

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 10 of 1957

HARNAM SINGH AND BAKSHISH SINGH Appellants

AND

BAWA SINGH Defendant

Native Leasehold—Head-lease for 999 years—Agreement for sale and purchase of sublease—Consent of Native Land Trust Board not obtained—whether or not consent necessary—section 35(2), proviso, Native Land Trust Ordinance—Meaning of the word “lease” in the proviso—specific performance ordered—appeal against order.

Held.—(1) The words “shall not apply to any such lease” in the proviso to subsection (2) of section 35 of the Native Land Trust Ordinance mean “shall not apply in respect of any such lease”, or “shall not apply to the land comprised in any such lease”.

(2) The consent of the Native Land Trust Board is not required in respect of a sublease of or any dealing with a lease of Native land granted for a term of 999 years or in respect of any assignment of any such lease or sublease.

Appeal dismissed.

Cases referred to:—

Jennings v. Kenny (1939), 4 All E.R., 464.

Feather v. The Queen, 122 E.R., 1203.

The London County Council v. Aylesbury Dairy Company (1898), L.R., (Q.B.) 106.

Abel v. Lee (1871), 6 L.R., (C.P.) 365, 371.

Kallu Labbu Ram Khelawan v. Mohanlal Civil Action No. 31 of 1950.

Harry Parker Ltd., v. Mason (1940), 2 K.B. 590.

Holmon v. Johnson (1775), 1 Cowp. 335.

This is an appeal against a judgment in which specific performance of an agreement for the sale of an interest in land, made on the 18th day of March, 1955, between the parties to this appeal, was decreed by the then learned Chief Justice who also ordered the appellants to execute a transfer of the land immediately on payment of the balance of the purchase money. It will be convenient if I set out the pleadings of the parties in the Court below. In his statement of claim the respondent said:—

“1. The Defendants are and have at all material times been the registered proprietors of that piece of land containing 7 acres 3 roods 20 perches more or less being portion of the land known as “Toko” and the whole of the land situated in the District of Tavua and Province of Colo North comprised in Native Sublease Number 26577.

2. By a certain Agreement in writing bearing date the 18th day of March, 1955, made between the Defendants of the one part and the Plaintiff of the other part the Defendants agreed to sell and the Plaintiff to purchase the said land for the price of £2,000.

3. The Plaintiff has paid or tendered to the Defendants the said sum of £2,000.

4. The Plaintiff has also tendered to the Defendants for execution a Transfer of the said land from the Defendants to the Plaintiff but the Defendants have neglected or refused to execute the same and they continue so to neglect or refuse.

5. The Plaintiff is and has at all material times been ready and willing to complete the said Agreement referred to in the 2nd paragraph hereof.

The Plaintiff claims:

- (a) Specific performance of the said Agreement bearing date the 18th day of March, 1955, and that the Defendants may be ordered to execute the said Transfer or alternatively some other proper conveyance or transfer of their interest in the said land.
- (b) Costs.
- (c) Such further or other relief in the premises as to this Honourable Court shall seem meet."

To this the appellant replied:

" 1. The Defendants admit the allegations contained in paragraph 1 of the Statement of Claim.

2. The Defendants admit the allegations contained in paragraph 2 of the Statement of Claim.

3. The Defendants deny the allegations contained in paragraph 3 of the Statement of Claim.

4. The Defendants do not admit the allegations contained in paragraphs 4 and 5 of the Statement of Claim.

5. The Defendants say that on the date of execution of the agreement referred to above the Defendants were holding in trust for the Plaintiff a sum of money in the vicinity of £1,400 0s. 0d. (ONE THOUSAND FOUR HUNDRED POUNDS) and whatever sum they were so holding was to be applied in part payment of the purchase money referred to in the said Agreement for Sale.

6. The Defendants further say that the Plaintiff failed to pay the balance purchase price of £600 0s. 0d. (SIX HUNDRED POUNDS) on or before the 31st day of January, 1956.

7. The Defendants further say that the Plaintiff contravened paragraph 3 of the said Agreement for Sale in that he did not cultivate and keep cultivated the land referred to in the said Agreement for Sale nor did he comply with the other requirements thereof.

