

Privy Council Appeal No. 153 of 1917.

William Fairchild Marsh and Another - - *Appellants,*

v.

The Honourable Hugh St. Leger - - - *Respondent.*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 4TH JUNE, 1918.

Present at the Hearing:

EARL LOREBURN.

LORD ATKINSON.

LORD SCOTT DICKSON.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

The only matter really in dispute on this appeal is the construction of one section of the New Zealand Statute entitled "The Land Act, 1892," but by reason of what appears to be somewhat unskilful drafting not only of the section in question, but of other sections, which if they were quite clear might be expected to throw light on the matter, the point is one of considerable difficulty. It is a point of some importance to all holders of "small grazing runs" under the Act, who are, no doubt, a fairly numerous class.

In 1916 the respondent was the holder of a lease of a small grazing run, originally granted in October 1896 for twenty-one years from the 1st March, 1897, expiring therefore on the 1st March, 1918, and doubts having, in some way not stated, arisen as to the terms on which tenants under such leases had a right to renewal, he, on the 16th November, 1916, issued an originating summons in the Supreme Court of New Zealand against the present appellants, who are the Crown Lands Commissioner for the district, and the Attorney-General of the Dominion, for the determination of four questions arising as to his right of renewal. The summons was by order removed into the Court of Appeal, which Court, on the 8th May, 1917, gave judgment answering these four questions. The appellants now appeal from that judgment or order of the Court of Appeal. The first and second questions were as to whether the plaintiff's rights as to renewal were governed by the Act of 1892 or certain

other Acts referred to in the questions, and the Court held that they were governed by the Act of 1892. Although the appeal is in form to the whole order, the appellants do not question this part of the judgment. The third question was—

“Whichever set of statutory provisions defines the plaintiff’s right of renewal, has he the right or has the Land Board the right to determine the rental of the renewed term ‘at a rent equal to not less than $2\frac{1}{2}$ per centum of the value of the fee simple as fixed less the value of improvements by the valuation’”?

The appeal is on the answer of the Court to this question.

The fourth question related to the procedure in a certain event, and subject to the correction of what is admitted by both sides to have been an accidental error in the order of the Court in referring to the “78th section” when the “79th section” ought to have been referred to, the answer to the fourth question is not complained of. That correction, of course, will have to be made, but it does not affect the substantial question on the appeal.

The answer of the Court to the third question was that the provisions of section 182 in ascertaining the rent must be followed. The terms of the answer will be found at page 9 of the record. The judgment of the Court interprets the doubtful words, “equal to not less than,” which occur in section 182 by reading them as “equal to *but* not less than,” and no detailed reasons are given in the judgment on the points argued before this Board, and it seems probable that there being other points before the Appeal Court on which a much fuller judgment was given, these points were not then given so much prominence as in the arguments before this Board.

By the Land Act of 1892, a former Land Act of 1885, and an amending Act of 1887, and some other Acts were repealed, and many of the provisions of the repealed Acts were re-enacted *verbatim*, some substantially altered, and some re-enacted with merely verbal alterations such as are commonly called drafting amendments, intended, it may be assumed, to improve the wording or clear up ambiguities. Part VII of the repealed Act of 1885 dealt with the subject of “small grazing runs” in twenty-three sections (197 to 219), and Part V of the Act of 1892 dealt with “small grazing runs” in fifteen sections (172 to 186). In some cases two sections of the first Act are put into one in the second, and practically the scheme is reproduced with comparatively slight alterations and to a great extent in the same words. Section 182 of the Act of 1892 takes the place of section 209 of the Act of 1885. It deals with the subject of renewal, and it makes more absolute the tenant’s right of renewal by a substantial variation of the opening words of the section. In the Act of 1885, section 209 ran:—

“If on the determination of any lease it be determined that a run either as to the whole or any part thereof, as the case may be, shall

again be let, then a new lease of the whole or such part, as the case may be, shall be offered to the existing lessee."

