SESS. II.—1891.

NEW ZEALAND.

JUDGMENTS OF THE COURT OF APPEAL

IN THE CASE OF TE MOAUROA AND OTHERS *v.* THE PUBLIC TRUSTEE AND ANOTHER.

Laid on the Table by the Hon. W. P. Reeves, with the leave of the House.

In the Court of Appeal of New Zealand, between Te Moauroa and Others, Plaintiffs, and the Public Trustee and Henry Thomas Turner, Defendants.

JUDGMENT OF CONOLLY, J.

BY a deed made the 17th of January, 1876, certain Natives leased to one Matilda Rhatigan part of the Native reserve called Otoia, in the Patea district, containing 700 acres more or less. The term of the lease was sixteen years from the 1st of January, 1876, and the rent for the first ten years was £105 per annum, and for the last six years £140 per annum.

At the date of the execution of this lease the ownership of the land comprised therein had not been determined. It was within that which was described as "confiscated territory" by the Acts of 1879 and 1880, with respect to which inquiry had been made by Commissioners. By "The West Coast Settlement (North Island) Act, 1880," the Governor was empowered to issue Crown grants in fulfilment of awards of the Commissioners. By "The West Coast Settlement Reserves Act, 1881," section 4, provision was made for the insertion of conditions in Crown grants issued or to be issued under the Act of 1880.

In pursuance of these Acts a Crown grant was issued on the 27th of July, 1882, to certain Natives of land in the Patea district, containing 1,200 acres more or less. It must be assumed that this includes the 700 acres demised by the lease to Mrs. Rhatigan.

The grantees were not all of them the same as those who in 1876 purported to be lessors; but any possible difficulty to arise under such circumstances was provided for by section 9 of the Act of 1881, whereby the Public Trustee was to be the receiver of all rents payable under any lease of any reserve, and to pay over the same to the Native owners in such shares and proportions as he should ascertain to be due to such owners respectively. It may be, however, that this provision did not extend to leases already irregularly made until they were confirmed by subsequent legislation, but this is not material.

It is important to consider the terms of the Crown grant. It was to be absolutely inalienable by sale, gift, or mortgage, except by way of exchange for land of equal value, and was not to be alienable by lease for any term exceeding twenty-one years, and then only by the written consent of the Governor in Council.

In February, 1883, regulations were made by the Governor in Council under the Act of 1881, as authorised by section 5 of that Act, and these regulations contain a form of lease and provide that leases shall be prepared by the lessor, and shall, as nearly as may be, be in that form, and contain the powers, reservations, provisions, conditions, covenants, and agreements set forth therein. This, however, would only refer to leases to be thereafter granted, and in the view which I take of the matter now before the Court becomes immaterial.

In the following year "The West Coast Settlement Reserves Act 1881 Amendment Act, 1884," was passed, which by section 10 empowered the Governor, upon being satisfied as to certain preliminaries, to confirm leases which had been irregularly granted by Natives prior to 1880. By virtue of this provision the lease of the 17th of January, 1876, was confirmed

on the 27th of October, 1885. It had just previously been assigned by the original lessee to Henry Frederick Turner, and was shortly after, namely on the 5th of January, 1886, assigned by him to the defendant, Henry Thomas Turner.

By section 13 of the Act of 1884 the Public Trustee may accept from the lessees surrender of any lease which has been confirmed by the Governor, and in lieu of such may grant a new lease of the land comprised in the surrender lease at a rental to be computed on the improved value of such land, on such terms, subject to the Acts of 1881 and 1884, and to all regulations made thereunder, as may be agreed upon between the Public Trustee the Native owners of the land and the lessees.

I am quite clear that the acceptance of a surrender under this Act is discretionary on the part of the Public Trustee; and also that the terms to be agreed upon must be in accordance with the terms of the Crown grant. It may be that the written consent of the Governor to the alienation of the land by way of lease was no longer required after the passing of this Act, or even after the passing of the Act of 1881; but nothing in either of these Acts would authorise the granting of a lease for more than twenty-one years. In 1887 "The West Coast Settlements Reserves Acts Amendment Act, 1887," was passed. This amends the Acts of 1881 and 1884.