8. The Defendants say that in view of the breaches complained of in paragraphs 6 and 7 of this Defence the said Agreement has been determined and is of no effect and value.

9. The Defendants further say that the consent of the Native Land Trust Board was never obtained in respect of the sale referred to above.

10. The said Agreement is null and void and of no effect in that it contravenes the provisions of the Native Land Trust Ordinance, Cap. 86, Volume I Laws of Fiji and Regulations made thereunder."

The Defendant abandoned clause 7 of his statement of defence and as it was found by the learned Chief Justice that time was not of the essence of the contract and that finding was not made the subject of any ground of appeal, clause 6 requires no further consideration.

The agreement, which formed the basis of the original action, is as follows:—

AN AGREEMENT made this 18th day of March 1955 BETWEEN HARNAM SINGH and BAKSHISH SINGH Sons of Basant Singh both of Yalalevu in the Province of Ba and Colony of Fiji Storekeepers (hereinafter called "the Vendors") of the one part AND BAWA SINGH Father's name Dalip Singh of Yalalevu in the Province of Ba and Colony of Fiji Labourer (hereinafter called "the Purchaser") of the other part WHEREBY IT IS AGREED as follows:—

1. The Vendors will sell and the Purchaser will purchase the land and chattels described in the Schedule hereto at the price of (£2,000 0s. 0d.) TWO THOUSAND POUNDS of which the sum of (£1,400 0s. 0d.) FOURTEEN HUNDRED POUNDS has already been paid and the balance namely the sum of £600 0s. 0d. shall be paid on or before the 31st day of January, 1956.

2. Possession of the premises shall be given and taken as from this date.

3. The Purchaser will cultivate and keep cultivated all such parts of the said land as are suitable therefore (and the onus of proving unsuitability shall be on the Purchaser) in sugar cane in a good and husbandlike manner according to the most approved system of agriculture in the district and in due and proper course of husbandry harvest the same.

4. Until payment of the said price all sugar cane growing or to be grown on the said land shall be sold to The Colonial Sugar Refining Company Limited and each debt coming due by the said Colonial Sugar Refining Company Limited to the Purchaser on each such sale of cane is hereby irrevocably assigned to the Vendors and the Purchaser hereby authorizes the said Company to pay each such debt so assigned directly to the Vendors whose receipts shall constitute a complete exoneration. The Vendors shall bring all such moneys received by the Vendors into account under these presents as payment of the said price.

5. The Purchaser shall neither mortgage charge assign nor transfer this interest under these presents nor let sublet or part with the possession of the said land or any part thereof nor give any lieu or Bill of Sale over the crop or crops growing or to be grown on the said land without the previous written consent of the Vendors.

6. The Vendors shall be at liberty at all reasonable times by the Vendors or by the Vendors' servants or agents to enter the said land and every part thereof and inspect the same.

7. Upon payment of the said price the Vendors will transfer to the Purchaser the said land and will make do execute and perfect all acts deeds and things necessary to vest the said land in the Purchaser. The Purchaser's costs and the incidental disbursement of the transfer shall be paid by the Purchaser.

8. In these presents where the context admits the expressions "Vendors" and "Purchaser" shall include their and each of their executors administrators and assigns.

THE SCHEDULE

AND THAT piece or parcel of land containing 7 acres 3 roods 20 perches more or less being whole of the land situated in the District of Tavua and Province of Colo North known as "Toko" (part of) comprised in Native Sublease Number 26577.

S.M.S. One pair Black working bullocks.

One Number 10 Plough.

This agreement and the pleadings sufficiently set out, *inter alia*, the antecedent and subsequent history as to what took place between the parties in relation to the transaction. As the defence had claimed that the agreement was null and void and of no effect, in that it contravened the provisions of the Native Land Trust Ordinance, it was necessary for the learned Chief Justice to reach a conclusion as to the intention of the Legislature, expressed in the relevant sections of that Ordinance. The only sections to which I need refer at present are as follows:—

" 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:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the 29th day of September, 1948, to mortgage such lease.

