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FB FIRST Maori land cases

IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

A. 28/82

IN THE MATTER of the Declaratory Judgments Act 1908

A N D

1505

IN THE MATTER of Memorandum of Lease Registered Number VOLUME 429 FOLIO 239 (Wellington Registry)

BETWEEN THE PROPRIETORS OF PARININIHI KI WAITOTARA BLOCK a body corporate established as a Maori Incorporation under the Maori Affairs Act 1953 and having its registered office at Stratford.

Plaintiff

A N D DUNCAN STEWART ROBERTSON of Waverley, Farmer and his wife GILLIAN ROBERTSON

Defendants

Hearing: 7 June 1984

Counsel: W.S. Shires Q.C. for Plaintiff
R.A. McGechan and J.B. McCarthy for Defendant

Judgment: 7 December 1984

JUDGMENT OF ONGLEY J.

The plaintiff seeks a declaratory order determining the terms upon which the defendants as Lessess under a certain

memorandum of Lease Registered Number Volume 429 Folio 239 (Wellington Registry) are entitled to the renewal thereof.

The lease in question relates to 532 acres of farmland in the Taranaki area and was initially granted by the Native Trustee (later the Maori Trustee) under the West Coast Settlement Reserves Act 1892 for a term of 21 years from 14 April 1936. The document itself is dated 26 February 1937. The term was extended by Memorandum of Extension of Lease under Section 3 of the Maori Trust Leases Renewal Act 1953 dated 23 July 1957 for a further period of 21 years expiring on 15 April 1978. At the time of the extension the West Coast Settlement Reserves Act 1892 with all amendments had been repealed by the Maori Reserved Land Act 1955, under which the demised land was "Reserved Land", Part IV of the Act having particular application to the land as a "Settlement Reserve".

Prior to its repeal the West Coast Settlement Reserves Act 1892 had undergone successive amendments in 1893, 1900, 1902, 1913, 1914, 1915, 1916, 1935 and 1948, all of which with the exception of the last had preceded in date the initial term of this lease. Only the 1935 and the 1948 amendments could have any significant bearing on the question now to be determined.

Provisions relating to renewal of the lease were contained in mutual covenants designated as (b) and (e) on page 3 of the Memorandum of Lease in the terms following:

"(b) All the provisions of the West Coast Settlement Reserves Act 1892 which are applicable to the renewal of leases granted under that Act shall be incorporated herein.

(e) This lease is perpetually renewable under and subject to the provisions in that behalf contained in the West Coast Settlement Reserve Act 1892 and its amendments."

It should be noted that the two provisions are expressed in a somewhat different way from each other. Clause (b) expressly incorporates in the lease provisions of the Act applicable to the renewal of leases but contains no reference to amendments to the Act. Clause (e) makes the lease subject to the provisions of the Act as to renewal but does not expressly incorporate the provisions of the Act into the lease. On the other hand the latter covenant gives effect to the Act and its amendments. I think that the effect of clause (b) was to incorporate the relevant provisions of the Act and its amendments at the date of grant in lease as contractual terms to which the renewals in perpetuity would necessarily have reference whether the Act or its amendments remained in force or were repealed. The amendments contemplated by clause (e) on the other hand appear to me to be those future amendments enacted prior to and in force at the time of any renewal. I shall return to that distinction later in this judgment but it is sufficient to say at this point that at the commencement of the lease the provisions of the Act as it stood with all amendments up to and including the 1935 amendment

governed the terms of renewal by virtue of being incorporated in the lease.

In the year 1935 questions arising out of the renewal provisions of the West Coast Settlement Reserves leases, of which I am informed there are now and presumably were then more than 300 granted in similar terms, were the subject of litigation concerning the application of Sections 56-60 of the First Schedule to the Act. Section 48 of the First Schedule provided that every lease was to be for a term fixed so as to expire twenty-one years from the date of commencement of the term and was to be renewable from time to time as thereinafter provided. Sections 56-60 contained the provisions as to the method of calculation of renewal rentals. Section 56 as originally enacted provided that not sooner than three and a half years and not later than one year before the end of the term a valuation was to be made by arbitration of the then value of the "fee simple" and also of "substantial improvements of a permanent character made by the lessee during the term and then in existence on the land." The lessee could then elect whether to accept a fresh lease for a further term of 21 years at a rental of 5% on the "gross value of the lands after deducting therefrom the value of the substantial improvements of a permanent character as fixed by arbitration." Prior to 1935 the only amendment to that provision was made in 1913 and was a machinery provision only. In practice the system was

applied by taking the gross value of the land i.e. its market value as it then stood, and deducting from that the total worth of all improvements which had been made to the land since the commencement of the initial term. The 5% rental was then assessed on the residual value. This approach was challenged in the case of Groom v Crocker [1935] NZLR 1030 in which Blair J. held that the earlier practice was wrong and that from the gross or market value of the developed land there should be deducted only the value of improvements carried out during the term then expiring so as to arrive at the residual value of the land upon which the renewal rental was to be assessed. The obvious effect was to increase rentals to a substantially greater extent upon renewal than had previously been the case.

