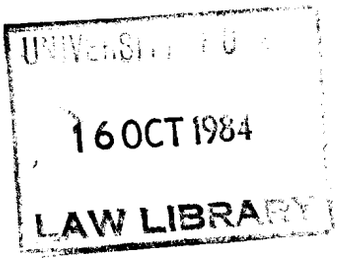
IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.370/83

BETWEEN PATRICIA MARTIN & OTHERS

Plaintiffs



A N D HER MAJESTY'S ATTORNEY GENERAL FOR THE DOMINION OF NEW ZEALAND

Defendant

Hearing: 11, 12 & 13 April 1984

Counsel: C.B. Atkinson Q.C. & I.D. Scott for Plaintiffs
G.K. Panckhurst & Miss K. McDonald for Defendant

Judgment: 23 JUL 1984

JUDGMENT OF COOK J.

The writ which commenced these proceedings was issued on 30th November 1983 and, at the same time, certain applications were made; these included a request that aspects of the plaintiffs' prayer for relief should be treated as if they were an application for review under the Judicature Amendment Act 1972 and that an interim order be made, pursuant to Section 8, that the defendant ought not to take any further steps to sell or dispose of the pieces of land, which are the subject-matter of the plaintiffs' action, either by public auction or otherwise until the final determination of the proceedings. An order to the latter effect was made on 7th December 1983.

The situation then before the Court was that the writ and statement of claim contained, in part, an action seeking relief on grounds based on contract or, alternatively,

tort, and, in part, a request for a review under the Judicature Amendment Act. At a conference held by Roper J pursuant to Section 10, it was decided that the action be heard first and that the plaintiffs should file a statement of claim in respect of the review proceedings in order to isolate the issues which pertained to them; there was also an order under Section 10(j) as to the production of certain minutes of the hearing of a Committee of the Land Settlement Board, background papers and submissions before the Committee, these to be filed in Court on the review proceedings with leave to counsel to apply for their use on the hearing of the action.

Accordingly, the claims in contract and tort were heard first and the review proceedings await their outcome. There is a reservation that such evidence as may fairly relate to the review proceedings may be heard in respect of them to the extent that counsel agree.

Background:

It is common ground that the plaintiffs, at all material times, have held land as tenants of the Crown, in each case a parcel of land in the Rolleston area. The terms of their tenancies are those contained in licences issued on various dates ranging from 10th June 1974 to 15th July 1983, such licences being given pursuant to provisions of the Land Act. The plaintiffs claim that a certain letter, written to each of them by the Commissioner of Crown Lands in Christchurch on the 13th August 1981, a letter which assumes substantial importance in this matter, added further terms in their favour, but this is denied by the defendant. In particular, they claim that the lands were held upon the following terms (to quote from the Statement of Claim):-

> " (i) The Defendant would upon deciding to dispose of the land the subject of a licence give preference under Section 54 of the Land Act to the particular occupier without competition; or
>
> (ii) Would under Section 52(2) and/or Section 53 of the Land Act 1948 offer the said land for

sale by public tender or for application and would under Section 77 of the Land Act 1948 in the case of competing applications take into account the special circumstances of the occupier in allotting the said land.

It is accepted that, at all material times, the Land Settlement Board and the Commissioner of Crown Lands for the district were acting on behalf of the defendant in relation to the administration, management, development, alienation, settlement, protection and care of the land, but beyond accepting that the plaintiffs each held their own particular parcel of land by virtue of a licence to occupy, the defendant denies the plaintiff's claim to any special rights in respect of the land being disposed of.

It is agreed that, from and after 1977, the defendant granted licences to the plaintiffs and others, in each case terminable on a month's notice, in the expectation that the land would be available for disposal within a comparatively short time, as soon as zoning difficulties under the Town & Country Planning Act had been overcome. In fact, such zoning difficulties were not overcome until 1982 and, in some cases, plaintiffs occupied the land for much longer periods than had been anticipated. In one such case the period was nearly ten years and the average period was approximately three and a half.

In 1982, when the zoning difficulties had been overcome, the defendant determined to dispose of the land, the subject of the licences. On 28th February 1983, there was a meeting of the Board. The plaintiffs allege that this was an enquiry pursuant to Section 16 of the Land Act 1948 to determine the appropriate method of disposal of the land and, in particular, to consider representations made by or on behalf of the plaintiffs for preferential allotment of the land. The defendant maintains that it was a meeting (as opposed to an enquiry), but agrees that representations were considered at it.