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

" 35.—(1) Any proclamation, order in Council, notification, document, licence, lease, certificate, or authority issued, made, given, or granted before the commencement of this Ordinance under the Native Lands Ordinance 1905 or the Native Lands (Occupation) Ordinance 1933 shall continue in force as if it had been issued, made, given or granted under this Ordinance.

(2) Every such lease or licence continued in force as aforesaid shall in all respects be subject to the provisions of this Ordinance:

Provided that the provisions of section 12 of this Ordinance and of any regulations made hereunder shall not apply to any such lease granted for a term of 999 years."

In his judgment the learned Chief Justice said:

"The question for determination is whether, when the word 'lease' is used in the proviso to subsection (2) of section 35, this also covers a sublease.

The period of alienation is so long, and the date of reversion to the native owners so distant, and this, I feel, is the reason that the legislature has seen fit to place 999 year leases in a special category free from the fettering control of section 13 of the Ordinance.

It is true that, unlike section 13, section 35 does not refer to a 'Sublease', but I cannot believe that the legislature intended that while the head-lease for 999 years should be exempt from control, there could be no dealings of any kind with a sublease for 966 years 10 months and 13 days, without the consent of the Board.

This, it seems to me, would result in an absurdity. If the contention that the head-lease alone is to be free from control because of the length of its duration, we would have the whimsical result that, if a sublease were granted for 999 years less one day, dealings with such sublease would be subject to control even though its duration is only one day less!

This could never have been the intention of the Legislature.

Where a section of a statute is capable of possible alternative meanings, one of which would lead to an absurdity, it is the duty of Courts so to construe it as to avoid absurdity.

Mr. Scott said that these are extraordinary leases, and that they are in fact as good as freeholds. No control over alienation exists in relation to freeholds, and I am bound to agree that it must have been intended that these leases should enjoy no less favourable treatment than freeholds in this regard. It is worth observing, too, that in legislation which deals with the Registration of transfer and other dealings in land; namely, The Land (Transfer and Registration) Ordinance (Cap. 120), 'lease' includes a 'sublease'.

There is also the question of practice to which I have referred and the interpretation which I place on the section recognizes that practice.

In *Jennings v. Kenny* (1939), 4 All E.R., 464 the House of Lords were influenced by existing practice in construing a certain section of the Intoxicating Liquor Act (Northern Ireland), 1923, and at p. 469, *Viscount Maugham* said:

'No violence is done to the words by such a construction, and it is not a disadvantage to find that it seems to carry out a practice which has prevailed in Northern Ireland for a good many years.'

There is evidence of practice in the present case in that, since, 1945, consents to dealings with subleases under 999 year leases have not been obtained, except when Banks were concerned. I accept the suggestion that Banks only required consents *ex abundanti cautela*. The Registrar of Titles has freely registered dealings where no consent has been obtained.

Non-consent is therefore also in conformity with practice, and strengthens the view I hold that in the proviso to section 35 'lease' must include 'sublease'.

The original lease provided in paragraph 2, for consent to any transfer of the lease, but such consent was rendered unnecessary in view of the proviso to subsection (2) of section 35.

Maxwell on the Interpretation of Statutes at p. 217 says:

'Enactments which avoid or abridge the effect of conveyances, contracts and instruments have generally received a construction more compatible with the obvious object and policy of the Legislature than with the natural meaning of the language.'

While the consent required by paragraph 2 of the Lease is abrogated by the proviso above referred to in so far as the head-lease is concerned, it appears to me to be more compatible with the obvious object and policy of the legislature that subleases should also come within the ambit of the proviso. Furthermore, it is the duty of Courts to make such construction of a statute as shall suppress the mischief and advance the remedy. For these reasons, therefore, I am of the opinion that no consent is necessary to the transfer of the sublease, the subject of this action.

I come finally to the general question as to whether the plaintiff is entitled to the relief which he seeks. I am satisfied that the plaintiff has paid to the defendants the sum of £1,400, receipt of which is acknowledged in the Agreement; that certain further sums have been credited to him from cane proceeds and that he has tendered to the defendants the balance owing and also tendered to them a document for execution."

