Privy Council Appeal No. 8 of 1973

Borambil Pty. Limited – – – – – – *Appellant*

v.

Francis O'Carroll – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH FEBRUARY 1974

Present at the Hearing:

LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD WILBERFORCE
LORD SIMON OF GLAISDALE
SIR GARFIELD BARWICK

[*Delivered by* LORD SIMON OF GLAISDALE]

By an agreement in writing of the 18th March 1952 the appellant agreed to "lease" to the respondent, at a rent, for his life, land on which was erected a block of flats. A statutory Memorandum of Lease under the N.S.W. Real Property Act 1900 was executed on the 13th October 1970, pursuant to a Consent Order for specific performance at the suit of the respondent. The only issues remaining for decision on this appeal are (1) whether the agreement of the 18th March 1952 constituted as between the appellant and the respondent the relationship of lessor and lessee for the purpose of the N.S.W. Landlord and Tenant (Amendment) Act 1948 (as amended); and (2) if so, whether the premises were the subject of a "lease for a fixed term" within section 17B of that Act.

Before the relevant facts and arguments can be appreciated it is necessary to refer in some detail to the provisions of the Act. It has been greatly amended; and, for its construction, it is incumbent to differentiate between its original provisions and the subsequent amendments, since these had different respective purposes. The original provisions were designed to institute a régime of rent control and security of tenure. They were subsequently amended, by no less than twenty statutes, partly to close loopholes in the original controls, partly (later) to relax those controls.

The Act was from the beginning and still is divided into five parts. Part I is Preliminary. Of this, their Lordships need refer only to passages from section 8, the definition section. In sub-section (1):

> "'lease' includes every contract for the letting of any prescribed premises, whether the contract is express or implied or is made orally, in writing or by deed, and includes a contract for the letting of prescribed premises together with goods . . .

'lessor' and 'lessee' mean the parties to a lease, or their respective successors in title . . ."

(It is unnecessary to set out the definition of "prescribed premises", since it is common ground that the premises with which the instant appeal is concerned are "prescribed premises" within the meaning of the Act.) Section 8 (2) reads:

"For the purposes of this Act, 'lessee' includes a person who remains in possession of premises after the termination of his lease of the premises, and 'lessor' has a corresponding meaning."

The draftsman therefore had in mind tenants holding over, whether on sufferance or at will, and brought them within the Act.

Part II of the Act deals with the machinery and criteria for fixing the "fair rent" of prescribed premises. Division 1 of Part II deals with Administration. It provides for Fair Rents Boards and a Rent Controller. Division 2, now repealed, dealt generally with the rents of prescribed premises: it is sufficient to say that they were in general fixed by reference to 1939 rents. Division 2A, added in 1964, provides for fair rents to be fixed by agreement between the parties: no such agreement was made in the instant case. Division 2B of Part II, added in 1968, is headed "Rent of Certain Prescribed Premises subject to Fixed Term Leases". The relevant part reads:

"17B. Where any prescribed premises . . . were the subject of a lease for a fixed term, the fair rent and the rent of the premises . . . shall, notwithstanding any other provision of this Act, be, as on and from the date on which the assent of Her Majesty to the Landlord and Tenant (Amendment) Act, 1968, was signified and while the lease remains in force—

(*a*) where the rent was fixed by a determination made before the twenty-sixth day of November, one thousand nine hundred and sixty-eight, and in force immediately before that day—the rent fixed by that determination; or

(*b*) . . .

or if the contractual rent provided for from time to time by the lease is greater than the rent referred to in paragraph (*a*) or (*b*) of this section, that contractual rent."

Division 3 of Part II, which, though since amended, formed part of the original Act, now provides for the Rent of Prescribed Premises other than Shared Accommodation, section 21 setting out the matters to be considered by a Fair Rents Board in determining the fair rent of prescribed premises. Division 4AA, added in 1968, provides for the Determination of Rents on Current Values, dependent on the income of the lessee and of the residents. Division 5 of Part II, headed "General", lays down general provisions relating to fair rents; though much amended, it was part of the original Act. The key section is 35, which provides that premises are not to be let at a rent exceeding the fair rent.

