[HIGH COURT OF AUSTRALIA.]

BORSERIO . . . . . APPELLANT;
APPLICANT,

AND

MINISTER FOR LANDS OF NEW SOUTH WALES . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 23, 24.

McTiernan, Williams, Fullagar, Kitto and Taylor JJ.

Crown Lands—Crown lease—Mortgage—Transfer—Consent of Minister—Conditional purchase—Conversion—Application—Reservation from sale—Local Land Board—Hearing of application—Lease transferred—Holder—Owner—Status—"Made in good faith"—Stated case—Land and Valuation Court Act 1921-1940, *s.* 17—*Crown Lands Consolidation Act* 1913, *ss.* 29, 154, 184.

Section 184 of the *Crown Lands Consolidation Act* 1913, so far as material, is as follows:—"(1) Upon application as prescribed the holder or the owner (subject to mortgage) of any settlement lease or Crown-lease which is not liable to forfeiture may convert such lease into a conditional purchase or into a conditional purchase and conditional lease but subject to the provisions of paragraph (b) of this sub-section so that the area of the conditional lease shall not exceed three times the area of the conditional purchase.

The provisions following shall apply to any application:— . . . (f) Upon confirmation by the local land board, whether before or after the commencement of the Crown Lands, Closer Settlement and Returned Soldiers Settlement (Amendment) Act, 1935, the conversion shall be deemed to have taken effect as from the date of application for conversion. On such confirmation the settlement lease or Crown-lease shall be deemed to have been surrendered to the Crown as from the date of application for conversion unless such application is withdrawn pursuant to paragraph (d) of this subsection".

Held that the application to which s. 184 (1) refers is an application that is completely made, not only initiated but carried through to the point of confirmation. Accordingly an applicant must possess his qualification as holder

or as owner subject to mortgage, not only when he becomes an applicant, but continuously until confirmation is obtained.

Decision of the Supreme Court of New South Wales: *Re Application by Agostino Borserio* (1955) 55 S.R. (N.S.W.) 194; 72 W.N. (N.S.W.) 119, subject to a variation, affirmed.

APPEAL from the Supreme Court of New South Wales.

This was a case stated by the Land and Valuation Court (*Sugerman* J.) arising out of an application made by Agostino Borserio to convert a Crown lease to a conditional purchase under the provisions of s. 184 of the *Crown Lands Consolidation Act* 1913, as amended, for the decision of the Full Court of the Supreme Court of New South Wales thereon in pursuance of s. 17 of the *Land and Valuation Court Act* 1921-1940.

The case so stated was substantially as follows:—

1. The above-named Agostino Borserio (thereinafter referred to as the applicant) was at all material times before 17th July 1951 and on that date and at material times thereafter until October 1951 recorded in the books of the Lands Department as the registered holder, subject to a mortgage to the Bank of New South Wales, of Crown Lease 1930/23, Parish of Rowley, County of Macquarie, Land District of Taree.

2. By a contract entered into before 22nd November 1950 between the applicant and one J. A. Livermore the applicant agreed to sell that Crown lease to Livermore.

3. On 22nd November 1950 the applicant applied pursuant to that contract for the consent of the Minister for Lands to a transfer of the Crown lease to Livermore.

4. The consent of the Minister to the transfer was given on 15th February 1951.

5. On 17th July 1951 the applicant lodged an application in which the above-named mortgagee joined for conversion of the Crown lease into a conditional purchase in accordance with s. 184 (1) of the *Crown Lands Consolidation Act* 1913, as amended. Livermore was not joined as a party to the application.

6. On 20th July 1951 the Minister in accordance with s. 29 of the Act by notification in the *Gazette* temporarily reserved from sale generally the land the subject of the Crown lease. That reservation has not been revoked.

7. On 13th August 1951 the applicant executed a transfer of the Crown lease to Livermore.

8. On 17th August 1951 that transfer was duly lodged in accordance with the Act and the regulations made thereunder.

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9. In October 1951 the transfer was duly registered in the books of the Department of Lands.

10. The application for conversion came before the local land board at Taree on 28th April 1953, 26th May 1953 and 16th September 1953.

11. That board was satisfied that on 17th July 1951 the Crown lease was not liable to forfeiture and that on that date the land the subject of the lease was not reserved from sale.

12. The board stating that it was in doubt in view of the decision in *Re Hunter* (1) as to whether it had any power to refuse the application, but being of opinion the above-mentioned transfer of the Crown lease was a material factor to be considered before confirming the application, purported to refer the case to the Land and Valuation Court for decision on the following matters :—(1) Must the board confirm an application for conversion under s. 184 of the *Crown Lands Consolidation Act* 1913, by the registered holder of a Crown lease that is not liable to forfeiture and where conversion is not barred by s. 188 ? (2) Can the board consider the fact that a Crown lease has been transferred after the lodgment of the application for its conversion when dealing with such application ?

