IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 398/77

NZLR

No Special Consideration

BETWEEN : LAURENCE WILLIAM FRY
Appellant

A N D : JOHN STEWART HOLDINGS LIMITED
Respondent

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Hearing: 15 March 1979

Counsel: Robinson for Appellant.
Casey for Respondent.

Judgment: 15 March 1979

(ORAL) JUDGMENT OF PERRY, J.

This is an appeal against the decision of the late Mr Pledger, Stipendiary Magistrate, when he gave judgment for the plaintiff for the sum of $725 plus interest, whereas a considera sum more had been claimed.

The litigation arises out of an agreement entered into on the 17th July 1974 whereby a company known as John Dee Group Holdings Limited which owned a building in Hepburn Street Te Atatu. This company is now known as John Stewart Holdings Limit This company agreed to let a portion of that property, a buildin divided into I think four factory premises, to Harrie David Barford and Laurence William Fry or their nominee. The operativ clause reads:

> "Whereas Harrie David Barford and Laurie William Fry or their nominee both of Auckland offer and agree to take on a Lease of the factory premises to be complete situated at Hepburn Road, Te Atatu, being Section 'A' fronting on Hepburn Road, upon the following terms and conditions, the costs of such lease drawn shall be at the expense of the Lessee."

Then follow a series of clauses providing for the term of the lease that was being entered into, and the right of renewal, fixing what rent would be payable, an obligation under the lease to pay pro rata proportion of the rates for the whole premises, the right to assign or sublet, a date of possession, agreement to pay the first months rent in advance and it is also described as in support of this agreement to lease, an undertaking to pay fire insurance on a pro rata basis of the whole building, and certain obligations on the letting company regarding installatio

of toilets, power points and a restriction also of the hours of working in the premises.

I have no doubt it was contemplated that Barford and Fry would not be likely to take the lease in their own names, of course they could well do so, but that the lease would be to a nominee person or company And in fact when the lease was about to be drawn, the parties Barford and Fry seem initially to have nominated Fry Manufacturing Company Limited, and the lea was drawn accordingly. That is shown by a letter of the 25th September from the lessor's solicitors. Then they seem to have reconsidered the position that is the prospective tenants, and nominated a company called Kelston Clothing Company Limited and they said that they would be changing the name of that company to North Shore Clothing Limited, so the draft lease was re-drawn and sent on the 13th November again to solicitors, in the name of North Shore Clothing Limited.

It would appear that the premises became ready for occupation about 1st October, and that somebody moved in. It may well be that Mr McMillan who is the Managing Director of the landlord company, was never very clear who exactly moved i He talks in his evidence about Fry moving in, but of course you have the company called Fry Developments, Fry Manufacturing, and you also have this other company, which would make it difficult to know who exactly was there, and they represented the physical bodies of either Fry or Barford no doubt.

No further rent was paid, the lease was never signed, notice to quit was given to North Shore Clothing, and apparently they vacated about 21st January, whoever was there. So that the landlord company then brought proceedings in the Court, claiming $1087 arrears of rent from 30 September 1974 to 21 January 1975 after deducting the sum of $362.50 paid on the signing of the agreement, the sum of $53.78 being a proportion of the rates, $57.29 being the proportion of the fire insurance premium, $725 being two months rental based on clause 5 of the agreement which I have not yet referred to, and interest on those sums.

The reason for claiming two months rental was because of clause 5 (Clause 7 of the lease, or clause 5 of the Statement of

Claim) which reads:

> "Should the Lessee default in completion of the Lease, then the Lessors shall have the right to claim loss of rent to the date of re-leasing the premises herein described provided that the amount payable in terms of this clause shall not exceed 2 months rental.

The learned Magistrate held that the landlord company was entitled to recover that sum but was not entitled to recover ren or proportion of rates or insurance, and suggested that if there was liability on anybody's part for those amounts, it might be laid at the door of the North Shore Clothing Company, who was of course one of the defendants.

The appeal has been lodged on two bases, first that the landlord company consented to the North Shore Clothing Company Limited becoming the Lessee and that that had the effect of releasing Mr Fry from any liability under the Agreement to Lease dated 17th July 1974; and next that in consenting to the North Shore Clothing Company Limited occupying the premises and serving notice to quit on it the landlord company had elected to lease the premises to North Shore Clothing Limited and that is inconsistent with such election for the landlord to treat Fry as a tenant lessee. It is estopped from alleging that Fry was a lessee.