Following the enquiry, or meeting, the Board determined that the land should be sold by public auction and it is claimed by the plaintiffs that this was done without giving the plaintiffs, or any of them, any opportunity for preferential allotment or consideration of their own special circumstances or hardship, and that the Board was purporting to act in accordance with what it perceived to be the policy of the Government and the wishes of the Minister of Lands.

The plaintiffs then formed an unincorporated association known as the Rolleston Crown Tenants Association to represent them and conduct negotiations with the defendant and, thereafter, the defendant accepted the Association as the representative of the plaintiffs. While the plaintiffs say that the formation of this Association was at the initiative and suggestion of the defendant, this is denied. The Association then applied to the Board for a rehearing under Section 17 of the Land Act 1948 and, on 3rd August 1983, the Board resolved to enquire further into the manner in which the land should be disposed of. A committee of the Board was appointed for this purpose and, on 25th August 1983, held a rehearing at which the plaintiffs, represented by the Association, made submissions and gave evidence to the Board in support of their application that, before the land was disposed of by public auction or offered for public application, the circumstances of each of the plaintiffs and preferential allotment to them be considered. The decision of the committee of the Board was issued on 29th August and this decided that the land should be offered by way of public offer and by public auction.

This was received by the plaintiffs on 3rd September 1983 and within one month after being so notified, they gave notice of appeal pursuant to Section 18 of the Land Act by delivering such notice to the Commissioner of Crown Lands, Christchurch, on the 3rd October 1983. I do not understand it to be admitted that a right of appeal arose in the circumstances, indeed, the Commissioner's advisers took the

view that there was none, but that is not a matter for determination at this time. The defendant advised the plaintiffs by letters of 7th October 1983 and 10th November 1983, and orally at a meeting of representatives of the defendant and the plaintiffs at Rolleston on 19th November 1983, that they considered the plaintiffs' appeal might be out of time but that, in any case, it did not lie and was therefore a nullity; that, notwithstanding the appeal and the representations made by and on behalf of the plaintiffs, it was proposed to offer the lands by public auction. The plaintiffs say further that the auction was to be held on 8th December 1983 and that it was without any preferential consideration of the position of the plaintiffs or any of them and without any consideration being given to the question of improvements effected by the plaintiffs or any of them. That latter allegation is denied, however.

Previous mention has been made of the letter from the Commissioner of Crown Lands to each of the plaintiffs written on 13th August 1981. As this is of particular importance, it should be quoted in full:-

> "As a result of a Government decision in January 1976 not to proceed with the proposed new Town of Rolleston the properties previously acquired by Ministry of Works and Development, on behalf of the Crown, for the new town development were declared surplus to Government requirements and handed over to this Department for disposal. There were some 70 properties acquired and of these some 30 have been disposed of. However, due to zoning restrictions the remainder have been held by this department pending investigations by the Canterbury Regional Planning Authority into the future development of Rolleston.
>
> Because of this, the department has been unable to proceed with disposal of some 40 properties and this office has continued leasing them until a decision on final zoning within the district scheme has been made. There are many problems associated with the leasing of these properties, not the least being the control of noxious weeds. The department has endeavoured to institute a programme of weed control but the co-operation of all licensees is a key

factor in ensuring satisfactory control.

While some have co-operated by carrying out the requirements of their licence to control noxious weeds, many have failed to co-operate, with the result that their properties have become infested to varying degrees. It is appreciated that the term of licences may be a factor in the reluctance of some to carry out control measures, it is nevertheless a condition of all licences to occupy, that the land be kept free of gorse, broom and noxious weeds. For various reasons this condition may not have been rigidly enforced in the past but will be in the future. The co-operation of all is sought in this matter to ensure proper control of noxious weeds. An unco-operative attitude in complying with the weed control requirement in the licence could result in cancellation of the licence.

Also, how a licensee has generally looked after his or her area will be a factor taken into consideration if and when the department is in a position to dispose of the properties and if an existing licensee is interested in applying when properties are publicly offered.

The field officer handling the Rolleston area will be happy to discuss any problem with you.

I regret the necessity to have to write to all licensees in this manner, but I am sure you will appreciate the reasons prompting it. I trust I can rely on your co-operation in this matter.

