IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A. No. 742/70

BETWEEN ALLAN JAMES HOGAN of Auckland, Company Director, and ZELDA MAY HOGAN of Auckland, Married Woman

PLAINTIFFS

A N D CAR SERVICES CENTRE (N.Z.) LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Service Station Proprietors

DEFENDANT

Hearing: 25th September, 1970.

Counsel: Burnes for Plaintiffs.
Clark for Defendant.

Judgment: 29th September, 1970.

JUDGMENT OF HENRY, J.

This judgment is supplementary to the judgment delivered on August 31st, 1970, and concerns the third question which was reserved, namely, ought relief be granted to defendants under the provisions of Section 120 of the Property Law Act, 1952? The option to purchase was exerciseable on three months' prior notice but, since its purported exercise took place four days before the termination of the tenancy, it was held in the previous judgment that the option had then already expired and so was not capable of being exercised. Notwithstanding this situation Counsel agree that Section 120 (6) of the Property Law Act, 1952, confers a right to apply for relief. Section 121, however, provides a limitation which is relevant to the instant case. Section 121 (1) reads:-

> "Application for relief in accordance with the last preceding section may be made at any time within three months after the refusal of the lessor to grant a renewal of the lease or to grant a new lease or to assure the reversion, as the case may be, has been first communicated to the lessee. "

The preliminary question is raised whether or not the said limitation applies.

On July 28th, 1970, Plaintiffs brought these proceedings seeking possession on the basis that Defendant had been holding over since February 9th, 1970. By a Statement of Defence filed on August 7th, 1970, defendant claimed that it had validly exercised the said option and that it was entitled to have the purchase price fixed by arbitration in terms of Clause 21 of the original lease. An application for relief was not included but it was agreed at the hearing on August 25th, 1970, that this question should be determined if the Court held that Defendant had not validly exercised the option. Thus the matter now comes before the Court.

By a letter dated December 23rd, 1969, Plaintiffs gave Defendant notice that the tenancy would terminate on February 9th, 1970. On February 5th Defendant gave a notice purporting to exercise the option to purchase. On February 9th, Defendant's solicitors stated that their client would discuss with Plaintiffs the matter of the purchase price but if agreement be not reached then it would be necessary to "follow the procedure set out in the lease for the ascertainm "of value". This meant arbitration and the question of fixi a purchase price. The solicitor for Plaintiffs made it pla that it was Plaintiff's contention that there was no option which Defendant could exercise and that therefore there was difference or dispute which might come within the ambit of arbitration. The solicitors to Defendant insisted, with

citation of authority to support their view, that Defendant had a valid option to purchase and that it had been properly exercised. So the matter rested except that, at about the end of March, 1970, the parties held discussions without prejudice to their respective contentions. On May 6th the matter again surfaced. Defendant gave written notice of the appointment of an arbitrator. This notice was accompanied by a letter. On May 12th the solicitors for Plaintiff replied as follows:-

> " We refer to your letter of 6th May. With reference to the appointment of an Arbitrator and the reference in your letter that no action has been taken by us in this respect since your letter of 24th March, you will be aware that the matter has not been ignored and has been the subject of some discussion as to possible settlement.
>
> We consider that the dispute in this matter is one in which it is not appropriate to submit to Arbitration. You will be aware that the question is essentially one of law and there does not appear to be much in the way of New Zealand case law which is relevant. We consider, therefore, that the matter should be determined at Supreme Court level and would invite you to issue a Writ seeking the necessary declaration.
>
> Furthermore, it could be argued that the dispute has arisen after the term of the lease and therefore the clause concerning Arbitration would not be relevant.
>
> We would advise that we would oppose reference to Arbitration should you seek such an order from the Court. "

This letter was replied to on July 21st, and the following paragraph is of importance, namely:-

> " The position has been considered carefully by our client and ourselves and, notwithstanding your suggestion that the matter should be determined in the Supreme Court, we have decided to proceed in terms of the provisions of the Lease referring to arbitration. "

The solicitors for Defendant again called upon Plaintiffs to submit to arbitration and again appointed an

arbitrator. Plaintiffs replied with a writ of summons. Defendant filed a Statement of Defence and their solicitors wrote as follows:-

> " We enclose herewith copy of our Statement of Defence.
>
> This matter is now set down for hearing during the week commencing the 24th instant.
>
> We would confirm that while our client has not invoked its rights to go to arbitration we have appointed Mr. Shieff as sole arbitrator in regard any matters not covered by the present proceedings. It does not seem to us that it should really be necessary for there to be any evidence called. Perhaps you would consider letting us have a draft "Agreed Statement of Facts".
>
> We are of the view that the main legal point in issue was settled by the House of Lords decision Batchelor v. Murphy 1926 A.C. 63, and that the option to purchase was one of the provisions contained in the lease which was renewed. "

In my judgment Plaintiffs, through their solicitors, made it abundantly plain from the beginning that there was "no option to exercise" as the solicitor for Plaintiffs stated in evidence. Plaintiffs refused at all times to accede to the attempts of Defendant to have the question of the purchase price referred to arbitration as provided for in the lease. This refusal was obviously based on a claim that Plaintiffs were under no obligation to assure the reversion to Defendant. It is true the refusal was based on a claim that there was no right in Defendant to call for such an assurance. In fact that claim has been held to be soundly based, but that is irrelevant. I hold that it has been established that, from shortly after Defendant purported to exercise the said option, Plaintiffs, through their solicitor, communicated to Defendant that they would not assure to the Defendant the reversion of the said land, and that accordingly the present claim for relief is barred by reason of Section 121 (1) of the Property Law Act, 1952.

There will be judgment for Plaintiffs as follows:-

(1) That Defendant deliver up possession of the said premises within fourteen days from date of judgment.

(2) That Defendant pay for the use and occupation of the said premises the weekly sum of $30.00 as from the 9th day of February, 1970, to date of judgment.

(3) That Defendant pay costs as on an action for $2,000, together with costs according to scale and Court disbursements and witnesses' expenses to be fixed by the Registrar.

(4) I certify for one extra day at $30.00.

Solicitors:

Shale & Burnes, Auckland, for Plaintiffs.

Earl Kent Massey Palmer & Hamer, Auckland, for Defendant.