This was in section 182 of the Act of 1895 altered to "on the expiry or other determination of the lease of any run a new lease shall be offered," &c. Thus the right of the Land Board to decide that the run or part of it should not be re-let was taken away, and the right of the existing lessee to a renewal was extended. Section 182 then proceeds in identical words with those in 209, with two variations only, one of which causes the difficulty. Each section provides that the new lease is to be offered "at a rent to be ascertained as hereinafter specified." Then a valuation is provided for of the then value of the fee simple of the lands and also of the improvements made during the term. This valuation is to be made by some one appointed by the Board, and in the Act of 1885 he is called a "valuer," and in the Act of 1892 he is called an "appraiser," and this change of name is the first of the two variations in the language of the two sections. It is obviously a mere drafting amendment. In the Act of 1885 the terms "valuer" and "appraiser" were each used in various places in the Act, and the interpretation clause 3 of the Act had contained a clause "appraiser or valuer means any person appointed to value any land or improvements or other matter under this Act." It was apparently thought by the draftsman of the Act of 1892 to be inartistic to use two words for the same thing, and then to have to resort to an interpretation clause to say that they did mean the same thing, so when drawing the Act of 1892 he chose appraiser, as the word to be used throughout, and there is in the interpretation clause 3 of that Act the same meaning given to "appraiser" as in the former Act but no meaning given to valuer, the term apparently being not used in that Act. This indicates that changes of the language used in the second Act from that found in the former Act may have been made as mere drafting amendments, but except in that way the substitution of the word "appraiser" for the word "valuer" has obviously no bearing on the questions involved in this appeal.

The section goes on again in the same words as are found in the earlier Act and enacts that the lessee shall elect by notice in writing whether he will accept a fresh lease for a further term of twenty-one years at a rental "equal to not less than two and a-half per centum of the value of the fee simple as fixed less the value of the improvements by the valuation." The expression "equal to not less than" is what causes this difficulty. The former Act read "equal to $2\frac{1}{2}$ per centum" and the words "not less than" have been introduced. The section goes on to provide in words identical with those of the former Act that in the event of the lessee not agreeing to the valuation, then the rent to be paid shall be determined by arbitration in manner provided by section 78. The next section, the 183rd, proceeds to provide in terms which are similar to, but somewhat varied from, those found in the 210th section of the

previous Act for a disposal by auction of the new lease in the event of the lessee not electing to accept a renewal "as above mentioned" or refusing or neglecting to execute a lease when tendered to him. The 184th section, in terms identical with those of the 211th of the old Act excepting some verbal alterations to make it fit the alteration of language in the 183rd, provides for the lessee having notice of the intended auction and having another opportunity of making the election which he had previously omitted to make.

The appellants' case is based on the introduction of the words "not less than." It is of course a sound rule of construction to say that when new words are introduced into what is in other respects old legislation, the Legislature must be taken to have intended by the new words either to make an alteration of the previous law, or at all events to clear away an ambiguity in the previous law. The words "not less than" obviously import that the rent may be more than $2\frac{1}{2}$ per cent. The appellants say that it is impossible that the Legislature can have intended to give the lessee the right to propose that the rent should be more than that at which he was to have a right to take the renewal, and that therefore it must be intended that the Board, the only other party to the matter, should have the right to propose a rent in excess of the $2\frac{1}{2}$ per cent. and that it is intended that, although if the lessee disputed the valuation he would have a right to take the renewal at a rental to be fixed by an arbitrator, yet that if he did not object to the valuation but only to the proposed increase on $2\frac{1}{2}$ per cent on it his only remedy would be to let the lease be put up to auction and to bid for it, and that an auction was to be the test of the reasonableness of the rent proposed by the Board. The appellants support this by saying that the language used in the sections presupposes an offer by the Board to be made as they suggest before the valuation, but if not, on giving notice of the valuation. If the appellants' view is correct the Board have a chance of forcing the lessee to give more than the $2\frac{1}{2}$ per cent. or by refusing to do so to risk losing his holding, and whenever there was likely to be competition they would succeed in doing so.