Parliament moved quickly to counter the anticipated trend by enacting Section 19 of the Maori Purposes Act 1935 which came into effect on 26 October 1935, the judgment in Groom v Crocker having been delivered on 17 July of the same year. Section 19 reads as follows:

> "(1) In this section, if not inconsistent with the context, "the said Act" means the West Coast Settlement Reserves Act, 1892, and includes the Schedule thereto and all amendments of the said Act and Schedule.
>
> (2) The words "value of the fee-simple of the lands" or "the gross value of the lands" where they occur in section fifty-six of the said Act shall mean the capital value of the lands or the exchangeable value in money or the marketable value or the sum which the

land if unencumbered by any mortgage or other charge thereon or any lease might be expected to realize at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require.

(3) Notwithstanding anything to the contrary in any other Act, the words "substantial improvements of a permanent character" in sections fifty-six and fifty-seven of the said Act shall have the same meaning as improvements in the Valuation of Land Act, 1925, and any amendments thereof, and any Act passed in substitution thereof.

(4) Where in the said Act it is provided that in ascertaining the rental to be paid by the lessee for the renewed term of any lease granted under the said Act a valuation by arbitration of the fee-simple of the lands comprised in the lease and a valuation of all substantial improvements of a permanent character made by the lessee and then in existence on the land comprised in the lease must be made, it shall be lawful for the lessor to offer to the lessee a lease for the renewed term at a rental based at not more than five per centum per annum on the unimproved value of the leased land as disclosed by a special valuation made for the purpose, under the Valuation of Land Act, 1925, or any Act amending or passed in substitution thereof in lieu of such arbitration.

(5) Section fifty-six of the said Act is hereby amended by omitting from the first paragraph thereof the words "made by the lessee during the term and", and this amendment shall be deemed to have taken effect from the first day of January, nineteen hundred and thirty-four.

(6) Whereas cases have occurred and are likely to occur where the valuations required to be made by sections fifty-six and fifty-seven of the said Act have not been made or may not be made within the time limited either by the said section fifty-six as amended by section twenty-five of the West Coast Settlement Reserves Amendment Act, 1913, or

> the said section fifty-seven now for the purpose of enabling such valuations to be carried out, it is hereby enacted that the same may be made at any time not later than the thirty-first day of December, nineteen hundred and thirty-six, and the said sections are modified accordingly."

Sub-section 5 was clearly directed to ameliorating the effect of the decision in Groom v Crocker for the Lessees. The overall effect of the legislation was summarised by the Royal Commission which inquired into the West Coast Settlement Leases in 1948 under the chairmanship of the then Chief Justice, Sir Michael Myers as follows:

> "However all that may be, what Section 19 does is merely to invoke the definitions of "capital value" and "improvements", but that does not mean that the rental is based upon the "unimproved value" in accordance with the provisions of the Valuation of Land Act. On the contrary, under the enactment as passed it is enacted in effect that all permanent improvements are to be taken into account whenever effected, and not merely those effected during the current and expiring term, and, instead of the "unimproved value" being ascertained first as it would be if all the definitions of the Valuation of Land Act had been invoked, and the rental fixed at 5% of the value, the capital value is ascertained first, then the improvements, and the rental is based at 5% on the residue in accordance with the Schedule to the 1982 Act. The capital value and the value of the improvements were still to be ascertained by arbitration, and the arbitrators were at complete liberty to fix their own valuations and to disregard the valuations made by the Government Valuers as appearing on the Valuation Roll."

Further legislation followed the report of the Royal Commission in the form of the West Coast Settlement Reserves Amendment Act 1948 which instituted a new regime for determination of rentals upon renewal. This system was subsequently carried forward into Part IV of the Maori Reserved Land Act 1955 which repealed the Act of 1892 and all its amendments and by Section 3(3) provided for all lands previously subject to the West Coast Settlement Reserves Act 1892 to become "Settlement Reserves" subject to the provisions of the new Act. By virtue of Section 3(6) such lands were deemed to be Reserved Land and the fee simple continued vested in the Maori Trustee and by Section 7 was deemed Maori freehold land.