Section 7 provides a different plan for settling the terms of new leases, when leases have been surrendered under the Act of 1884. It was contended by the counsel for the defendants that this section 7 operates as an implied repeal of section 13 of the Act of 1884. I cannot agree to this. It may have been intended to deprive the Native owners of some of their safeguards by repealing that section; but if so the intention was not carried out, for section 7 expressly refers to surrenders of leases under section 13 of the former Act, refers to it again later on in the section, and merely provides that the terms shall be settled by arbitrators instead of by the parties themselves. It is probable that it had been found almost impossible to settle the terms of new leases where a large number of Natives had to agree.

Under this Act certain regulations were made in February, 1888. The Court is asked to declare these rules *ultra vires* and void; and, in my opinion, some of them undoubtedly are so if their intention was that which the words of them convey to my mind.

I have already stated my opinion that the acceptance of the surrender of a lease by the Trustee, under section 13 of the Act of 1884, is discretionary. I see nothing in section 7 of the Act of 1887 to alter this position. And I say, further, that the Public Trustee is in no way less liable to his *cestui que trust* than any other trustee would be, and that he must not accept the surrender of a lease unless it is certainly to their advantage that he should do so. The power to be exercised was not coupled with any duty to the parties who called upon him to exercise it; his duty was to those for whom he was trustee.

Now, the regulations of 1888 convey to my mind—and, I think, would do so to any ordinary mind—an intention that the acceptance of the surrender of a lease should be compulsory upon the Public Trustee; since, upon the lesssee of a confirmed lease desiring to surrender the same and to obtain the grant of a new lease, he is to notify his desire to the Public Trustee and appoint an arbitrator; and the Public Trustee is to notify the lessor, who is then within a month to appoint an arbitrator, or in default have one appointed for him; and then the arbitrators are to decide, not whether a new lease shall be granted, but what the terms of it shall be.

I fail to find in any of the Acts any authority for such proceedings. Indeed, I may go further, and say that there is no authority for them unless we are to assume that the Public Trustee has a merely ministerial act to perform in receiving notices of a wish to surrender a lease and in informing the lessor of the fact.

In the present case, the Public Trustee has, in my opinion, acted upon the regulations and contrary to the Act. On the 20th of February, 1888, the lessee gives him notice, "I intend to surrender the lease." That lease had then four years to run. He does not even say that he desires to surrender it, but that he intends to do it. And it is worthy of remark that this notice was given only ten days after the publication of the regulations. We are told that there are a large number of similar cases. With that we have nothing to do, but it certainly looks as if there had been a preconceived plan to defeat the plain meaning of the Acts to the great disadvantage of the Native owners. At least the lessee in this case had received early intimation that the regulations had been passed.

Upon the receipt of this notice, the Public Trustee appears to have taken as a matter of course that he had no discretion in the matter, and that all he had to do was to give notice

to the Native owners to appoint an arbitrator, and that, in default of their so doing, he should apply to the Government to appoint one. It does not appear that the matter was ever brought before the Public Trust Board.

The Natives never appointed an arbitrator, and, so far as appears from the case, did nothing. Thereupon, the Governor appointed one some ten months after, and the arbitrators shortly afterwards appointed an umpire, and made their award on the 1st of March, 1889.