Section 12 to which I have referred is a re-enactment in the 1955 consolidation and is the same as section 13 of the 1945 Ordinance to which the learned Chief Justice referred. With respect, I regret that I find myself doubtful of the correctness of the statements of the learned Chief Justice in that passage in which he refers to *Jennings v. Kenny* and says "the House of Lords were influenced by existing practice in construing a certain section..." The *dictum* of Viscount Maugham in the House of Lords case contains the words:—"It is not a disadvantage" but I think I should point out with respect that such *dictum* alone does not show that the practice which had prevailed, in any way influenced the House of Lords in reaching a conclusion as to the interpretation of certain words in a statute. I consider also that evidence of a legal practitioner, as to what he has found a prevailing practice to be, is of doubtful value when evidence of the actual practice would have been available from but was not given by an officer who or whose predecessor was responsible for such a practice and who could have spoken with undoubted authority. In any event the witness admitted in the lower Court that he did not know whether or not the Native Land Trust Board received consents in the matter of dealing with subleases. The learned Chief Justice had said during the trial, in reference to evidence of existing practice—"It is in my view, clearly a legal interpretation that is required and practice does not affect it", but the judgment seems to show that the learned Chief Justice was, apparently, influenced by the evidence of an alleged prevailing practice. In my view the evidence did not prove such a practice with any degree of certainty. I thought it necessary to express some observations on this aspect of the judgment as, otherwise, it might be taken that the principles therein implied, could be accepted and followed with the tacit approval of this Court.

The grounds of this appeal are as follows:—

- (1) The Learned Chief Justice was in error in law in holding that the Plaintiff was entitled to specific performance of the Agreement in writing dated the 18th day of March, 1955, because the said Agreement was void, illegal and of no effect by reason of the fact that consent to the said Agreement was not obtained pursuant to the provisions of the Native Land Trust Ordinance 1940 and the Amendments thereunder;
- (2) The Learned Chief Justice erred in law in holding that consent of the Native Land Trust Board was not required in respect of the Sale and Purchase of land contained in Native Sublease No. 26577;
- (3) The Learned Chief Justice ought to have placed a strict or confined meaning to the word "lease" in section 35(2) of Ordinance No. 30 of 1945;
- (4) The Learned Chief Justice erred in law in construing the word "lease" appearing in section 35(2) of Ordinance No. 30 of 1945 to mean and include all dealings in respect of that lease or its subleases;
- (5) The Learned Chief Justice in construing the meaning of the word "lease" above referred to ought to have given it its ordinary grammatical construction because the language used in the Ordinance is plain unambiguous and clear and the Learned Chief Justice ought not to have taken the several matters referred to in his Judgment into consideration in placing the meaning of the word "lease" as he did;
- (6) That the Learned Chief Justice for the reasons aforesaid should have given Judgment for the Appellants."

Mr. Falvey, for the appellant, said that there was only one issue for determination by this Court, namely, whether or not the consent of the Native Land Trust Board was required to the dealing with the land in question. He argued that the head-lease was granted for 999 years from the 15th day of November, 1907, and a sublease numbered 26577, was entered into between the original lessees and one Sumitra, the term expressed being 966 years 10 months and 13 days from 1st day of January, 1941. This is a sublease of all the land comprised in the head-lease and Mr. Falvey informed the Court that by his own arithmetical calculation the term expressed in the sublease would result in its termination 364 days after the termination of the head-lease. If that is so I am satisfied that the calculation of the remainder of the term of the head-lease was made in error when it was included in the sublease and that the parties then intended to sublease the land for the balance of the term then remaining under the head-lease, less one day. That, I think, disposes of any question of that sublease being intended to be, in any way, an express or implied transfer of the head-lease. The sublease was duly registered and Counsel for the appellant referred to *Williams on Real Property* to show that it stood by itself. The Learned Author, at page 572 of the 23rd edition says:

"Every underlessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. Between him and the underlessee no privity is said to exist. Thus the original lessor cannot maintain an action against an underlessee for any breach of the covenants contained in the original lease. His remedy is only against the lessee, or any assignee from him of the whole term."