13. In accordance with s. 12 of the Act, as amended, the Land and Valuation Court dealt with the case so referred to in all respects as if it had been brought before it in the first instance.

14. On the hearing of the case by the Land and Valuation Court it was submitted by counsel for the Minister that the application could not be confirmed because : (1) on 17th July 1951 the applicant was not, in the events which had happened, competent to make the application ; (2) if he was, then in the events which had happened, the application was not capable of confirmation ; (3) the application was not made by the applicant in good faith within the meaning of s. 154 of the Act ; and (4) that by reason of the reservation so made on 20th July 1951 the Crown lease was thereafter not convertible into a conditional purchase unless and until such reservation should have been revoked.

15. At the hearing before the board application was made on behalf of the applicant for amendment of the application by joining as an applicant Livermore as if he had been a party to the application in the first place. That application for amendment was refused by the board, renewed at the hearing of the case by the Land and Valuation Court and refused by that court for reasons stated in an annexure to the case stated.

(1) (1942) 21 L.V.R. 5.

16. Being of opinion that after the applicant had divested himself of all title to or interest in the Crown lease he was no longer competent to pursue the application and that there was thereafter no subsisting application of which confirmation could be granted the Land and Valuation Court did not find it necessary or appropriate to give a decision upon any of the other submissions made by counsel for the Minister, and ordered that the case be returned to the board with the direction that, the applicant having transferred away the Crown lease, his application for its conversion into a conditional purchase could not be confirmed, and that such action be taken as was necessary to give effect to that direction.

The questions of law stated for the decision of the Supreme Court were as follow :—

(1) Whether on 17th July 1951 the applicant was in the events which had happened competent to make the application ? (2) If so, whether in the events which had happened there is now any subsisting application which is capable of confirmation ? (3) If " Yes " to (1) and (2) : (a) whether the requirement of s. 154 of the *Crown Lands Consolidation Act* 1913 extends to an application under s. 184 thereof for the conversion of a Crown lease into a conditional purchase ? ; and (b) if so, whether in the events which have happened confirmation of the subject application must be refused upon the ground that it was not made " in good faith " within the meaning of the said section ? ; (4) If " Yes " to (1) and (2) and " No " to 3 (a) or 3 (b), whether by reason of the reservation made as aforesaid on 20th July 1951 the said Crown lease was, in the events which have happened, thereafter not convertible until the reservation should be revoked ? ; (5) Whether the applicant should be allowed to amend the said application by adding or substituting as an applicant Livermore as if he had been a party thereto in the first place ? ; and (6) Whether having regard to the answers to questions (1) to (5) both inclusive above the application should now be confirmed ?

The Full Court of the Supreme Court (*Street* C.J., *Herron* and *Myers* JJ.) answered the various questions as follow : (1) Not necessary to answer. (2) There was an application in existence at the date when the Local Land Board sat to make its determination but that application was incapable of confirmation. (3) and (4) Not necessary to find conclusive answers. (5) Answer not pressed by appellant. (6) No.

The appeal was dismissed : *Re Application by Agostino Borserio* (1).

From that decision the appellant, Borserio, appealed to the High Court.

(1) (1955) 55 S.R. (N.S.W.) 194 ; 72 W.N. (N.S.W.) 119.

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G. P. Stuckey Q.C. (with him *B. B. Riley*), for the appellant. The question is whether the appellant was entitled to make an application under s. 184 (1) of the *Crown Lands Consolidation Act* 1913 to convert a Crown lease, of which he was then the registered holder, into a conditional purchase. It is a contest, the appellant being the holder, to determine whether he was entitled to convert, or was entitled to at that time, or whether he was entitled to continue to maintain the application after he ceased to be the registered holder by reason of the fact that the Act itself in par. (f) of s. 184 (1) provides that if the application is confirmed then it dates back to the date of application, namely 17th July 1951 in this case, three days before the reservation. The order of events was different from *Hawkins* v. *Minister for Lands (N.S.W.)* (1). The position as between the appellant and Livermore does not affect the question at issue. The appellant is interested to maintain the application either for his own benefit or the benefit of Livermore, or for benefit by reason of the fact that he is obligated to a third party. The appellant was the holder of the lease on 17th July 1951. The word " holder " as used in s. 184 means the registered holder; it is impossible otherwise to get any consistency whatever in the Act (*Re Locker* (2); *Re Hooke* (3); *Bagot's Executor & Trustee Co. Ltd.* v. *McKenzie* (4)). The right to convert is, under the Act, only a right to convert at a particular period of time. Although the tenure is divided under the statute, the basis of the relationship between the holder and the Crown is contractual. The effect of s. 184 is that the holder of a Crown lease has a contractual right to make an application to convert his Crown lease into a conditional purchase or conditional lease. That offer by the Crown is, by s. 184, irrevocable so long as the Crown lease is in existence. One of the incidents of a contract of a Crown lessee is that s. 184 provides he can convert his lease—is not liable to forfeiture and the land is not held for sale. The position as to contract is stated in *Re Hawkins* (5). A reservation made after the application has no operation on the land included in the application. Whether Borserio made the application expressly on Livermore's behalf or not does not matter. Borserio had the right under the statute, as the registered owner, to make an application and thereby bring into existence a contract by the Crown to grant a fee-simple of this land. The holder has applied when he has merely started to apply by lodging the application.