A cross-appeal was lodged by the landlord company, claiming the sums which the learned Magistrate had not given or agreed Fry was liable for, and Mr Casey's memorandum says that clause 7 of the agreement dated 17th July 1974 refers to the period from default and completion of the lease until the date of re-leasing. Consequently the default arose when the appellant Fry or his company vacated the premises, and consequent upon that, the allegation of two months rental applies only to the period following the vacating of the premises, and that the landlord company had to be able to recover from Fry the rental and other charges accruing before that time. In addition he says that Fry having been in possession of the premises from 30 September 1974 to 21 January 1975 is liable for main profits over that period. That I take it, is an alternative one to the claim for rent,

one cannot be both liable for rent and main profits so I take that submission to mean if he is not liable as a tenant he is liable as a person in occupation and should pay mean profits. Now the law I think is prefectly clear on this, and I have no doubt the learned Magistrate did the same. When you have one of these nominee agreements it is contemplated that in the ultimate the people who have entered into the contract to buy or to lease may seek the other party's consent to the substitution of a nominee. It is clear from Lambly v. Silk Pemberton Ltd 1976 2 N.Z.L.R. 427, a decision of the Court of Appeal that while the original parties to the contract have a right to ask the other party to enter into a subsequent contract with their nominee that nominee must be a person acceptable on proper grounds to the other party. In other words, people who enter into a contract, cannot merely nominate men of straw and then sa you entered into this contract with me or my nominee, you now complete it with this man of straw. That is common sense and on would expect it to be the law and it is recognised in Lambly's decision but it is also recognised in that decision that a mere nomination of another party does not substitute a contract between that nominee and the other party to the contract here, in this case, the landlord.

After all, Mr Barford and Mr Fry might between them nominat say the Bank of New Zealand as its nominee. It may be if the Bank had been willing to enter into a contract, then the landlord company would have had to complete the lease to the Ban So nomination is only part of it and the essence of this nomination is subsequent novation. There is to be a new contrac to be substituted for the old one and that new contract then is between the nominated person with his approval and the other party to the contract, the landlord here.

And it is only when that new contract is entered into that the parties to the original contract or the persons making the nomination are released from their liability. The essence o novation is the substitution of a new contract for a previous one. Now that stage was never reached here. All that was done was that Fry nominated first of all his own company, Fry

Manufacturing Limited, then later North Shore Clothing Limited, as a person willing to enter into a contract or to take on the obligations under this contract and the rights. But nothing was ever done by North Shore. It may be that they moved in, I do not know. It looks like it but no contract was ever entered into between them and the owners. And even if they moved in, they certainly moved out again. And of course it means that if the landlord company had wished to enforce any rights against North Shore as tenants they would have been met with the answer "But we have not entered into a contract with you at all."

Now Mr Robinson's proposition about Walsh and Lonsdale was based on a misunderstanding of the effect of that case. That case simply says that if there are people, parties to a contract which is to be followed by a formal document and they take steps such as taking possession pursuant to that agreement, in anticipation of the formal document, then the courts will enforce the rights as though the formal document had been executed. But that presupposes a contract between the parties. But here there is no contract between North Shore Clothing and the landlord company. There is merely the nomination of North Shore by Barford and Fry. So accordingly I am not prepared to accept the submission of Mr Robinson that the landlord company had entered into a contract with North Shore as its tenant. It had indicated it was willing to enter into a contract with it but no contract was ever entered into, and it would only be when that new contract was entered into that the old contract and the liability of Barford and Fry would cease. That did not ever happen and the learned Magistrate was right in holding that that was the position. What then were Barford and Fry liable for in those circumstances If they had taken possession then they would be liable of course as tenants but it said here, and the evidence points to it, that the one who went into possession was the North ShoreClothi- Limited, and the correspondence from the landlord company's

Solicitor makes that quite clear. The correspondence says:

> "Our client considers that your client company, that is North Shore Clothing Limited, has been in possession of the premises since 1st October."

So it cannot be said that Fry and Barford had entered into possession and in my view this is the very position that is contemplated by clause 7 of the agreement. The parties themselv have spelt out their own remedies in the event of a lease not being completed because the clause says:

> "Should the lessee, (and that includes Barford and Fry, or their nominee) default in completion of the Lease, then the Lessors shall have the right to claim loss of rent to the date of re-leasing the premises herein described provided that the amount payable in terms of this clause shall not exceed 2 months rental"

Now it cannot be plainer that the lessee did default in completion of the lease. No lease was ever signed. Whether they went into possession or not, and Barford and Fry covenanted or were obligated the right was given to the landlord company, that is a better way of putting it, to claim such rent from them, to the date of re-leasing the premises with the restriction of two months rent, and that is exactly the view the learned Magistrate took and he gave judgment for that amount.

Now that is a restriction of course immediately on any other obligation which they might have had. This spells out the extent to which Barford and Fry were to be liable. They were not to be liable for any more than two months rental. They were not to be liable as Mr Casey contends for rent until the date the premises became vacant and then for two months. With th restriction set out they were to be liable only for two months rental and I cannot see how the landlord company having entered into this restriction or having agreed to the restriction of a prospective tenant's liability could ever succeed in endeavouring to reopen that very clause and claim something greatly in excess of the amount agreed upon. In my view the learned Magistrate was completely right in his decision in giving judgment for two months rent under that clause and not in respect of any other amounts claimed and in my view he was also right in holding that Barford and Fry were still liable under that agreement because no other lease had ever been completed and there was no novation,

no contract entered into which would act as a substitution for this agreement.

Both appeal and cross appeal are dismissed. And as neither has succeeded, there is no purpose in my awarding costs.

Clifford Perry J