Having arrived at the conclusion that the whole of these proceedings were unwarranted by law, it is perhaps unnecessary to comment upon the contents of the award itself; otherwise there would, in my opinion, be sufficient on the face of it to cause this Court to set it aside. (1.) It orders a surrender of the lease. This had already been treated by the Public Trustee as surrendered by the notice of the 20th of February, 1888; but, for some unexplained reason, the arbitrators do not fix either that date or the date of the award for the commencement of the new lease, but fix the 12th of February, 1889. (2.) The term is made thirty years and some months, in contravention of the Crown grant, which makes the land inalienable for more than twenty-one years. (3.) It directs that the lessee shall be entitled to compensation for his improvements unless he gets a renewal of the lease. (4.) It gives the lessee the option of a further renewal for thirty years on the same conditions, at a rent to be fixed by arbitration, thus practically giving the lessee a right of occupation for sixty years, still further contrary to the Crown grant. (5.) It does not contain a valuation of the land, or give the basis on which the rent is fixed at £72 19s. 10d. per annum, thus not complying with No. 13 of the regulations under which it is supposed to be made.

The result of this award would be an immediate loss to the Native owners of £68 per annum for three years, and of £27, their share of the costs of the award. It is clear, from the immediate application of the lessee for a surrender of his existing lease, and the grant of a new one at a rent to be fixed by arbitration, that he expected such a proceeding to be much to his advantage. It should, therefore, have been equally obvious to the Public Trustee that it would be to the disadvantage of the Native owners, whose interests he was, in my opinion, bound to protect.

I am of opinion that an injunction should be granted as prayed.

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JUDGMENT OF WILLIAMS, J.

THE main question for decision in this case appears to be whether, under section 7 of "The West Coast Settlement Reserves Acts Amendment Act, 1887," the Public Trustee has a discretion to accept or refuse to accept a surrender of a confirmed lease, or whether the section gives to the lessee an absolute right to surrender and to obtain a new lease. If the Public Trustee has a discretion, it is quite clear that in the present case he did not exercise it, but that all the proceedings were taken on the assumption that the right of the lessee was absolute, and that there was a duty imposed upon the Public Trustee at the request of the lessee to submit to arbitration, and to grant a new lease in pursuance of the award. If, then, it be established that there was no such duty, but that the Public Trustee, before agreeing to accept a surrender, was bound to exercise a discretion as to whether it was advisable to accept it or not, there is a defect which cuts at the root of all the subsequent proceedings, and renders them entirely inoperative. Section 7 of the Act of 1887 is an amendment upon section 13 of "The West Coast Settlement Reserves Act 1881 Amendment Act, 1884." Under the 13th section of this latter Act, apart from the subsequent amendment, it is abundantly clear that the acceptance of a surrender by the Public Trustee was entirely optional. Section 5 of the Act of 1884 directs that the powers of leasing conferred upon him are to be exercised "in such manner as he shall think fit with a view to the benefit of the Natives to whom such reserves belong, and to the promotion of settlement." The 7th section of the Act of 1884, though it in terms refers only to the West Coast Settlement Reserves Trustee in carrying out the routine business, mentioned in the unrepealed part of section 8 of "The West Coast Settlement Reserves Act, 1881," seems to indicate a general intention that the Natives interested are themselves to be consulted, and their wishes, if possible, given effect to. The terms upon which the new lease is to be granted are, by section 13, to be the subject of agreement. The surrender of the old lease would, of course, be conditional on the terms of the new lease having been agreed upon. In order to give effect to the section, the course of proceeding would be for the Trustee to con-