Counsel argued that the reason for specific provision in section 12 for the word "lease" in that section to include "sublease" was that there would otherwise be no privity between the head-lessor and a sublessee and it was necessary to provide for the head-lessor to have the requisite control of the land comprised in a sublease which was embraced by the Ordinance. That is not so, he urged, with the word "lease" in the proviso to section 35(2) of the Ordinance exempting particular 999 year leases, granted under the 1905 Ordinance and continued in force under the present Ordinance, from the application of the provisions of section 12. Counsel said there could be no dispute that "lease" in the proviso to section 35(2) referred to head-leases granted by Native owners under the 1905 Ordinance with the requisite consent, because the proviso related back to that Ordinance by using the words "every such lease". That being so, he argued, the only interpretation of the proviso to section 35(2) which could reasonably be put on it by the relevant finding of the learned Chief Justice was:

" Provided that the provisions of section 12 of this Ordinance and of any regulations made under this Ordinance, whenever granted and for whatever term and whether granted before or after the Native Land Trust Ordinance, 1940, shall not apply to any lease granted under the 1905 Ordinance or to any sublease of the land comprised in such lease or any part thereof ",

but, he pointed out, the only lease to enjoy the exemption from the provisions were those granted before the commencement of the 1940 Ordinance. He went on to refer to the sublease entered into and registered in 1941, and later to the basis of the appellant's title which is a sublease without consent, but is registered. I agree with Counsel that the instant case is not affected by any reference to what took place with regard to other dealings with the land in question and that this court must confine itself to the position which has arisen as a result of the transaction between the parties to this appeal. Counsel referred the Court to the case of *Jennings v. Kenny*, to which the learned Chief Justice had also referred and stressed that a rule of interpretation as to a statutory proviso accepted and followed by the House of Lords in that case was applicable in the instant case and that when the proviso to section 35(2) said "such" lease it meant nothing in addition to the head-lease.

As far as there was any evidence of a prevailing practice regarding the necessity to give consent to subleases which stem from a 999 year lease granted under the 1905 Ordinance, Counsel referred to *Feather v. The Queen*, 122 E.R., 1203, where a practice which had continued in force for many years with the tacit approval of a department of the Crown was held to be a wrong practice which, not having the sanction of law, could not be supported by the Court.

The London County Council v. Aylesbury Dairy Company (1898), L.R. (Q.B.) 106, was cited by Mr. Falvey as a clear authority to show that the learned Chief Justice had no justification in attempting to add, by implication, to the proviso to section 35(2), words to include subleases as by so doing he altered the enactment of the Legislature. In the *London County Council* case *Wright, J.*, said:

" But the mere fact that it may have been better to extend the section to those cases, or that one can apparently gather that such an intention was probable, is not enough to justify us in putting a construction upon the section which would necessitate reading into it words which the appellant's Counsel has invited us to read in. It is clear to my mind

that we should, as the Court of Queen's Bench said in *Underhill v. Langridge* be taking upon ourselves the office of the Legislature. We should be doing that which the Court, in *In re Sneezum, ex parte Davis*, declined to do with respect to a provision which, it was suggested, ought to be read into section 23 of the Bankruptcy Act, 1869."

James, L.J., said:

"That is a provision which might perhaps very properly be made by the Legislature, but, to my mind, to insert it this way by implication would not be to construe the Act of Parliament, but to alter it, it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the Legislature has thought fit to make with respect to such contracts. I am more strongly driven to this conclusion because the proceeding here is penal, involving penal consequences, and without making the alteration we are asked to make, it could not be prosecuted at all. I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

With respect, I agree with the learned Judge's *dicta* but I would draw the distinction that in the instant case, what the learned Chief Justice did was not to alter the expressed intention of the Legislature but he purported to interpret such intention. In the case I have cited, the words which it had been suggested should be added would have brought about a clear alteration of intention. The learned Chief Justice was not bringing within the scope of the Ordinance, persons who would not otherwise have been included even though he purported to bring within the proviso, by implication, certain classes of subleases with respect to which no provisions had been specifically expressed. He was, in fact, excluding from the operation of section 12 those in respect of which it would otherwise have been necessary to obtain consent if the subleases stemmed from the particular 999 year leases. I would refer to the *dictum* of Willes, J., in *Abel v. Lee*, (1871), 6 L.R. (C.P.) 365 at 371. He said:

