KHALIL V JOHN

(1961) SIERRA LEONE ONLINE JUDGEMENTS (SLOJ) XX

In The Supreme Court of Sierra Leone

On Friday, the 14th Day Of. April, 1961

Suit No: Civ.App.20/60

CORAM

BENKA COKER C.J *Justice of the Supreme Court of Sierra Leone*
AMES P. *Justice of the Supreme Court of Sierra Leone*
MARKE. J *Justice of the Supreme Court of Sierra Leone*

BETWEEN

NAMIE KHALIL
Appellant

AND
SAMUEL JOHN
Respondent

RATIO/HOLDING:

1. *Real property - Lease by tenant for life -Whether lease by tenant for life invalid as against remainder men*

Cases Cited

Boyce v. Edbrooke [1903] 1 Ch. 836
Davies v. Davies (1888) 38 Ch.D. 499
Davies v. Hall [1954] 2 All E.R. 330
Gas Light & Coke Co. v. Towse (1887) 35 Ch.D. 519
In re Hand man and Wilcox's Contract [1902] 1 Ch. 599
In re Cornwallis West (1919) 88 L.J.K.B. 1237
In re Farnell's Settled Estates (1886) 33 Ch.D. 599;
Kisch v. Hawes Bros. Ltd. [1935] 1 Ch. 102
Pawson and Others v. Revell [1958] 2 Q.B. 360
Sutherland v. Sutherland [1893] 3 Ch. 169

Legislation Reference

Law of Property Act, 1925 (15 Geo. 5, c. 20) s. 152.
Leases Act, 1849 (12 & 13 Viet. c. 26)
Settled Land Act, 1882 (45 & 46 Viet. c. 38) ss. 6, 7, 53

AMES PJ

This appeal is against a decision of the Supreme Court declaring a lease of property in Freetown by Letitia Caroline John to the defendant to be invalid and of no effect, and also giving consequential relief and an order for costs.
Letitia Caroline John was a tenant for life of the property under the settlement created by the will of her husband who pre-deceased her. She died on

April 25, 1957, and the plaintiff respondents, who had been the remainder men then came into their estate, namely, an estate in fee simple as tenants in'
common.
The plaintiffs' claim in the court below was as follows:
" The plaintiffs' claim is for a declaration that the lease dated 12th December, 1951, and supplemental lease thereto dated the 6th December, 1956, purporting to be made between Letitia Caroline John (now deceased) of the One Part, and the defendant Namie Kalil of the Other Part, in respect of premises at Little East Street, is invalid as against the plaintiffs because it was not granted in the bona fide exercise of the leasing powers of the tenant for life, having regard to the interests of all parties entitled under the settlement created by the will of James Thompson John (deceased), within the meaning of section 53 of the Settled Land Act, 1882."
The learned judge's reason for holding it to be invalid and of no effect was something which was not before him, namely, that the will had been witnessed by Letitia Caroline John, who as tenant for life was a beneficiary under it. This did not arise out of the pleadings and arose when the learned judge was considering his decision and had the original documents before him, the will and the lease, and came to the conclusion that the signature of Letitia Caroline John on each was that of the same person.
The learned judge did not then and there decide against the lease. He called for further argument as to the legal position arising out of this discovery. Mr. Macaulay agrees that the learned judge misdirected himself in deciding the issue on something which did not arise. He submits, however, that the learned judge's decision was right in the circumstances, although given for the wrong reason, because the lease infringed the provision of the Settled Land Act, 1882, in that the period for re-entry on non-payment of rent was 60 days ; whereas by the Act it should be only 30 days ; and also because it contained a covenant for renewal for 10 years at the end of the 91 years' term, which, he submits, offends also against the provision of the Act that a term cannot exceed 99 years and also because the 10 years was an estate which could not take effect within twelve months of the grant as required by the Act.
It should be said at the outset that it is admitted by Mr. Macaulay that the lease reserved the " best rent " and that there was no question of bad faith on the part of the lessee, the defendant appellant. He relies entirely on the infringements of the Act of 1882. He cited a number of cases in which leases by tenants for life were held to be bad, and I have examined most of them to see what the infringement was and why the bad leases were not held to be good contracts for leases in equity under the provisions of the Leases Act of 1849 (12 & 13 Viet. *c.* 26) which is in force in this country. This Act is "an Act for granting relief against defects in leases made under the powers of leasing in certain cases," which is its long title, and that and its long preamble make its purpose abundantly clear. Its purpose was to avoid the evils which arise when tenants for life and others having powers to grant leases " through mistake or inadvertence on their part," grant leases which deviate from their powers, with the result that when the successors or remaindermen come into possession of their estates they are able to treat the lease as invalid. It enacts (inter alia) that any lease, which by reason of the non-observance or omission of some condition or restriction or by reason of any other deviation from the