(1) (1949) 78 C.L.R. 479.
(2) (1926) 5 L.V.R. 91.
(3) (1938) 17 L.V.R. 6.
(4) (1948) 27 L.V.R. 50, at pp. 64-66.
(5) (1948) 49 S.R. (N.S.W.) 114, at pp. 119, 120, 123; 65 W.N. 270, at p. 272.

This is shown if one keeps in mind the concept that it is a contractual relationship, then under the Crown lease, by virtue of s. 184, the holder may convert it into a conditional purchase. The whole scheme of the Act is that the change, if change there is to be, is to be at the date of the application. All that the board is required to do is to decide whether there has been a breach of the conditions of the lease, that is to say whether it is liable to forfeiture or not. The holder is not bound to go before the board at all. Whether or not the making of the application brings into existence the contract to grant the fee-simple subject to a condition that if it is not confirmed it shall cease to be a contract. On the words of the Act that is the effect of the application, and it does not matter what the form prescribed is. There is not any power to make the matters the subject of regulations. The word " may " was read in the court below as indicating futurity, but it is submitted that it is facultative. Whatever was prescribed has been done. The matter was considered, so far as settlement leases are concerned, in *Minister for Lands* v. *Yates* (1). That case was correctly decided. In the case of a Crown lease the only question is : was it liable to forfeiture or not ? See *Abbott* v. *Minister for Lands* (2). Clear words are necessary to show that a right properly availed of at the inception is taken away by reservation in a period while awaiting the decision of the board, therefore in the absence of any statutory provision taking away the right it still remains. The important general question is the effect of the reservation at the time. Although the Act contains provisions for withdrawal, lapsing, forfeiture and other matters dealing with peoples' rights, nowhere in the Act is there to be found that such an application as this is to come to an end. A contract cannot be terminated without agreement, or performance, or the like. An application having been made, it does not come to an end merely because there is a transfer. Livermore could not make an application while the other one was still pending. By the application under s. 184 a new contractual relationship had been created with respect to this land. It being a contractual right, the Minister has contracted to sell the land or to give Borserio a conditional purchase. A contract between the Crown and the applicant does not come to an end merely because somebody else became registered as the holder of the lease. It will inure for his benefit and he will have the option of taking it.

R. F. Loveday, for the respondent, was not heard.

(1) (1917) 17 S.R. (N.S.W.) 114, at pp. 117, 118; 34 W.N. 37.

(2) (1895) A.C. 425, at p. 431.

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The following judgment of the COURT was delivered by McTIERNAN J: This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales, given upon a case stated by the Land and Valuation Court.

The case stated concerned an application which the present appellant had instituted for the conversion of a Crown lease into a conditional purchase, under s. 184 of the *Crown Lands Consolidation Act* 1913 (N.S.W.), as amended. It is provided by sub-s. (1) of that section that " Upon application as prescribed the holder or the owner (subject to mortgage) of any settlement lease or Crown lease which is not liable to forfeiture may convert such lease into a conditional purchase . . ." The sub-section goes on to make a number of provisions, in lettered paragraphs, to apply to any such application. We need mention only par. (f), which provides that upon confirmation by the local land board the conversion shall be deemed to have taken effect as from the date of application for conversion.

The appellant lodged an application for conversion of his Crown lease into a conditional purchase on 17th July 1951. At that time he was recorded in the books of the Lands Department as the holder of the Crown lease; and the books, apparently through some departure from the usual practice, also showed that the Bank of New South Wales was the mortgagee of the holding. Even if it were considered that because of this entry in the books the appellant was not the holder of the Crown lease within the meaning of s. 184, it would nevertheless follow that he was the owner subject to mortgage. It may therefore be taken that he was competent to lodge the application for conversion. He had, it is true, already contracted with one Livermore to sell the Crown lease to him, but we shall assume without deciding that the existence of that contract created no obstacle to the application. Before the application was dealt with by the local land board, however, the appellant transferred the lease to Livermore, and on 17th August 1951, the transfer was registered in the books of the Lands Department. In the meantime, namely on 20th July 1951, the land comprised in the Crown lease became reserved from sale, and by reason of s. 188 it was not thereafter convertible into a conditional purchase unless and until the reservation should be revoked: see *Hawkins* v. *Minister for Lands* (1). This has not happened, and consequently Livermore is not entitled at present, and may never become entitled, to make an application of his own for conversion. It has been assumed, however, that the appellant's application, having

(1) (1949) 78 C.L.R. 479.

been instituted before the reservation was made, is unaffected by the reservation, and we are content, without expressing any opinion upon it, to accept this assumption for the purposes of the appeal.