"I have no hesitation, therefore, in concurring with my Lord that not only the ordinary signification of the words used in subsection (4) of section 3, but also the other sections of the Act which have been referred to, shew that the more general and extensive meaning is that which the Legislature intended should be put on the words in question."

Later in his judgment *Willes, J.*, also said:

"No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy or injustice."

Mr. Falvey contended that the words of the proviso to section 35(2) were clear and unambiguous and should not be construed except in accordance with the ordinary grammatical construction of the words of that proviso. It is clear from a scrutiny of *Abel's* case that the learned Judges found the language of the statute they were considering, to be clear and unambiguous and not to give rise to an absurdity, as Counsel had submitted to them. In the case cited it was not only the words which were clear but also the intention.

The intention is not so clear in the proviso to section 35(2). Counsel for the appellant in the instant case claimed that if his argument was correct it followed that the agreement entered into between the parties was and remains null and void because no consent had been obtained to the transaction as required under section 12. He pointed out that Native lands were controlled by the Ordinance for the benefit of the Native owners who had an interest in any accelerated reversion there might be of 999 year leases and for that reason the provisions of section 12 must necessarily apply to every dealing with such land except to leases for 999 years granted under the 1905 Ordinance. In view of such control he stressed, it was essential that the words of the relevant portions of the enactment be strictly construed. He agreed that the appellants were seeking to take advantage of their own default but said that they were entitled to do so. In support of his contention he referred the Court to a Judgment of *Carew, J.*, given in the Supreme Court of this Colony in the case of *Kallu Labbu Ram Khelawan v. Mohanlal*, Civil Action No. 31 of 1950. In that case the plaintiff had entered upon and had not only taken possession of but had built a house upon land which was subject to the very rigid provisions of the Crown Lands Ordinance. The defendant had agreed to sell him that land but later varied the arrangement in that the plaintiff's son was to be the purchaser. Consent was necessary but before the sale was completed the defendant withdrew his application for consent. However, the plaintiff remained in possession which was an offence under the Ordinance and he was liable to a penalty for so doing. *Carew, J.*, said, referring to the defendant:

"As a result of the transaction he received a sum of £78 and acquired on his property a valuable building; and it is suggested that he cannot benefit to this extent through his own deliberate default in frustrating the sale."

He then cited with approval, the judgment of *MacKinnon, L.J.*, in *Harry Parker Ltd., v. Mason* (1940), 2 K.B., 590, in support of his finding that:

"The transaction was unlawful: the sale was carried out in a manner forbidden by the Crown Lands Ordinance, and is in this sense illegal. If, indeed, it could be said of the plaintiff that he had ever become penitent, it certainly was not at any time before the illegal purpose had been performed."

I do not think it necessary for me to cite any except a pertinent portion of the judgment of *MacKinnon, L.J.*, where he refers to a judgment of *Lord Mansfield* who said in *Holman v. Johnson* (1775), 1 Cowp., 353:

"If from the plaintiff's stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

Lord Mansfield also said:

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I might so say."