Part III of the Act provides for security of tenure, being headed "Recovery of Possession of Prescribed Premises". Section 62 provides that the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee except on prescribed grounds, which are set out in sub-section (5). Among those grounds are the following:

"(*n*) that the lessee has become the lessee of the premises being a dwelling-house by virtue of an assignment or transfer which the lessor has not consented to or approved:

(*o*) that the lessee has sub-let the premises being a dwelling-house or some part of the dwelling-house by a sub-lease which has not been consented to or approved by the lessor; or

(*p*) (i) that the lessee has parted with the possession of the premises being a dwelling-house without the consent or approval of the lessor; or

(ii) that the lessee, not having parted with possession of the premises being a dwelling-house, has, without the consent or approval of the lessor, ceased for a period exceeding six months to be a bona fide occupant of the premises;".

By sub-section (7) of section 62 notice to quit on a ground specified in paragraph (*n*) or paragraph (*o*) of subsection (5)

"(*a*) shall not be given—

(i) . . .

(ii) where the lease is for a fixed term—unless that term has expired; or

(iii) in the case of a periodic lease—unless the period which was current at the date on which the assignment, transfer or sub-lease took effect has expired; and

(*b*) . . ."

Sub-sections (8) and (8A) of section 62 are in similar terms as regards sub-paragraphs (i) and (ii) respectively of paragraph (*p*) of section 62 (5).

Section 62B, added in 1952, deals with power to assign certain tenancies at will.

Section 86(1), part of the original Act though since amended, reads now as follows:—

> "The lessor under a lease, or the proposed lessor under a proposed lease, of any prescribed premises for a fixed term may, at any time during the currency of the lease while the lessee is in occupation of the premises, or prior to the commencement of the term of the proposed lease, make application in writing to the Controller to exclude the premises from the operation of this Part and Part V of this Act."

(It appears that this sub-section originally read ". . . fixed term *not exceeding six months*"; but that the period referred to was enlarged by various amendments; and that the italicised words, as amended, were finally repealed (apparently in 1954).) Section 86(3) reads:

> "The Controller may, in his discretion, issue a certificate excluding the premises, for such period as is specified in the certificate, from the operation of the provisions of this Part and Part V of this Act and the premises shall be excluded accordingly.
>
> The period specified in the certificate shall not exceed seven years unless the lessor and lessee or proposed lessor and proposed lessee under the lease or proposed lease are employer and employee."

Parts IV and V of the Act throw no light on the problems posed by this appeal and need not be referred to.

Against this statutory background the facts and arguments in this case can be understood. On the 18th March 1952 an agreement in writing was made between the appellant and the respondent, whereby the former agreed to lease to the latter for his life land on which was erected a block of flats called Texas Flats; and the respondent thereafter carried on a business of letting the flats. On the 1st November 1967 the fair rent of the premises was determined at $15,725.10. This determination was in force on and immediately prior to the 26th November 1968, the date

mentioned in section 17B (*a*) of the Act. (It follows that, if this were a lease and one for a fixed term, that would be the rent of the premises while the lease remains in force.) In August 1969 the appellant applied to the Fair Rents Board in Sydney for the fair rent of the premises to be determined in accordance with the provisions of Division 4AA; *i.e.*, on current values related to the net income of the lessee and of residents. On the 20th August 1970 specific performance was ordered of the agreement of the 18th March 1952; *i.e.*, that the appellants should execute a Memorandum of Lease of Texas Flats in favour of the respondent for his life, pursuant to the Real Property Act 1900. This was executed on the 13th October 1970. Its relevant provisions were as follows:

> " I, *BORAMBIL PTY. LIMITED* (hereinafter called or included in the expression Lessor) . . . Do hereby lease unto [*the respondent*] (hereinafter called or included in the expression Lessee) All that piece of land mentioned in the schedule following:— [*Texas Flats*] to be held by the said Lessee as tenant for the term of *his lifetime* years computed from the [*18th*] day of *MARCH* [*1952*] at the yearly rent of . . . *$10,400.00* . . . "

(A printed, statutory, form was used, the typed insertions being here italicised.) On the 13th October 1971 the Stipendiary Magistrate of Sydney, acting as a Fair Rents Board, acceded to the appellant's application under Division 4AA. He held (*inter alia*), first, that the relationship of lessor and lessee within the meaning of the Landlord and Tenant (Amendment) Act 1948 (as amended) existed between the parties, because the document described as a Memorandum of Lease dated the 13th October 1970 was a " lease " within the meaning of the Act; but, secondly, that the Memorandum of Lease vested an estate of freeehold in the respondent, so that the premises were not the subject of a lease for a fixed term within the meaning of section 17B; and, thirdly, that Division 4AA therefore applied in the circumstances. He apparently determined the fair rent accordingly at $59,444.44.