terms of such power, •• is invalid " against the person entitled after the deter-mination of the interest of the lessor-then if the lease was made bona fide and the lessee has entered into possession thereunder, the lease shall be con-sidered in equity as a contract for a lease to the same effect but subject to any variation necessary **to** make it comply with the lessor's powers of leasing. In the case before us, it is agreed that as no powers were given by the will, the lessor's powers were those of a tenant for life under the Act of 1882. I will now turn to a consideration of the cases cited by Mr. Macaulay.

First of all there is *Sutherland* v. *Sutherland* [1893] 3 Ch. 169. In this case, the lease was held not to have been granted in the bona fide exercise of a tenant for life's leasing powers, having regard to the interest of all the parties and also that the best rent had not been reserved. The Act of 1849 was con-sidered but it was held that there had been no mistake or inadvertence and furthermore that the lease could not be regarded as a contract for a lease because it would then have been a lease on terms which were substantially different.

Another case was *In re Handman and Wilcox's Contract* [1902] 1 Ch. 599. A tenant for life had granted a lease and thereafter became bankrupt. His trustee sold the lease. While the matter was still in the stage of a contract, requisitions on title made by the purchaser indicated that the lease had not been made for the best rent. This case was a summons under the Vendor and Purchaser Act of 1874 to seek a direction from the court as to whether or not in these circumstances the purchaser should be compelled to complete the purchase. It was held that he should not be compelled to complete a purchase which might thereafter be questioned by the remaindermen (there was **also a** question of notice which is not relevant to this appeal).

Another case was *Pumford* v. *W. Butler & Co. Ltd.* [1914) 2 Ch. 353. This was a lease of licensed premises by a tenant for life at a rent of £150. The Licensing Act, 1904, allowed tenants of licensed premises to deduct from their rent certain statutory charges imposed thereon " notwithstanding any agreement to the contrary." The lessees nevertheless covenanted to pay the rent without deduction of these charges and did so pay it. After the death of the tenant for life, the remaindermen took action and the lease was held to be bad because the £150 rent was not in the circumstances the true best rent-because the covenant to pay these charges was an invalid promise, and could not be enforced.

Another case was *In re Cornwallis West* (1919) 88 L.J.K.B. 1237. What happened in this case was really an arrangement to defeat creditors by a lease of the property by a tenant for life to his son-in-law at a rent, which was not the best rent, and not in the bona fide exercise of his powers. The son-in-law never went into possession of the property but sublet to the tenant for life at a peppercorn rent. The tenant for life went bankrupt and his trustee in bankruptcy had the lease set aside.