sider first whether a surrender would be desirable at all, and then, if he thought it might be desirable, to negotiate as to the terms on which the new lease should be effected—that is to say, the terms on which the new lease should be granted. When the terms were settled, the agreement for surrender and for the new lease would be one transaction, and would be carried out by the grant and acceptance of the new lease, which would operate as a surrender of the old one. The Trustee, however, clearly has the right to say that he will not enter into any negotiations for surrender at all unless he is satisfied there is reasonable prospect that the terms of the new lease will be such that the acceptance of a surrender will benefit his *cestui que trusts*. Does, then, the 7th section of the Act of 1887 make the acceptance of the surrender by the Trustee, which was previously optional, compulsory upon him. That section enacts that on the surrender of a lease under section 13 of the Act of 1884 a new lease thereunder may be granted to the former lessee, at a rental to be computed on the value of the land comprised in the lease less the value of any improvements thereon, upon terms to be decided by arbitration. It will be observed that section 7 does not repeal section 13, but refers to it as the section under which the surrender is to be made and the new lease granted. If the parties can without arbitration come to an agreement under section 13, computing the rent on the improved value of the land, there is nothing that I can see in section 7 to prevent them doing so. If, under section 13, the acceptance of the surrender is optional, then, as the surrender referred to in section 7 is a surrender under section 13, the acceptance of a surrender would still remain optional, although arbitration under section 7 might be resorted to to decide the terms of the new lease, unless the provision of the section that the rent is to be computed on the value of the land apart from the improvements is a clear indication of the intention of the Legislature that the Trustee must accept a surrender and grant a new lease. I do not think that such an indication of intention appears. Apart from the fact that the Legislature has expressly connected section 7 with section 13, and that the acceptance of a surrender under the latter section is clearly optional, the word "may" in section 7 *primâ facie* gives the Trustee a discretion.

The consequence of holding that the meaning which is *primâ facie* to be applied to that word did not apply, would be to decide that the Legislature intended to compel a trustee to sacrifice the interests of his *cestui que trusts* at the instance of a party with whom he had contracted on their behalf, and to confiscate for the benefit of a lessee that to which the lessor by the terms of the contract of the lease was entitled to. In order to deprive persons of rights to which they have become entitled by contract the clearest indication of intention on the part of the Legislature is necessary. The result, therefore, of holding the section otherwise than as giving an option to the trustee is the strongest argument that the *primâ facie* meaning of the word "may"—viz., that it gives an option, is to be adhered to. By the implied terms of the original lease, the improvements, in the absence of an agreement to the contrary, would at the expiration of the term become the property of the lessor. This, of course, was known to the lessees when they made their bargain for the lease, and the rent and other terms of the lease would be adjusted upon this basis. There is no suggestion that the parties in making the original bargain were not on equal terms. Of the two parties, the European lessees would presumably have a better knowledge of the effect of the instrument than the Native lessors. If the section is to be construed as contended for by the defendants, a lessee could compel the trustee the day before the term expired to grant him a new lease, with the rent computed on the value of the land apart from the improvements, and so deprive the Native owners of what they had originally bargained for. It may be said that any new lease under section 7 must inevitably be to the detriment of the Native owners, and therefore the Legislature must have intended to give an absolute right to the lessees to surrender and obtain a new lease, as if they had no such right the section must be inoperative, as the trustees could never be expected to consent to what was to the detriment of the Native owners, if they had any option to refuse to consent. In the absence of express words compelling the trustees to consent, I should hesitate before putting this construction upon the section, even if the necessary effect of a new lease were to injuriously affect the interests of the lessors. I do not, however, think that this would be in all cases the necessary effect of a new lease: the old lease might have several years to run; the rent computed on the value of the land, apart from the improvements, might be considerably more than the rent originally reserved. In such a case it might be a good thing for the lessors to agree to an extended term at the increased rent and to leave the improvements out of consideration. I think that it would be the duty of the trustee, before agreeing to accept a surrender and grant a new lease upon terms to be decided by arbitration under section 7, to

consider whether there was a reasonable probability that the result of arbitration would be beneficial to the *cestui que trusts,* and, if he thought there was no such probability that he should decline to enter into any such agreement, and that he is not compelled to enter into it, but was bound to exercise his discretion before doing so. I think, therefore, that the award is void on the above ground. I think, also, that, if and so far as the regulations under the Act of 1887 conflict with this construction of section 7 they are *ultra vires.* I think, also, the award is void on the ground that it directs a lease for thirty years to be granted, when the Crown grant limits the power of leasing to twenty-one years. Section 4 of the Act of 1881 validates the grant, and the restrictions on alienation contained in it. By section 8, the power of leasing given to the trustee is subject to such restrictions. That part of section 8 was repealed by section 3 of the Act of 1884; and by section 5 of that Act the Public Trustee has, subject to the provisions of the Act, and to any conditions, limitations, or restrictions attached to any reserves, a power of leasing. By the 8th section of the Act of 1884 there is a power of leasing agricultural land for thirty years. By section 5, however, of the Act of 1884, the power of leasing of any particular reserve is not only subject to the provisions of the Act but to the restrictions attached to such reserve; and in the present case there is a restriction to twenty-one years, which thus, by the terms of the Act, controls the more extended leasing power given by the Act itself. As I consider the award to be thus radically bad, there is no need to consider other minor objections to it.

