

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from Judgment of the High Court of Solomon Islands (Goldsbrough J)

COURT FILE NUMBER: Civil Appeal Case No. 3 of 2010 (On Appeal from High Court Civil Case No. 176 of 2009)

DATE OF HEARING: 7 October 2010

DATE OF JUDGMENT: 11 October 2010

THE COURT: Auld, P
Adams, JA.
Hansen, JA.

PARTIES: **Anthony Chee Ming WONG** Appellant
-V-
Attorney General & Commissioner of Lands Respondent

ADVOCATES:

Appellant: Mr. Hapa for Wong

Respondent: Mr. Banuve

ALLOWED/DISMISSED: **DISMISSED**

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JUDGMENT OF THE COURT

Introduction

1. The appellant acquired by purchase a “fixed-term estate” in land (specified as a particular enumerated “parcel”), near the township of Honiara, of which the owner of the perpetual estate was the Commissioner of Lands. The vendor had obtained a grant of what was described in the grant as “an estate in the land” for a term of fifty years. The grant contained the following term –

The GRANT is subject to the reservation in favour of the Grantor of the right, subject to ... notice being given ... to resume, without payment to the Grantee(s) of any compensation for unimproved land but upon payment to the Grantee(s) of compensation for actual loss sustained in respect of improved land, such portions of the land comprised in the estate as may at any time be required for the construction of roads or other public purposes.

2. On 27 February 2007, the Commissioner of Lands consented to the transfer of the fixed-term estate from the original grantee to the appellant. Although it was not explicitly so stated, it is evident that the property transferred was the whole of the grantee’s interest in the fixed-term estate, whatever was its character and extent.
3. On 26 February 2009, the Commissioner gave due notice of an intention to resume the land in accordance with the reserved right to do so for specified public purposes. Except for the erection of a building on the land worth about \$50,000 the land was unimproved. There seems to be little doubt that the land was worth very much more than value of the building. The Commissioner declined to pay any sum reflecting such value.
4. Relying on sec 8 of the Constitution providing for the payment of reasonable compensation for the compulsory taking of (*inter alia*) an interest in property, the appellant brought proceedings in the High Court seeking a declaration that the Commissioner was not entitled to resume the land pursuant to the reserved right in the Grant unless compensation was paid for the land, and ancillary relief. The Commissioner contended in effect that he was merely exercising the power reserved under the grant to resume his own property and sec 8 was irrelevant.

5. In the event that the Court held that the Commissioner did have a power of resumption (*semble*, under the grant) the appellant also sought a declaration that the measure of compensation payable was “the market value” of the resumed “parcel” as at the date of resumption.
6. The learned trial judge held that sec 8 of the Constitution was inapplicable and the terms of the grant justified the action of the Commissioner. The appellant appeals to this Court from the refusal to grant the declaration sought. His Lordship also held that the appellant was not entitled to compensation equivalent to the market value of the parcel.

The Constitution

7. Counsel for the appellant referred to the following provisions of the Constitution –

Fundamental rights and freedoms of the individual

3. Whereas every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual ... to each and all of the following, namely:-

...

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection of those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest.

Protection from deprivation of property

8.-(1) No property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –

...

(c) provision is made by a law applicable to that taking of possession or acquisition -

(i) for the payment of reasonable compensation (the valuable consideration of which may take the form of cash or some other form and may be payable by way of lump sum or by instalments) within a reasonable period of time having due regard to all the relevant circumstances; and

(ii) securing to any person having an interest in or right over the property a right of access to the High Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the reasonableness of the compensation and the period of time within which it shall be paid.

8. It does not seem to us that sec 3 takes the question of compulsory acquisition any further than sec 8 in the circumstances here and, accordingly, we focus on the latter provision. It will be noticed that no power of compulsory acquisition is conferred. Rather, any law effecting or permitting such an acquisition must comply with the specified requirement that provision is made for the payment of reasonable compensation within a reasonable time (both factors to be determined “having due regard to all the relevant circumstances”) and a right of access to the High Court is secured.
9. Accordingly, it is necessary to ask whether, indeed, the Commissioner in this case purported to take something that was the property of the appellant; if he did, whether he was acting pursuant to a law “applicable to that taking” within the meaning of sec 8(1)(c) and, if so, whether that law complied with the requirements of sec 8(1)(i) and (ii).