The respondent appealed against this decision to the Supreme Court of New South Wales (Court of Appeal Division) who allowed the appeal. They agreed with the learned Magistrate that the relationship between the parties was that of lessor and lessee within the meaning of the Act; but they held that the Memorandum of 13th October 1970 constituted a lease for a fixed term within the meaning of section 17B (with the result that the fair rent would be $15,725.10). Borambil now appeal from that decision to Her Majesty in Council.

The first point for decision is whether the relationship of lessor and lessee within the meaning of the Act existed between the parties. It was argued for the appellant that at common law the grant to a person of a lease for his life created a freehold estate, whether a payment in the nature of rent was reserved or not; so that the relationship between the parties was that of owner of the fee simple and owner of a freehold estate for life, and not that of lessor and lessee. But their Lordships agree with the Supreme Court that here it is a matter of construing the words " lease ", " lessor " and " lessee " in their statutory contexts. If control of rents was one of the original (and still subsisting) purposes of the Act, control of the rent of a lease for life is in no way to be distinguished socially from control of the rent of a term of years or of a periodic tenancy. The word " lease " in section 8 (1) is given an interpretation which could hardly be wider: it " includes every contract for the letting of any prescribed premises ". There is nothing to suggest that it is limited to chattels real. Moreover, section 53 (1) of the Real Property Act 1900 provides as follows under the heading " Leases ":

> " When any land under the provisions of this Act is intended to be leased or demised for a life or lives or for any term of years

> exceeding three years, the proprietor shall execute a memorandum of lease in the form of the Eighth Schedule hereto."

(See also section 14 (2) (*b*) of the 1900 Act, which lists "a leasehold for a life or lives" with "a life estate in possession" and with "a term of not less than twenty-five years.") The draftsman of the 1948 Act and its amendments could not have failed to have had those provisions in mind. The Memorandum of Lease of the 13th October 1970 was, in fact, in the form stipulated by the Real Property Act 1900. Their Lordships agree with Jacobs J.A. that where property is let at a rent for life the letting is appropriately, even if not strictly, called a lease. Jacobs J.A. reviewed the authorities in full; and their Lordships do not think it necessary themselves to give more than two citations. In *Jones v. Jones* (1868) L.R. 4 C.P. 422 Bovill C.J. said at p. 424:

> "Most persons who hold property on a lease for lives consider it as leasehold, and it is only the strict law which calls it freehold."

and Brett J. said at p. 425:

> "Assuming this property to be freehold it was held under a lease; the description of it therefore was, if not accurate, at any rate sufficient . . ."

Their Lordships consider that the statutory words "lease", "lessor" and "lessee" are fully capable of embracing a life interest at a rent, which the statutory objective requires. It follows that their Lordships agree with the Supreme Court on the first issue—namely, that the interest created by the document of the 13th October 1970 and its antecedent agreement was a "lease" within the meaning of the Act, and that the appellant and the respondent were accordingly "lessor" and "lessee" respectively within the meaning of the Act.

Their Lordships therefore turn to the second issue—namely, whether the interest of the respondent falls within the words "lease for a fixed term" in section 17B. The appellant argued that the expression means a term defined by reference to the calendar. The respondent argued, adopting the words of Moffitt J.A., "The phrase 'lease for a fixed term' in section 17B refers to a term defined by the agreement of the parties, so that it is either defined by reference to the calendar or by reference to some event certain to happen, the occurrence of which is readily ascertainable by reference to the agreement."

As the Supreme Court indicated, the conclusion that a lease for life is within the statute facilitates the determination of this second issue.

Section 17B is a recent amendment of the Act; so it is a presumption that the phrase "lease for a fixed term" is used there in the same sense in which it appeared theretofore in the Act. It is thus appropriate initially to examine the phrase in such prior contexts.

