay.

132. **Lessee's Election** - (1) Within six months after the receipt of the notice referred to in the last preceding section notice in writing shall be given to the Commissioner by the lessee to the effect -

(a) That he accepts the offer of a renewal lease at the rent based on the values set out in the notice and exercises his option in respect of improvements in accordance with subsection three of the last preceding section; or

(b) That he does not desire a renewal lease, and agrees to the value of the improvements under paragraph (a) of subsection one of the last preceding section; or

(c) That he does not desire a renewal lease, but requires the value of the improvements under paragraph (a) of subsection one of the last preceding section to be fixed by the Land Valuation Court as hereinafter provided; or

(d) That he desires a renewal lease, and requires any of the values set out in subsection one of the last preceding section to be fixed by the Land Valuation Court as hereinafter provided.

(2) If the lessee of a renewable lease omits to give to the Commissioner within the time limited therefor the notice referred to in the last preceding subsection, he shall be deemed to have agreed to accept a renewal lease at a rental value ascertained in accordance with subsection four of the last preceding section, and to have agreed to the values set out in the notice given to him by the Commissioner.

The case arises because of a fall in land values. The 33 year term expired on 30 June 1984, the Board having failed to cause values to be ascertained as required by s.131(1). The lessee failed to exercise its remedy under s.131(7). The Board endeavoured to set the machinery of the Act in operation belatedly, as appears from the agreed statement of facts. The lessee responded by making the elections already mentioned, yet in July 1986 began the action, claiming inter alia that the valuation and notice of it were invalid. The real issue in this case, however, is the date as at which any valuation should be made.

The Judge held that, although the Board had failed to comply with its mandatory duties, the failure was not fundamental and had not prejudiced the plaintiff and should not result in the valuation being declared invalid. Further the Judge held that the Board acted correctly in causing the valuations to be ascertained as at 1 October 1981, being a date within the prescribed period between 1 July 1981 and 30 June 1982.

It seems to us that the scheme of the Act is all-important. Once the period of one year specified in s.131(1) has passed without action as required by that subsection, the Board or the Commissioner are in breach of their duties; but the lessee, if still in possession, may require the statutory valuation machinery to be set in motion. That would not commit him to taking a renewal at an unacceptable rental, as he would have options at the stage covered by s.132. Moreover if a valuation by (now) a Land Valuation Tribunal is required by the lessee, he may thereafter still elect not to accept a renewal lease or forfeit his right to one, in which event there are some provisions for compensation for improvements if an incoming lessee can be found to pay for them: see ss.134 to 137.

That is a scheme of interlocking provisions. We do not think that it matters whether they be regarded as statutory or contractual, nor whether they be described as within 'public' law or 'private' law. The Judge invoked the

principle relating to restraint in the setting aside of administrative decisions illustrated by such cases as A.J. Burr Limited v. Blenheim Borough Council [1980] 2 N.Z.L.R. 1. In our opinion there is no need to use this approach when the statutory or contractual scheme provides its own mechanism for dealing with delay. If the lessee wishes to renew or to preserve his opportunity to renew, the remedy is in his own hands. He can set the valuation machinery in motion under s.131(7). Unless he does so, or by agreement or waiver allows the Board to do so, there is no way in which he can exercise his right of renewal: on notice to quit or on any other appropriate procedure the Board will be entitled to recover possession - and possibly without compensation for lessee's improvements. The important point is that exercise of the right of renewal is inextricably bound up with the valuation machinery.

As regards the date as at which any valuation for renewal purposes must be made, s.131(1) in the form in which it stood for the purposes of this case fixed a certain period, that is to say not earlier than three years and not later than two years before the expiry of the renewable lease. Paragraphs (a) and (b) refer to improvements 'then' in existence. Subsection (2) has the phrase 'at the time of valuation'. Subsection (6) imposes an obligation on the Commissioner 'As soon as possible afer the values have been ascertained under subsection one of this section...' Subsection (7) refers to 'the said values' and 'the values'.

Section 132 uses throughout 'the values set out in the notice' and corresponding language. The subsequent sections use similar language. It is clear, we think, that the statute contemplated at all stages a valuation of the land at a time between the three and the two years. Delay in obtaining it is not intended to alter the date as at which it is to be made, referred to in the Act as 'the time of valuation'. The right to renewal is at a rent based on a value at that time. In a period of rising land values this will probably be to the benefit of the lessee; in a period of decreasing land values the lessor will probably benefit.

Cases in the line of United Scientific Holdings Ltd v. Burnley Borough Council [1978] A.C. 904 do not provide direct guidance as to the interpretation of the New Zealand statutory scheme, but they are in point by analogy to the extent that they establish that the rents fixed by valuations are payable retrospectively from the review dates. There is also relevance in the observations of Lord Diplock (at 931-2) to the effect that delay in fixing the new rent operates to the economic benefit of the tenant, who has the use of money in the meantime.

It has been said that the statute contemplates a valuation fairly reflecting as between lessor and lessee the standard of land values prevailing in the year in question: Commissioner of Crown Lands v. Kinney (1964) New Zealand Valuer 273, 274, per Judge Archer. Adopting that view, we

would hold that the Land Valuation Tribunal are not bound in this case to take 1 October 1981 as the time for valuation. Such time between 1 July 1981 and 30 June 1982 may be taken as is fair to both parties. Paragraph 4 of the agreed statement of facts may recognise this.

The effect of what we have said is substantially to endorse the conclusion and reasoning of Tompkins J. as to the valuation date. Regarding the Board's action in obtaining a valuation out of time, the lessee would strictly have been entitled to insist that this was invalid and ineffective as not requested by the lessee; but at best for the lessee that would have led to some delay, since the Act does not give the lessee a right to remain in possession unless the valuation and renewal machinery is set in motion by one party or the other.

In the present case, and one would expect in other similar cases, the lessee protected its rights by giving notice that it desired a renewal lease and electing to have the land value fixed by the Tribunal. That constituted, we think, a true election by which the lessee must be bound. In effect the lessee has waived objection on the ground of delay. As noted earlier, the lessee is not finally committed to renew, having the rights conferred by ss. 134 to 137. The practical result is the same as that reached by the Judge, though the route is different. Accordingly we

dismiss the appeal but, having regard to the somewhat different reasons, without costs.

RB Cooke P.

Solicitors:
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Crown Law Office, Wellington, for Respondent