The judgment under appeal

10. The learned trial judge concluded that the claim was made under a law which was not of a kind comprehended by sec 8(1)(c), though it was certainly made pursuant to an asserted legal right. The legal basis for the claim was the terms of the grant itself, which reserved the right to resume the land. It is correct that the general law gave legal efficacy to the provision in the grant but this, his Lordship held, was of the character of a contractual right and did not depend on a law within the meaning of sec 8. The law simply gave efficacy to the agreement of the parties and it was that agreement which permitted the Commissioner's claim.
11. His Lordship did not need, therefore, to address the question whether any property of the appellant was actually sought to be taken.
12. As to the measure of value of the resumed land, his Lordship noted that the evidence of valuation tendered by the appellant was significantly deficient but (rightly) confined himself to declining to make the declaration sought as to this matter.

The submissions of the appellant on the appeal

13. The appellant first submits that, because he was not a party to the original grant, he could not be bound by its provisions and, in particular, the reservation and calls in aid the provisions of sec 118(1) of the *Land and Titles Act* (the Act) which provides –

118.- (1) No person dealing or proposing to deal for valuable consideration with an owner of a registered interest in land shall be required or in any way concerned-

(a) to enquire or ascertain the circumstances in or the consideration for which such owner or any previous owner was registered; or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under any previous written law relating to the registration of documents relating to land.

(2) Where the owner of such an interest is a trustee, he shall, in dealing therewith, be deemed to be the absolute owner thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.

The Fixed-Term Estate Register kept in the Honiara Land Registry records the Commissioner of Lands as the grantor and the vendor to the appellant as grantee, notes the term of the estate as 50 years and certain other details. There is a note of the restriction on transfer or dealing with the land without the Commissioner's consent but no mention of the reservation. It is argued that the appellant was therefore not concerned to enquire about any such condition and was not bound by it.

14. The appellant secondly contends that, on the proper construction of the grant document itself, the reservation applied only to the interest taken by the original grantee and did not apply to a purchaser for value of the interest, such as he was. He points, in particular, to clause 5 of the Grant and to clauses 1 and 10 of the First Schedule, which provide –

The Estate shall be held subject to the provisions of the said Act and to the performance, by the Grantee(s) or other the owner of the estate for the time being, of the obligations in the First Schedule hereto ...

The First Schedule –

1. The Grantee(s) or other the owner of the estate for the time being shall not subdivide, lease or part with the possession of ... the land comprised in the estate ... or

transfer ... the estate without the written consent of the Grantor (which shall not be unreasonably withheld) ...

10. In the event of any resumption of land included in this Grant the Grantor in the terms provided in this instrument, the Grantee shall on the request of the grantor and within the period of time specified in the written notice, do all things necessary to give effect to the resumption aforesaid.

15. The appellant submits that the phrase "or other the owner of the estate for the time being" would have been included in the reservation clause had it been intended for the estate of any subsequent transferee or grantee to be subject to resumption, since the reference to other owners was said elsewhere to denote subsequent acquirers. It is consistent with and supportive of this interpretation that argued that the mention only of the grantee – as distinct from adding a reference to the owner for the time being – in clause 10 as being obliged, in effect, to cooperate with the resumption indicates that it was not expected that any such subsequent owner would be faced with a resumption.

16. Thirdly, the appellant contends that there is a vital distinction between a grant and a subsequent transfer or the estate granted. He points to sec 132(2)(c) of the Act, which provides that on "the transfer or grant of an estate, the Commissioner may ... provide that the estate shall be held subject to the performance, by the owner for the time being of such obligations as may be specified in the transfer or grant". Since this power does not refer to subjecting the ensuing owner to a reservation, it is argued that it can only have been intended to apply the reservation to the initial grant. It is submitted that sec 132(4) permitted the Commissioner to impose the reservation to a subsequent purchaser. In substance, that provision permits the variation "of the obligations contained or implied in any transfer or grant of an estate" by an instrument executed by the Commissioner and the "owner for the time being". Counsel referred the Court to the form of the transfer prescribed by the Act (Form 4). This form contains a proposed clause 3 as follows –

The Transfer is also affected by any reservations, promises and other matters written in the First Schedule and the rights, easements and other matters written in the Second Schedule.