Whether or not the facts in the instant case are such that the appellants, who, it is not disputed, have never applied for the consent of the Native Lands Trust Board, can take advantage of their own default (they clearly undertook to obtain such consent when they contracted in clause 7 of the agreement that they "will make so and execute perfect all acts, deeds and things necessary to vest the said land in the purchaser") is a pertinent question for determination. In *Civil Action No. 31* of 1950 the plaintiff was clearly in illegal possession though with the agreement of the defendant. I agree, with respect, that despite the seeming injustice, that defendant could plead the illegality as it was created by statute. In the instant case, neither in the lower Court nor in this Court has it been suggested that it was possession by the respondent which was the basis of any allegation of illegality. I have not overlooked the fact that the agreement was in evidence; it was also before this Court and clause 2 enabled the respondent to enter into possession as from the date of the agreement, but clause 4 made provision, in effect, that the respondent was to be an agent or employee of the appellants who were to receive the proceeds of the respondent's labours on the land and that such proceeds were later to form part of the purchase price. The question of illegal possession, moreover, was never pleaded nor does it form a ground of appeal. It then must be seen whether or not this agreement was null and void. It could not have been null and void *ab initio* because it seems apparent from section 12 which says, *inter alia*, "it shall not be lawful to alienate or deal with the land . . . 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." That, in my view indicates without doubt that it is anticipated that there must be a "written dealing", or an agreement to deal with the land in question, which is required to be submitted for consent. Were it not so an absurd position would arise whereby a written agreement, being null and void and so being a complete nullity from the time it was executed could not be submitted to the Board at all. It would also create the absurdity that, if a testator left to a beneficiary an interest in his sublease of Native land the relevant portion of the Will would be null and void from the date of death of the testator. I have no doubt that the words in section 12 "shall be null and void" mean "shall be inoperative unless and until the consent of the Board is obtained" in so far as the agreement in the instant case is concerned, and of course any other similar agreements to deal with native lands. If I am right, I am unable to see that the penal section, 26, can apply as there is no "act done, or attempted to be done, contrary to the provisions of this Ordinance" by the mere entering into an agreement for sale of native land. The agreement in my opinion has created no illegality at all. It is a necessary preliminary in obtaining the essential consent before the land is actually disposed of, if the agreement falls within the provisions of section 12.

I am fortified in my view by the wording of subsection (2) of section 5 of the Ordinance:

"All instruments purporting to transfer, charge or encumber any native land or any estate or interest therein to which the consent of the Board has not been first given shall be null and void."

That section is clear and unambiguous and needs no further comment as to its effect. It also supports my opinion that, under section 12, such an instrument is merely inoperative until consent is given and is not null and void *ab initio*. I cannot accept as serious, the suggestion that details of an

oral arrangement can be orally related, or incorporated in a letter, to the Board which would then consider whether or not to consent. There clearly must at least be something in the nature of a document which, signed by the parties, sets out in sufficient detail the terms of the proposed dealing. As I find that neither party to this appeal has been shown to be guilty of any illegality it follows that I do not consider that the judgment of *Carew, J.*, nor any of the relevant cases cited by that learned Judge could be said to apply to cases of a like nature to that now before this Court. Following the most lucid and very thorough submission of Counsel for the appellants, Mr. Scott for the respondent, who made his submissions with equal clarity, was commendably brief. Mr. Scott could find no logic in the arguments for the appellant's case. He said that if the real object of section 12 was to control leases but leases for 999 years were not controlled by reason of the proviso to section 35(2), that proviso must intend also the de-control of subleases of the 999 year leases. He gave three reasons for this contention. Firstly, he argued, if the land comprised in such a lease was not to revert to the native owners for 999 years, it would be senseless to control the land if it was held under a sublease but to leave it free from control if held in possession under the head-lease. He pointed out, secondly, that there were no 999 year subleases, so the word "lease" in the proviso must in all common sense mean lease and include sublease. His third point was that it was not possible for section 12, read by itself, to apply to leases and not to subleases; so the object of subsection (2) of that section, which was to prevent the section being circumvented by the device of granting a sublease for a long period. He said that the converse must be considered. The legislature having negatived the need for control in specific cases, the manner of holding the land during the 999 years was outside the ambit of the legislation. It was clear that consent was required in such cases until the enactment of the 1945 Ordinance but, Counsel said, thereafter subleases have been freely registered without consent and in this respect he drew attention to the very root of the appellants' title which had received no consent before registration. Counsel found it absurd to suggest that, if all the land comprised in the head-lease were subleased for 999 years less one day such a dealing would require consent whereas the leasing of the land for 999 years would not. As I understood each Counsel, leases for 999 years were granted by the authority administering the land on behalf of the native owners and that is the authority whose consent was necessary. It seems pointless to insert a specific proviso doing away with the necessity for the consent of the lessor to the very lease he is about to execute and it seems to me to be just as pointless to do the same thing in respect of the original lessee and not with subsequent dealings, if control of the land is the expressed policy.