By the time the lease with which these proceedings are concerned came up for renewal in 1957 the method of fixing the rental was determined by Part IV of the Maori Reserved Lands Act and by then it appeared that the long conflict had been laid to rest. The lease was renewed upon a rental fixed in accordance with Part IV so as to expire in the year 1978.

Had the leased land continued to be vested in the Maori Trustee it would seem that no problems were likely to arise in connection with the fixing of the renewal rental in 1978. However in the year 1976 the land became vested in the plaintiff by virtue of the enactment of Section 15A of the

Maori Reserved Land Act by Section 11 of the Maori Purposes Act 1975 and the consequential Parininihi Ki Waitotara Order 1976 which came into force on 28 February 1976.

Section 15A(1) provided for the constitution by the Governor-General by Order in Council of the beneficial owners of parcels of reserved land as Maori incorporations under Part IV of the Maori Affairs Act 1967. Such an incorporation by subsection (4) was to be entitled to have the freehold of the land specified in the Order transferred to it in accordance with the provisions of Section 15A(6) and all land so transferred, on the registration of the transfer, ceased to be "Reserved Land" within the meaning of the Act and by subsection (7) became Maori freehold land.

The plaintiff incorporation was constituted by Order in Council with effect from 28 February 1976. The land subject to Memorandum of Lease Vol. 429 Fol. 239 was transferred to the plaintiff in accordance with Section 15A(6). Since the expiry of the second term of the Lease on 15 April 1978 no further renewal has been granted for the reason that the parties are not in agreement as to the terms upon which the defendants are entitled to a renewal and particularly the basis upon which the rental is to be assessed.

The plaintiff contends that as the land is no longer "Reserved Land" within the meaning of the Maori Reserved Land

Act 1955 the provisions of that Act no longer apply to the fixing of the rental but that the terms of the legislation as it stood at 26 February 1937 which were incorporated in the lease as terms of the contract have again become effective to govern renewals granted by the plaintiff. Had the intention of the parties been to include future amendments Mr Shires submits that the wording would have been explicit in that regard and calls in aid the presumption that parties contract with reference to the law as it exists at the time of the contract. If that view be correct the regime established by the 1948 Amendment would not be applicable after the repeal of the principal Act. The renewal in 1957 was effected by Memorandum of Extension of Lease under Section 3 of the Maori Trust Leases Renewal Act 1953 the effect of which, in Mr Shires' submission, was to continue the existing contract subject only to the substitution of a new rental. If it had been intended that the provisions of Part IV of the 1955 Act should be incorporated in the lease it was open to the parties expressly to stipulate for that. As they did not do so he submits that the provisions of the 1892 Act as to renewals as they stood at the date of the lease continued unaltered as contractual terms.

It is conceded by the plaintiff however that the 1958 renewal was granted pursuant to Part IV of the 1955 Act. Section 60 affirms the lessee's right to a renewal as nearly as may be in acordance with the terms covenants and conditions of

the lease for the last expired term "subject to the provisions of this Act". Section 61 is to like effect. It is clear then that the contractual terms must have yielded to the Act at the time of that renewal.

On the land ceasing to be reserved land within the meaning of the 1955 Act and so ceasing to be subject to the Act, two provisions of the Act became of particular relevance in relation to renewals. They were Section 15A(6) and Section 14(4), the provisions of the latter Section being made applicable to current leases of land transferred to a Maori incorporation pursuant to Section 15A (see S.15A(9)).

The operation of S.15A(6) was uncomplicated in relation to leases of land transferred to an incorporation. It provided for the transfer of the land "subject to all leases, licences, charges and other encumbrances." It is the operation of S.14(4) that is at the heart of the present question. The sub-section is as follows:

> "The rights, duties, and obligations of the Maori Trustee under any leases granted or administered by him pursuant to this Act shall, upon the vesting by an order under this section of the land comprised in any such lease, be exercisable by and enforceable against the legal owner or owners for the time being of the land, and all the provisions of the lease and any provisions of this Act incorporated in the lease, either directly or by reference, and relating to the service of notices and the making of applications and the like, upon, to, or by the Maori Trustee shall be read accordingly."

The subsection is divisible into two parts. It relates primarily to leases of land vested in beneficial owners by order of the Court. The first part provides that the rights, duties and obligations of the Maori Trustee under any leases of such land granted or administered by him pursuant to the Act shall be exercisable by and enforceable against the legal owner for the time being of the land. The second part is distinguishable in its drafting in that it relates to "all the provisions of the lease and any provisions of this Act incorporated in the lease." The specific matters dealt with in the second part of the subsection appear to be matters of a procedural or formal character. In my view it is intended to apply only to such matters and does not extend to the granting of renewals of leases, the fixing of rentals and such like matters.