(The mentioned Schedules are those specified in the Transfer, not in the original grant.) We were informed (and it does not appear to be disputed) that this clause was struck out of the form of the Transfer executed in this case and registered. It is argued that, if it were intended that the reservation in the grant should survive transfer, the clause would have been retained and the reservation would have been noted in the Schedules.

17. Fourthly, the appellant submits that the provisions of sec 229 of the Act, which provides for rectification of the register for fraud or mistake, prohibits such rectification in the case of an owner in possession who acquired the interest for a valuable consideration without knowledge of the fraud or mistake and any substantial contribution to it, give what is described by the appellant as "special protection for a purchaser for valuable consideration".
18. Lastly, the appellants rely on secs 3 and 8 of the Constitution, as to which enough has been said for now.
19. It should be noted that only two grounds were advanced at first instance: the Constitutional argument; and an argument that there was no right to resume the whole property as distinct from a part or parts of it. The latter argument is not sought to be made in the appeal and nothing need be said about it except, perhaps, that his Lordship's rejection of it was clearly right.
20. The Constitutional argument of the appellant was based upon the assumption that the compensation for which the grant provided in clause 2 was not "reasonable compensation" within the meaning of sec 8. The measure of compensation for which he contended differed significantly from that in clause 2. As we have mentioned, the trial judge rejected this contention. There is no appeal from this part of the judgment below although, as is obvious,

if the appellant succeeds on the Constitutional argument, this question would need to be addressed. The factors, however, are closely related, since the fundamental notion underlying the Constitutional argument is that the compensation for which the grant provides is inadequate and thus “unreasonable”. We address this issue briefly below.

Discussion

21. The contentions of the appellant proceed upon a fundamental misconception of the nature of the reservation. This may be most simply explained by observing that a fixed-term estate is, essentially, a kind of leasehold. The lease grants possession of the land for a term of years, specifying the payment of rent and imposing certain limits on the uses to which the land may be put. The reservation expressly gives to the landlord – here, the Commissioner – the right to reenter and resume possession in certain specified events, namely the intention to use the land for public purposes and subject to notice and certain limited compensation, in short, the right to bring the term to an end. When the landlord terminates the lease in accordance with the reserved power to do so, he takes nothing in the nature of an interest in land from the lessee even though it is true that the lessee loses the right to occupy and use the land. However, as the compensation provision in clause 2 implicitly recognizes, the occupant loses the improvements made on the land and must be paid for “the actual loss sustained in respect of improved land”. (We add for reasons of clarity that, even if the improvements were made by a prior occupant, it would be reasonable to infer that the purchase price included their value and, accordingly, it would not be appropriate to disregard those improvements in the calculation of “actual loss” if the land were subsequently resumed. Since the meaning of “actual loss” was not the subject of argument before us, we do not attempt to define it but content ourselves with the observation that it would at least appear to comprehend the loss of the value of improvements.)

22. From the very beginning, therefore, the leasehold was subject to a condition that in certain circumstances his rights to occupy certain parts or the whole of the land could be terminated. It is therefore quite wrong to characterize the reservation as imposing any obligations on the lessee or holder of the fixed-term estate.

23. It is a truism that a lessee cannot transfer a term that is greater than that which the lessee possesses. It follows that the grantee of a fixed-term lease cannot transfer the balance of the fixed-term estate which is not subject to the liability, in the agreed events, of termination at the instance of the Commissioner. This is elementary and needs no resort to authority. Not only must this be so as a matter of law, it would be contrary to the public policy embodied in the form of the grant to hold otherwise, since the grantee could transfer the fixed-term estate, say, on the following day and subvert the evident purpose of the reservation.
24. It follows that no question of privity arises. It is immaterial that the purchaser may have not bargained with the Commissioner for the grant subject to the reservation. On the view most favorable to the appellant his contract is with the grantee but he can only acquire what the grantee has to sell, namely a term which may be cut short in the specified events. It is scarcely necessary to say that what was transferred was not the *land*, but the *fixed-term estate* held by the grantee and subject to all the conditions and reservations which described its limits and quantified its character. This point is made very clear by the Instrument of Transfer itself, which explicitly transfers "the *Transferor's interest* as registered proprietor in the ... fixed-term estate ..." (emphasis added). Thus it is the transferor's interest, whatever its content and extent, that is transferred, hence necessarily subject to the Commissioner's powers of termination. The striking out of clause 3 in the prescribed form is immaterial, since it refers only to new or additional matters referred to in the Schedules to the transfer and, as nothing had changed, it was irrelevant.
25. It should, perhaps, also be noted that the appellant acquired the estate with full notice of the potential termination of his occupation of the land and thus, as against the owner, cannot rely on his being merely a purchaser for value. If it were necessary to do so, equity will enforce the owner's rights even against the registered proprietor of the leasehold. There is nothing in sec 118 of the Act that affects this position. Nor does the omission of a reference to the reservation in the fixed-term register result in its destruction, if for no other reason that the grant containing the term is itself also registered.