As to the argument for the appellants that the proviso could not intend to embrace subleases because the Native owners are interested in any accelerated reversion I would have thought that, if there was a reversion of the land comprised in the head-lease the interests of the Native owners would be amply protected because all the land comprised in the lease would fall into the possession and come under the immediate control of the Board. If there was a reversion to a sub-lessor of any land comprised in a sublease, the interests of the Native owners would not be served any better while the total area comprised in the head-lease remained out of the control of the Board. If Mr. Falvey's submissions are correct, all that can now be done without consent is that the interest of the lessee in the particular lease for 999 years, can be assigned or transferred.

In my view, to give the proviso to section 35 the narrow interpretation which Mr. Falvey invites the Court to put upon it, would be to admit an absurdity. I find much more force in the argument put forward in the lower court and in this Court by Counsel for the respondent, and, in the main, I adopt the reasoning of the learned Chief Justice which led him to the conclusion that the proviso must have a meaning wider than would appear from the word "lease" used therein.

I would make it clear, however, that I adopt that reasoning only in so far as it shows that the legislature would not appear to have intended, by the words of the proviso, what that proviso says, accepting the words in their ordinary grammatical meaning. I think this Court must go beyond the reasoning of logic and must analyse the other relevant provisions of the Ordinance as well as the proviso itself, in an endeavour to ascertain what, in fact, the words of the enactment do mean. It will be seen that the proviso excludes the provisions of section 12 of the Ordinance from application to the particular leases mentioned. If the legislature had intended that such leases for 999 years did not require the consent of the Board, it could be expected that they would have said so in clear terms, but section 12 does not deal merely with the question of consent to instruments.

It says, in effect:

"It shall not be lawful for any lessee or sublessee under this Ordinance to alienate or deal with the land comprised in his lease or sublease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board . . ."

With the rest of that section those words are important in giving some assistance to enable this Court to ascertain the intention of the proviso to section 35(2) because the words I have quoted show that the intention of section 12 is to control the dealing with the land or any part thereof. Those are some of the words of the section which the legislature has excluded from application to 999 year leases. If, as was impliedly contended by Counsel for the appellants, it was intended to control, as one whole, all the land comprised in a 999 year lease, there seems no reason for the legislature to exclude from operation such of the provisions of section 12 as refer to the dealing with part of the land.

Again I would point out that the intituling to the Ordinance describes it as being "an Ordinance relating to the control and administration of Native Lands".

The Board must be content with the control it has exercised over the land in a 999 year lease within the terms of the lease granted with consent under the 1905 Ordinance. The terms and conditions of that lease will be applicable to any purchaser of the interest of the lessee, so there seems to be no reason for the legislature to concern itself to release the original lessee from any necessity for consent if its object is to control and administer the land whether in one parcel or not.

Furthermore, there is section 32 which gives the Governor in Council power to make regulations, not inconsistent with the Ordinance, *inter alia*, for the purposes of controlling the occupation and use of native land. These regulations are made by the proviso not to apply to leases granted for a term of 999 years under the 1905 Ordinance, and again, it is the occupation and use of the land comprised in such leases which is freed from any control by reason of the proviso excluding the application of any such regulations to such a lease.

It seems to me to be abundantly clear that the intention of the words "shall not apply to any such lease" in the proviso to section 35(2) must mean "shall not apply in respect of any such lease" or "shall not apply to the land comprised in any such lease".

I cannot find that any other suggestion makes reasonable sense in the circumstances of this case.

It will be seen, therefore, that I agree with the conclusion reached by the learned Chief Justice, although for different reasons, and it follows that I would dismiss this appeal with costs to the respondent.

A. G. LOWE
Chief Justice, President.

I concur.

C. F. C. MACASKIE
Judge of Appeal.

I agree that this appeal must be dismissed.

C. C. MARSACK
Judge of Appeal.

17th June, 1958.