It remains to consider the application of the first part of Section 14(4). Mr McGechan submits that the conclusion is logically open that although the land no longer is reserved land within the meaning of the Maori Reserved Land Act 1955 its provisions can still remain applicable by reference, the intention of the legislature being that the Act was to remain a reference by which existing relationships are to be governed. He submits that common sense and the avoidance of absurdity support a construction favouring the continued application of the 1955 Act; that it is unlikely that the legislature would

revive the application of an Act repealed twenty years before without using express words to indicate such an intention. Arguing from a practical point of view Mr McGechan submits that it is improbable that in 1975 in the knowledge that for 20 years past farmer lessees had carried on operations involving programmes of improvement to their farms on the basis that they were secure in their rights of perpetual renewal under the Maori Reserved Land Act 1955 Parliament would have imposed upon them a regime last operative before the 1955 Act was passed. There is much force in that argument and had the legislature chosen to continue in force the provisions of the 1955 Act I think it unlikely that either party would have complained. As it happens, however, I do not think that the legislation has that effect.

From its inception the legislation governing these leases has made a distinction between statutory provisions incorporated in the contract and the imposition of statutory terms upon the contract. As I read the contract document that distinction was apparent when it was signed. By clause (b) of the mutual covenants the provisions of the 1892 Act applicable to the renewal of leases were incorporated in the lease. I take it to be logical that that covenant makes no reference to the amendments to the Act. I interpret the provision to refer to and include the Act as it stood at the date of the execution of the document. The terms of the legislation were certain and

quite understandably could be incorporated in the lease in their known form. I do not think that the clause contemplated the incorporation of as yet unknown amendments as terms of the lease; but clearly the legislature did not intend to surrender its control over and supervision of the contract and the lease recognised that by providing in clause (d) that the lease would be renewable under and subject to the provisions of the Act and its Amendments. That in my view meant and included future amendments. To provide that a perpetually renewable lease which was governed by legislation should be affected only by existing amendments of the Act to which it was subject could over the long period during which renewals were in contemplation lead to anachronisms. Whether clause (e) had been incorporated in the lease or not it would have been open to the legislature to intervene at any time but the purpose of the clause in my view was to evidence the intention of the parties that their contractual rights and obligations were to be circumscribed to that extent. That is not such a startling concept in the light of the history of these leases which are the creatures of statute and have always been subject to statutory intervention at the discretion of the legislature in an endeavour to balance the interests of the parties as fair dealing has appeared from time to time to dictate. The pattern of the drafting of the original document assists in the reading of Section 14(4). The distinction in the lease between terms incorporated in it and legislative provisions governing it is

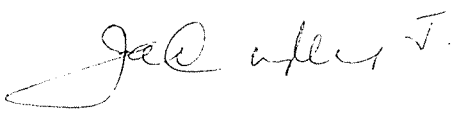
again apparent in Section 14(4) . Although the second part of the subsection relates only to procedural and formal matters this distinction is discernible there. All provisions of the Act relating to the lease are not made applicable; only those incorporated in the lease are affected. I am unable to accept that every provision of the legislation relating to the lease is deemed to be incorporated in it by reference. If that were so it would be unnecessary to say anything but that the provisions of the Act should continue to apply. If some are to be regarded as incorporated and some not, how is the distinction to be made?

Turning to the first part of the subsection one finds no reference to the Act at all. That part is concerned with the "rights, duties, and obligations ... under any leases." If the provisions of the Act are not incorporated in the leases how can it be said that the rental renewal provisions of Part IV are to be regarded as rights, duties or obligations under the lease? I do not believe such a construction is open. I do not pretend to be able to divine the motivation for returning to the old regime but I conclude that that is the effect of the legislation. To reach any other conclusion it would be necessary to import other words into the subsection or distort the ordinary meaning of the words used in it. I am not persuaded that the result of the construction which I have given to Section 14(4) is so unreasonable that the words should

be given any other meaning than that which they literally bear. That the Act from which the contractual terms are derived has been repealed is not a hindrance to this construction. The effect of Section 20(h) of the Acts Interpretation Act is to continue the relevant provisions in force for the purposes of the contract.

I declare thereforth that the defendants are entitled to a renewal of the lease on the terms provided in the West Coast Settlement Reserves Act 1892 as amended up to and including the amendment enacted by Section 19 of the Maori Purposes Act 1935.

Costs are reserved. I will hear Counsel further in that connection.



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