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JUDGMENT OF DENNISTON, J. (delivered 23rd May, 1891).

THE first point to be determined is whether section 7 of the Act of 1887 compels the Public Trustee to accept the surrender and grant the new leases in such section mentioned. In determining this it is necessary to look at the state of the law which the section purports to alter. Section 13 of the Act of 1884 undoubtedly gave the Public Trustee a discretion. Although the section is very clumsily worded, it is clear that the surrender and the new lease were to be contemporaneous. The lessee intimated his desire to surrender. If the lessee, the Natives, and the Public Trustee came to terms for a new lease, the execution of such lease operated as a surrender of the previous term. Except as to one proviso, the section amounted to no more than clearing away any possible doubt as to the power of the Trustee to accept surrenders of existing leases. The proviso referred to is that by which it is provided that in any new lease the rental is to be computed on the improved value of the land. This proviso is obviously in favour of the Natives.

We then come to section 7 of the Act of 1887. The first observation that suggests itself is that if, as contended by the plaintiff, the only object of the amendment was to get over the difficulty of getting the Natives to agree, such object could have been effected very simply by making their consent unnecessary, and leaving their interests in the hands of their trustee. Has, then, the Trustee a discretion? It is, I think, obvious that, as in the other section, the power to accept a surrender must depend upon the agreement as to a lease. It is, I think, also obvious that the discretion, if any, must be exercised before the arbitration. A discretion to be exercised by one only of the parties, after the terms of the proposed contract have been settled by arbitration and the expense incurred, would, I think, be absurd. It would, indeed, be inconsistent with the very idea of arbitration, which is to take the matter out of the hands of the parties. If, then, there is any discretion, it must, I think, be a discretion on the part of the Trustee to determine whether it is in the interests of the Native lessors to accept a new lease in lieu of the one proposed to be surrendered. And in this connection it may be noticed that to compel a trustee to submit the interests of those he represents to arbitration is in itself unusual. (See Attorney-General *v.* Fish.) Such a provision is in itself a fetter on the discretion of the trustee. If the only object of the section was to enable the Trustee to decide as to whether a lease would be beneficial, he would do so better if unhampered with the restriction. But the provision in the section which seems to me most decisive on the point is that which declares that in the new lease the rental is to be computed on the value of the land less the value of the improvements. This is a distinct fetter on the discretion of the parties, and a fetter imposed clearly in the interests of the lessee. It can, of course, only apply to lands which have been improved. In many, I should think in the greater number, of the original leases from the Natives there would be no provision for valuation of improvements. At the end of the existing term the

improvements would go to the Natives. This may have been thought a hardship, and to have retarded settlement. It is at all events clear that the alteration is for the lessee's benefit. There can be cases perhaps imagined in which such arrangement could benefit lessor and lessee. I cannot easily conceive them. But such cases could have been provided for (if necessary) by simply omitting the provision in section 10 of the Act of 1884, fixing rents on the improved value. As it stands, the provision in the vast majority of cases would amount to the virtual confiscation, for the benefit of the lessee, of the lessee's rights to the improvements. Of course, if the Trustee had a discretion, such a proviso would determine, in all cases where improvements had been made, a decision against the new lease. But this would in effect render nugatory the entire section in respect of the whole, or practically the whole, of the largest class—those who had improved—for whose benefit it was enacted, and for which alone the proviso as to the basis of rental was inserted. For it must always be remembered that if the Trustee has no discretion the lessee only is given the right to insist on a surrender.