26. We turn briefly to the argument concerning the interpretation of clause 3 of the grant. They are without merit. Having reserved the power to terminate the grantee's occupancy of the land, this defined the term of the lease and no subsequent transfer could extend the term. The omission of the reference to the owner for the time being in the clauses of the Schedule is also immaterial. Not only does clause 5 expressly provide that the obligations set out in the First Schedule bind the "Grantee(s) or other the owner of the estate for the time being" (thus, necessarily clause 10 requiring the lessee's cooperation with the Commissioner's regaining possession) but many of the other clauses which refer only to the grantee must bind any successor in title, for example clause 4 limiting the use of the land to residential purposes, clause 6 requiring the erection of an approved building within 18 months of the grant, clause 8 limiting the extent of buildings to less than half of the area included in the grant, clause 9 the provision of drainage and sewage connection, clause 11 prohibiting commercial use, clause 12 requiring prevention of breaches of the Liquor Act, clause 13 limiting the erection of signboards and clause 14 requiring payment of the rates and taxes applicable to the land. All these obligations are expressed as those of the grantee but it is self-evident that they must apply to any successor in title. The contention that the obligation to cooperate with the Commissioner when the land is resumed is imposed only on the grantee is untenable.

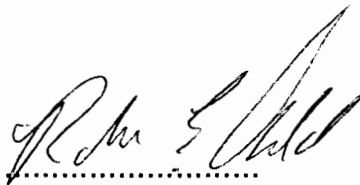
27. We now turn to the Constitutional argument. Firstly, we agree with the opinion of the trial judge that the law under which the content of the fixed-term estate acquired in the first place by the grantee and then transferred to the appellant is not a law applicable to the acquisition of property within the meaning of sec 8. Secondly, at all events the Commissioner is not seeking to acquire any property of the appellant but simply seeks to resume full possession and use of property that is his by virtue of his right to terminate the lease and accepts the obligation to compensate him for any "actual loss" he may have suffered. The appellant's rights to possession end, as has been noted, but they are not obtained, taken possession of or acquired by the Commissioner. Thirdly, even if the appellant's property is being taken and even if the general law that gives legal effect to the grant is a law within sec 8, it is manifestly reasonable to pay the compensation which, after all, has been agreed between the parties, a measure which the appellant adopted by obtaining a transfer of the fixed-term interest in the grant. The fact of such an agreement would plainly be one of the

circumstances to which regard should be had in assessing the amount of "reasonable compensation" within the meaning of sec 8(1)(c) on the assumption (which we do not accept) that this provision is applicable.

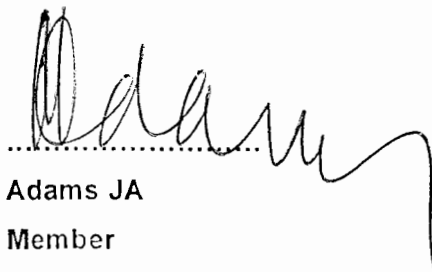
28. Sec 3 of the Constitution takes the matter no further than sec 8 and it is unnecessary to discuss it further.
29. Although we have not found it necessary to refer to the submissions made on behalf of the respondent we should state that we found them helpful in dealing with the issues in the appeal.
30. We would finally observe that, despite the claim made by counsel on the appellant's behalf that he has suffered an injustice by virtue of the application to him of clause 2 of the grant which he purchased, we are far from persuaded that this is so.

Conclusion

31. The appeal must be dismissed with costs.



Auld
President



Adams JA
Member



Hansen JA
Member