Section 62 (7) can be taken as typical of the group of sub-sections in which the phrase is used in connection with a notice to quit. In these, "lease for a fixed term" stands in contrast to "periodic lease". These sub-sections provide *inter alia* that notice to quit on the various grounds referred to shall not be given, where the lease is for a fixed term, unless that term has expired. The object must have been to ensure that the statutory exceptions to the statutory security of tenure should not be in derogation of any contractual security of tenure. It would be quite anomalous to limit such a provision to a lease for a calendar term, to the exclusion of a lease for life. The objective of the provision therefore requires it to apply in relation to the expiry of a life tenancy as much as to the expiry of a calendar term.

Then section 86. This provides for discretionary decontrol of a tenancy for a fixed term. But, if this is desirable in relation to a calendar term, it is equally desirable in relation to a lease for life. The section fell for consideration by the Supreme Court of New South Wales in *Panucci v. Motor Body Assemblers Pty. Ltd.* (1958) S.R. (N.S.W.) 390, where it was said at p. 393:

> " These words, ' fixed term ', have no special meaning in law and would seem to be used in the Act in contradistinction to periodic tenancies such as, weekly or monthly tenancies. The parties must have in contemplation a definite term . . . "

It was argued for the appellant that sub-section (3) of section 86 precluded " fixed term " being interpreted to include a life tenancy; since the Controller, not knowing when the life tenancy would end, would be unable to decide what period of exclusion to fix. But, whatever period were fixed, the tenancy would come to an end with the life in question: moreover, by subsection (4), the Controller has power to revoke or vary any certificate of exclusion.

As for section 17B itself, *Belmore Property Co. (Pty.) Ltd. v. Allen* (1950) 80 C.L.R. 191 determined that the existence of a lease for a term did not prevent the determination of the fair rent of the premises at an amount greater than the reserved rent. Section 17B modifies the effect of that decision. If this were desirable in relation to a calendar term, it would be equally desirable in relation to a lease for life.

Their Lordships are therefore of opinion that the purpose of each of the statutory provisions in which the expression " lease for a fixed term " appears indicates that it should include a lease for life. The same result ensues from linguistic analysis. The statute does not refer to a " fixed term of years ". " Fixed term ", as noted both in *Panucci v. Motor Body Assemblers Pty. Ltd.* (p. 393) and by the Supreme Court in the instant case, is not a technical phrase. It seems to be used in contradistinction to a term which is or is liable to be of indefinite duration, such as a periodic tenancy (with which it is contrasted in section 62), a tenancy at will (cf. section 62B) or a tenancy on sufferance, *e.g.* by holding over (cf. section 8 (2)).

Though the foregoing is sufficient to conclude the appeal in favour of the respondent, their Lordships must notice two other arguments advanced on his behalf. The first, which found favour in the Supreme Court, was based on the interpretation of " fixed term " in the English Partnership Act 1890. In *Moss v. Elphick* [1910] 1 K.B. 465, 846, for example, the words were held to be applicable to a term of an agreement which was construed to relate to the joint lives of the parties (see Fletcher Moulton L.J. at p. 849; Farwell L.J. at p. 850). The context is remote from the instant one; but the case is of marginal value in indicating that distinguished legal minds found nothing repugnant in the use of the expression " fixed term " in relation to a life interest.

The other argument on behalf of the respondent, to which their Lordships finally advert, does not appear to have been advanced before the Supreme Court. It was argued on behalf of the respondent that " lease for a fixed term " had been interpreted in *Panucci v. Motor Body Assemblers Pty. Ltd.*, and that the New South Wales Parliament must be assumed to have used it in the 1968 amendment (section 17B) to include a lease for life. Without entering upon any discussion as to the proper limits of the so-called guide to construction on which the submission sought to rely, it is sufficient for their Lordships to say that *Panucci's* case was not concerned at all with a lease for life, nor does

a lease for life appear at all to have been in judicial contemplation in that case. It therefore seems to their Lordships that for those reasons alone it would be quite inappropriate to use the remarks made in *Panucci's* case as of assistance in construing the expressions here under consideration.

For the above reasons their Lordships agree with the judgment of the Supreme Court, and will humbly advise Her Majesty that the appeal should be dismissed with costs.

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In the Privy Council

BORAMBIL PTY. LIMITED

v.

FRANCIS O'CARROLL

DELIVERED BY
LORD SIMON OF GLAISDALE

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