I find, then, an interference of the Legislature with the freedom of contract between certain parties—one of them a quasi-public officer. The restriction is beneficial only to one of the parties, and meaningless and unnecessary as to the other. What is the effect of this on the enacting words in the section, "a new lease may be granted"? Does it not bring the case within the principle stated by Lord Cairns in "Julius *v.* Bishop of Oxford" (5 Appeal Cases, 214, at page 222): "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so." Giving full force to the consideration that the words being in themselves permissive, it lies upon those who contend that an obligation exists to show circumstances which will create the obligation. I think in this case they have done so. I think, badly as the section is worded, that section 7 is intended to take the place of section 13. It is clear that all that comes after the opening words of that section, "the Public Trustee may accept from the lessees surrender of any lease confirmed by the Governor in Council under the said Act or this Act," is inconsistent with the provisions of section 7. I cannot think it was intended to preserve the two conflicting sets of provisions merely because one of the provisions in section 13 was to require consent. I think the preferable view is to take the reference in section 7 to section 13 as referring only to so much of section 13 as refers to surrender—that is, the words I have quoted, and to substitute for the rest the new provisions of section 7. That the Legislature has continued to treat the Public Trustee as having a position and duties somewhat different from those of a private trustee is shown, I think, by the section which enacts that he may exchange or lease reserves in such manner as he shall think fit with a view to the benefit of the Natives to whom such reserves belong and the promotion of settlement. This assumes that the promotion of settlement may be adverse to the interests of the Natives—otherwise the words would be unnecessary. Assuming the right of the lessee to insist on a new lease on terms to be decided by arbitration, has the award in this case been properly made? The most important objection is to the extent of the term awarded—thirty years. The grant to the lessors contains a restraint on alienation for any term exceeding twenty-one years. This was obviously in contravention of section 4 of the Act of 1880, which provided that any restraint on alienation was to be made by Act of the General Assembly. By section 4 of the Act of 1881, all grants issued for any reserve within confiscated territory made by the Governor in Council containing therein any conditions, restrictions, or alienations are validated in respect of such conditions. The latter part of the section leaves it open to the argument that such validation was intended to apply only to grants under section 3 of the Act of 1880, that is as to lands granted in fulfilment of any award, promise, or engagement made by the Government of this Colony. I think, however, that the general words at the beginning of the section and the reference to the reserves as made by the Governor in Council, make the section applicable to grants under section 4. The powers of leasing given to the Public Trustee under section 8 of the Act of 1881, and by section 5 of the Act of 1884, are made subject to any conditions, restrictions, or limitations attached to any reserves which shall have come or been placed or shall come and be placed under his jurisdiction. I think the terms of section 5 limit the general language of section 8 of the Act of 1884, and that the term of thirty years mentioned in the award is bad, as inconsistent with the grant. If so, it is clear the lessee cannot claim to take the shorter term, as it is impossible to say that the length of the term has not affected the other terms of the award. It has been practically admitted that the provision for compensation for improve-

ments, involving as it does a grant either to the present lessee or another of a further term of thirty years is bad. I am inclined to think that had this been the only objection to the award the lessee could have taken a lease without this proviso—of course losing any claim to improvements. I think that the amount of the rental is one of the terms intended to be settled by any arbitration under section 7. The language is in the same words as in section 13, which described what could be the subject of agreement among the parties, nor, I think, in the case of a compulsory arbitration, could so vital a point as the rental be omitted. I think the regulations of 1883, purported to be made under the Act of 1881, are *ultra vires*, and are not validated by the reference in section 7, except so far as they define improvements and provide machinery for arbitration. As the award shows that the arbitrators have considered themselves controlled by the regulations, I think this alone would make such award bad. I think the plaintiffs entitled to the injunction asked.

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