Yours faithfully

E.J. Davies
Commissioner of Crown Lands"
Per 'A.T. Dobbs'"

The plaintiffs say that, with the receipt of that letter, it became a term of their respective licences that money and effort expended by them in maintenance and/or improvement of the land would entitle them either to preferential allotment when the defendant ultimately decided to dispose of the land, or to consideration of the effort, time and expense expended in any individual case in considering preferential allotment; that relying upon, and in accordance with such terms, the

plaintiffs have expended time and money effecting improvements to the land and that the defendant has made no investigation or enquiry for the purpose of determining, pursuant to Section 68(3) of the Land Act, the value of improvements effected by the plaintiffs or any of them. While denying the preceding allegations, the defendant admits that it has made no such investigation, but says that the time has not yet been reached for the defendant to make a determination pursuant to Section 68(3).

The plaintiffs say, further, that they, and each of them, are interested in acquiring the lands and improvements, the subject of their respective licences and that, provided the sale price should represent fair market value and they are offered "the fair and reasonable terms usually adopted by the defendant in respect of cash sales under Section 64 of the Land Act 1948 or purchases on deferred payments under Section 55 of the Land Act", they wish to acquire their land. If, however, the land is offered for sale by public auction without further consideration being given to the position of the plaintiffs, they will suffer loss and damage represented by the loss of improvements they have effected and, in addition, will suffer further loss and damage associated with the disruption of their lives and the necessity or probable necessity of moving from the district. These latter allegations are also denied.

Issues:

On the basis of these facts and allegations, the plaintiffs claim as follows - that the defendant has committed or threatened to commit, breaches of the express or implied terms of the licences, in particular:-

> "(c) In breach of the term contained in the letter of the 13th August 1981 referred to in paragraph 2(c) hereof the Defendant did not take into consideration how the Plaintiffs or any of them had looked after the land the subject of a particular licence when the Plaintiffs and each of them were interested

in applying when the properties were publicly offered.

(d) In breach of the provisions of the Land Act 1948 the Defendant by advertising the properties for sale by public auction before the Plaintiffs' appeal is heard and without giving consideration to the individual circumstances of the Plaintiffs or any of them or giving any weight or effect to the letter of the 13th August 1981 referred to in paragraph 2(c) hereof or without offering the Plaintiffs a reasonable opportunity to be heard or without taking into account relevant considerations or taking into account irrelevant considerations has or will cause the Plaintiffs the loss and damage set out against their respective names in the schedule hereto."

As already mentioned, questions relating to the plaintiffs' right of appeal do not come up for consideration at this stage.

There are then allegations in support of a claim that there has been negligent misrepresentation. It is alleged that, in the letter of 13th August 1981, the defendant made the representation when it was known, or ought to have been known, that the plaintiffs, or any of them, would rely upon it and in the knowledge that the plaintiffs, or any of them, would assume that the defendant knew of the future policy or conduct of the Department of Lands & Survey would be in relation to the land, the subject of the licences, when it was known, or ought to have been known, that in reliance upon the representation, the plaintiffs would be expected to expend time and effort maintaining and improving their respective properties in reliance upon the representation; in these circumstances the defendant was under a duty of care to the plaintiffs, and each of them, and in breach of such duty of care the defendant:-

"(a) Made the said representation when it knew or ought to have known that the policy of the department was not or might not be to give

any preferential consideration to the Plaintiffs.

(b) Failed to make any or adequate investigation or enquiry as to the policy of the department in relation to the method of disposal of the said land.

(c) Made the said representation in such circumstances that it was not known whether the promise express or implied therein could be fulfilled.

(d) Took no or no adequate steps when the time came to give effect to the promise expressed or implied in the said representation."

On the basis of these causes of action, the plaintiffs seek certain declarations and also claim general and special damages for breach of contract and/or negligence. It was agreed that should the finding open the door to an assessment of damages, all questions in relation to it should be adjourned.

Put briefly, the present issues appear to be:

(a) Whether, by virtue of the letter of 13th August 1981 or otherwise, a term was imported into the contract between each plaintiff and the defendant whereby the former became entitled to some form of preference or right to be considered in advance of others as a potential purchaser when the land he held under licence came to be disposed of; and

(b) whether the letter contained a representation which was made negligently or, if it was not so made, there was a negligent failure to carry out the representation there made, with the result that in either event each plaintiff suffered damage.

It may be noted that the allegation in the Statement of Claim that there is an implied term as to preferential rights was not pursued.