In all of these four cases the best rent was not reserved and in some of them there was also lack of bona fl.des. A lease which does not reserve the " best rent " could not possibly act as a contract for a lease. A lease with too long a term could be treated as a contract for the term minus the excess length, and other infringements can be amended and the lease read as a contract. But where the " best rent " is not reserved, how can the lease be possibly read as a contract, because what is the " best rent " is a matter 9f negotiation and there is no statutory formula for arriving at a figure. It is also impossible

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for 30 years for them to build on at rent which was the " best rent " at that time. There was a covenant for renewal for another 30 years at the like rent, if the lessees previously gave notice of their desire. Notice was given-a renewal was refused. The statutory successors to the Gas Company sued the trustees and their cestuis que trust claiming specific performance of the contract. The covenant was held not to be ultra vires but to be unenforceable on the ground that what had been the best rent 30 years before had ceased to be the best rent. It was also held that the Act of 1849 could not apply because there had been no mistake or inadvertance. As I have said, the Act of 1849 cannot be of avail where the best rent has not been reserved.

The other case to which I shall refer is *Pawson* & *Ors.* v. *Revell* [1958] 2 Q.B. 360. This was a lease made by the mortgagor informally in circum-stances which Jenkins L.J. described as "a hole and comer arrangement." The arrangement for the lease did not contain a condition for re-entry in the event of the rent not being paid. In the case before us there is a condition but the statutory period has been exceeded. In *Pawson's* case Jenkins **L.J.** said-(at p. 239):

" ... There is no doubt that section 152 contemplates the variation of the provisions of a lease where that is necessary in order to bring it within the terms of the section, and it appears to me that a provision such as this condition of re-entry is exactly the sort of provision, the inclusion of which, when necessary in order to validate the lease, was contemplated by section 152...."

How do all these cases indicate what effect the statutory provisions have or should have on this case before us?

It is clear from the last ca,se that the 60 days' period of re-entry which made the lease bad under the Act of 1882 should be altered to 30 days so as to make it a contract for a lease within the Act if the mistake was due to inadvertance. The evidence shows that a Mrs. Bull, one of the remaindermen, and the defendant met at a solicitor's office where the terms were agreed to. A draft of the agreement was made by the solicitor then and there and sent to the solicitor whom the defendant had engaged to watch his interest. (This draft is one of the documentary exhibits in the case.) Each party having the services of a solicitor there ought not to have been an infringement of the terms of the Act. There is no question of mala fides, consequently the infringement was due, presumably, to inadvertence. Also what about the convenant to renew? I would point out that the convenant is not one which would take effect auto-matically if desired by the lessee because it is not a convenant to continue the same terms for a further 10 years ; it is a covenant to continue the lease at the "best rent." What the best rent will be at the end of the present 91 years' term, no one knows-it will be a matter of negotiation. In my view, this covenant is pleasing to the eye rather than real in law because it could not be enforced by an order for specific performance owing to the question of the " best rent."

There are, however, two further facts which are, to my mind, decisive in favour of the appellant. First of all this lease was a building lease. The tenant convenanted to build on the property and did build on it spending about £8,000." No wonder the plaintiffs/respondents want to get the lease cancelled and set aside by hook or by crook.

The other fact is that they have accepted rent from the appellant. We have before us a receipt by Mrs. Bull on behalf of herself and the other remainder. men. The receipt is somewhat naively headed "without prejudice," but it is in evidence. To my mind these facts make this case very different from those cited.

The second clause of the enactment of the Act of 1849 which I have already referred to ended up with the following proviso :

" Provided always that no lessee under any such invalid lease as afore-said, his heirs, executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation."

Then there follows :

"3. And be it enacted that the acceptance of rent under any such invalid lease as aforesaid shall as against the person so accepting the same be deemed a confirmation of such lease."

I think that, in these circumstances, this lease should be confirmed, subject to the following variation, namely, that the period for re-entry on non-payment of rent should be reduced to 30 days and the covenant for renewal should be deleted.

For these reasons, I would allow the appeal, and set aside the judgment in the court below and order the variation of the lease accordingly

Appearances

Frances Wright (Miss) (with her Arthur Dobbs)
For Appellant.

Berthan Macaulay (with himAlfred Barlatt)
For Respondents.