The respondent, on the other hand, says that the obvious intention of the Legislature when enacting the Statute of 1892 was to strengthen and improve and not to diminish the value of the tenant's right of renewal, and that this is shown by the omission in section 182 of the words of the former Act entitling the Board not to relet the run at all, or not to relet the whole of it—also by the fact that in section 172 providing for the length of the original term being twenty-one years there are added the words "with right of renewal or valuation for improvements as hereinafter provided," which did not appear in sections 197 and 198, the corresponding sections of the earlier Act. He says that it is inconsistent with anything which can be called a right of renewal to have the rent liable to be raised by the action of the lessor, and by the competition of other people. He points

out that the lessee by saying that he disputed the valuation even when he had no real objection to it, could always make nugatory the proposal of a higher rent by the Board, and secure a renewal at a rent to be fixed by arbitration.

The respondent points out that $2\frac{1}{2}$ per cent. on the difference between the value of the fee simple and the value of the improvements would, when the improvements were carefully valued as items, very probably work out at a sum which might include the decimal fraction of a penny, and at any rate be very inconvenient as a rent to be payable quarterly, and they suggest that the very careful, though possibly not very practical, draftsman of this Act desired to prevent by the added words the possibility of an offer by the Board, or an election by the lessee being held not in accordance with the Act, if it named as the rent the next convenient round sum in excess of that at which the $2\frac{1}{2}$ per cent. worked out arithmetically.

Their Lordships have not had the advantage of knowing the reasons on which the Court of Appeal in New Zealand acted, but the Court obviously adopted the respondent's view by reading the words as "equal to *but* not less than." In any view the words are awkward, and probably tautological. Either "equal to" or "not less than" appear superfluous, but it may be that the draftsman, who seems to have been careful on small points, merely meant to say "equal to, that is to say, substantially equal to and not less than, but not necessarily exactly equal, it may be the next convenient round sum in excess of $2\frac{1}{2}$ per cent.," and this seems to have been the view of the Court. Taking a broad view of the matter, their Lordships fail to find any sufficient ground for saying that the Legislature intended by the amending Act in any way to cut down the right of renewal, and to make the amount of the rent dependent upon anything but the machinery of a valuation. It is assumed in the introductory words of the 182nd section that the rent can be ascertained "in manner hereinafter specified," and in the last clause of it that the valuation, if not disputed, will settle the matter. This would not be done if the Land Board had any option which could affect the rent ultimately fixed.

The other provisions of the Act do not throw much light on the matter. The omission of the word "upset" and the other alterations in the wording of sections 183 and 184 can hardly be meant to introduce the novelty of disposing of the lease by bids of a premium, instead of by bids of an increased rent, as there is no provision in the Act for what is to be done with the premium if obtained, but even if it was so it would not affect the construction of the preceding section. There is, therefore, in the opinion of their Lordships no ground for altering the answers given by the Court below to the questions put by the originating summons except by making the corrections necessitated by the Court having overlooked the fact that by an amending Act of 1893 the 182nd section of 1892 had been amended by substituting the machinery of section 79

for that of 78. This correction does not affect the merits of the appeal.

Their Lordships will therefore humbly advise His Majesty that the answer of the Court below should be varied by substituting section 79 for section 78 in the answer to the third question, and by deleting the words of that answer after "78," and by substituting in the answer to the fourth question the words "arbitrators or arbitrator" for "Compensation Court," and for "that Court," where these words occur, and that except as to that variation, the appeal should be dismissed, and that the appellants should pay to the respondent the costs of the appeal.



In the Privy Council.

WILLIAM FAIRCHILD MARSH AND
ANOTHER

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THE HONOURABLE HUGH ST. LEGER.

DELIVERED BY
SIR ARTHUR CHANNELL.