Existing rights:-

If any plaintiff has a claim in contract then it must arise from the letter of 13th August 1981 and any effect it may have had upon the existing contractual arrangement between the particular licensee and the Crown. In each case the terms of the existing arrangement are to be found in the licence issued under the provisions of Section 68 of the Land Act 1948. Certain tenants had started with longer term tenancies granted under the Public Works Act but, when the decision was made not to proceed with the development of a new town at Rolleston and the land was handed to the Department of Lands & Survey for disposal, such licences as they fell due were replaced by monthly tenancies under Section 68. In two cases plaintiffs did not obtain licences and enter into possession of their land until after August 1981, so that it is difficult to see that, in their case, the letter could have had any contractual effect at all, even if it should be found to do so in others.

Section 68 provides for short tenancies for grazing and other purposes; a licence may be for any term not exceeding five years but subject to conditions whereby, in certain circumstances, the licence may be determined without the licensee being entitled to any compensation. Subsection (3) provides:-

> "Any licensee under this section shall not be entitled to compensation for any improvements effected or purchased by him, but on the expiry or sooner determination of the licence he may, within such time as the Board determines, remove any buildings, enclosures, fencing, or other improvements effected or purchased by him."

Not all licences were produced at the hearing but, apart from the fact that some contained provision for a rebate of rent for clearing noxious weeds and plants, it seems that they all contained the same general terms and conditions, the only variation from one licence to another being in the description of the land and the rent payable. In each case

the licence authorises the licensee to occupy the land "monthly" commencing on a given date. The covenants contained in the licence include obligations as follows:-

> "4. THAT the Licensee will keep the said land free from gorse, broom, noxious weeds, rabbits, and other vermin.
>
> .....
>
> 8. THAT the Licensee will accept and keep all buildings, fences, gates, drains, and other improvements in their present order, condition, and repair, and at the expiry of the term yield up the same in a clean and tidy order and condition to the satisfaction of the Licensor fair wear and tear without fault of the Licensee excepted."

It is agreed and declared that in certain circumstances, including "any portion of the said land being required for...sale...", the licence may be terminated by the Crown on one calendar month's notice. On the subject of compensation the licence provides:-

> "THAT upon the expiration or sooner determination of this Licence either as to the whole or any part of the said land the Licensee shall not be entitled to compensation for any improvement effected by him but he may within such time as the Licensor shall determine remove all buildings, enclosures, fencing, or other improvements effected by him and should this Licence be determined as to part of the said land then the Licensor shall make such adjustment to the rent payable as he shall in his discretion deem fit and proper."

Some of the properties included houses, reasonably modern in some cases. Others had no such improvements. Many were badly infested with noxious weeds and on some there were trees which had been blown down by the wind. Some licensees did a substantial amount of work before the letter of August 1981 was received. Others appear to have done much less, but much of what was done prior to that time may have been done in the hope that in some way or another the opportunity would arise to

acquire the land when disposal became possible, a hope not based upon any grounds which could be recognised in law. Others performed work so that they could make use of the land for grazing or some such purpose while the licence continued in force. There may have been a feeling that Government policy would be to give existing tenants first opportunity, but no legal basis for such a belief was suggested and such preference was not given in the case of a number of properties which were in fact sold over the period 1977 to 1980.

It was generally known that there was a zoning problem which had to be resolved with the local authority; that so long as that remained unresolved, it was to be expected that the land would not be disposed of. As mentioned, however, some properties had been sold. According to Mr A.D. Mason, who for a time had been employed by the Department and had become a tenant himself when he took up his position as a field officer in January 1979, the Department had sold some 30 properties since late 1977, the last one going in November 1980. It seems that these properties were initially advertised for tender but, as they did not reach the reserve prices, they were then advertised at a set price. No preference was given to existing tenants and, according to Mr Mason, that policy had not been deviated from at Rolleston up to 1980. It is in the light of these facts that the letter of 13th August 1981 must be considered.

Letter of 13th August 1981:

If there is anything in the letter which might contain contractual force it must be the paragraph on the second page:-

> "Also, how a licensee has generally looked after his or her area will be a factor taken into consideration if and when the department is in a position to dispose of the properties and if an existing licensee is interested in applying when properties are publicly offered."