Before the local land board, several questions arose as to the right of the appellant to have his application granted by the local land board, and these questions were submitted to the Land and Valuation Court for decision. In that court, *Sugerman* J. held that the application could not be proceeded with, because the appellant had ceased to be either the holder of the Crown lease or the owner of it subject to mortgage. His Honour stated a case for the opinion of the Supreme Court on that point and others, and the Supreme Court affirmed his decision. It should be said that *Sugerman* J. had also held that the application, if incompetent, could not be rendered competent by an amendment adding Livermore as an applicant, and that his Honour's decision in that respect was not attacked in the Supreme Court.

The argument presented in support of the challenge now offered to the Supreme Court's decision has been, in effect, that s. 184 gives a holder, or an owner subject to mortgage, of a Crown lease which is not liable to forfeiture and which comprises land which has not been reserved for sale, an option to convert it into a conditional purchase; and that the option is exercised by the lodging of an application in the prescribed manner, whereupon the applicant acquires an absolute vested right to have the conversion confirmed and thus made effective retrospectively to the date of the lodgment of the application—a right which is not divested from him by his ceasing, before confirmation, to be the holder of the Crown lease or the owner of it subject to mortgage.

It is true that s. 184 gives a right to convert if in fact the Crown lease is not liable to forfeiture and the land comprised in it is not reserved from sale. But it is a right to convert "upon application as prescribed". Paragraph (f) makes it clear that there is no conversion until the local land board confirms the application, though the conversion which then takes effect is retrospective. Therefore it is not the lodging of the application, but its confirmation, which brings about the conversion: *Hawkins* v. *Minister for Lands* (1); *Re Hawkins* (2). From this it seems necessarily to follow that when the section says that the conversion may be made by the holder or owner subject to mortgage "upon application" it means upon an application being made, that is to say

(1) (1949) 78 C.L.R., at pp. 487, 488, 492, 499.

(2) (1948) 49 S.R. (N.S.W.), at p. 123; 65 W.N. 270.

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completely made, not only initiated but carried through to the point of confirmation.

If this be so, then an applicant must possess his qualification as holder, or as owner subject to mortgage, not only when he becomes an applicant, but continuously until confirmation is obtained.

The construction for which the appellant contends would produce strange results. It would mean, in the present case for example, that the appellant could insist upon converting the Crown lease into a conditional purchase without Livermore's concurrence, thereby producing no benefit to himself but involving Livermore in liabilities which he may not wish to assume. Moreover it would mean, in the case of an application to convert a settlement lease, that par. (b) of s. 184 (1) would bring about an incredible result. That paragraph provides for dividing the area of a settlement lease in certain cases, converting part into an original conditional purchase and the remainder into a conditional lease, by reference to the question whether the land comprised in the settlement lease, together with certain other lands held by the applicant for conversion, would substantially exceed a home maintenance area. If the appellant's argument is correct, in a case in which the facts resembled those of the present case except that the holding to be converted was a settlement lease instead of a Crown lease, the paragraph would have to be applied by considering, not whether the lands held by the person who would become the holder of the converted holdings would exceed a home maintenance area, but the completely irrelevant question whether the lands held by the applicant, a person no longer interested in the land, would exceed such an area. This simply cannot be right.

In our opinion when the appellant transferred his Crown lease to Livermore his application for conversion ceased.

In the Supreme Court the only questions answered were those numbered (2) and (6). Question (1) was not answered, but should be stated. These three questions were :—

> " (1) Whether on 17th July 1951 the applicant was, in the events which had happened competent to make the said application : (2) if so, whether in the events which have happened there is now any subsisting application which is capable of confirmation : (6) whether having regard to the answers to questions (1) to (5) both inclusive above the said application should now be confirmed ".

Questions (2) and (6) were answered :—

" *Question Number Two* (2) : There was an application in existence at the date when the Local Land Board sat to make its determination but that application was incapable of confirmation.

Question Number Six (6): No."

In our opinion the answer to both of these questions should be "No" and, subject to this variation of the answer given by the Supreme Court to question (2), the appeal should be dismissed with costs.

The answer to question Number (2) *should be varied to read "No". Subject to that variation of the answer given by the Supreme Court to question* (2), *appeal dismissed with costs.*

Solicitor for the appellant, *R. S. Hawkins*, Taree, by his agents *R. A. O. Martin & Nelson.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.