This must be read, not only in the context of the whole letter, but also in the light of the circumstances as they then existed, as known to the Department and to the tenants. It was well-known, as indeed is stated in the letter, that the disposal of the remaining 40 or so properties out of the original 70 had been held up because of questions relating to zoning, but that a day must surely come when the Department would be free to proceed with its task, for which purpose the land had been transferred (departmentally) from the Ministry of Works as it is the Department of Lands & Survey which is responsible for the disposal of unwanted Crown land. It was well known further that the 30 sections which had been sold had not been offered in any preferential way to the respective tenants; it appears that after a few had been offered for tender, unsuccessfully in that the reserve prices were not reached, 30 or so were disposed of at a set price on deferred payment terms by public application and, if necessary, ballot between applicants. It must have been apparent to the Department, also, that some, at least, of the tenants who had occupied the land for a considerable period of time, might well wish to have an opportunity to purchase. It may be noted further that up to that time the policy of the Land Settlement Board had been not to auction land. Looking at the situation from another point of view, on a number of the properties there was a substantial problem with noxious weeds.

After dealing with the reasons for the delay in disposing of the land, the letter turns to the question of noxious weeds and, while recognising that the term of the licences might be a factor in the reluctance of some tenants to carry out control measures, the obligation to do so was stressed and the statement made that while this condition might not have been enforced in the past, it would be in the future. It was pointed out that a failure to co-operate could result in cancellation of the licence. Up to that point nothing had been said which went beyond the terms of the contract between the Department on the one hand and the individual tenant.

Then follows the paragraph quoted above. This I read as a positive statement - ".... will be a factor taken into consideration ....". Certainly it is followed by "if and when the department is in a position to dispose of the properties" but I do not consider much weight need be given to the word "if". It is clear from the earlier portion of the letter that the intention is to dispose of them when that becomes possible. Then there are the concluding words "if an existing licensee is interested in applying when properties are publicly offered". I stress the final words; they are not qualified by the word "if", it is a direct indication that upon disposal there will be a public offering.

Claim in contract:-

For the plaintiffs it was submitted that this added a term to the contract between each tenant and the Crown and statement of claim contains the following:-

> "13. FROM and after the receipt by the Plaintiffs and each of them to that letter it became a term of their respective licences that money and effort expended by them in maintenance and/or improvement of the land the subject of each respective licence would either entitle them to preferential allotment when the Defendant ultimately decided to dispose of the said land or to consideration of the effort, time and expense expended in any individual case in considering preferential allotment."

At the hearing Mr Atkinson explained the meaning of this allegation to be as follows:-

(a) That the plaintiffs were entitled to preferential allotment in the sense that they were entitled to the right of first refusal at a fair market price which took into account the value of improvements made by them, but subject always to the right of the Land Settlement Board under Section 75 to reject any application; or

(b) At least if they wished to purchase, to have their effort and expense considered under Section 54 which empowers the

Board to alienate Crown land without public notice or competition in certain circumstances; in particular, Section 54(1)(f) which reads as follows:-

> "Where because of the special circumstances of the applicant and the hardship which would be caused to him by the calling of public applications it would be equitable to allot him the land without competition."

On the other hand Miss MacDonald, for the defendant, submitted that the statement in the letter was devoid of contractual formality and that there was no intention on the part of the Department to contract; that even if it could be construed as an offer, there is no evidence of a concluded bargain resulting from it. Also, that the sentence could not bear the interpretation sought to be put upon it and that, quite apart from other considerations, there was a lack of certainty. Reference was made to G. Scammell & Nephew Limited v. H.C. & J.G. Ouston [1941] A.C. 251 at 268:-

> "It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. In my opinion that requirement was not satisfied in this case."

There was a suggestion, also, that the Department had no authority to enter into a contract of this nature. I see no merit in that, however. While it is true that under the Act it is the Land Settlement Board to which authority to alienate land is given (Sec.13), there is power to assign duties to the Commissioner and for the Commissioner to delegate to any officer of the Department (Sec. 24); the licence to occupy is expressed to be granted by the Commissioner of Crown Lands acting on behalf of Her Majesty the Queen and, whatever may be the true situation as to assignment of duties between

the Board and the Department, anyone dealing with the Department must surely be entitled to assume that the officer had authority to make any statement contained in a letter, just as he would be entitled to regard his licence as validly issued. Neither can I accept the submission that the situation would be such as that discussed in Treitel's Law of Contract 6th Ed. at p. 148; that it would so go to the root of the original contract that it would, of necessity, be viewed as a new contract with the consequent rescission of the licence which proceeded it.

In my view, setting aside for the moment the meaning to be attached to the words used, and assuming that a sufficiently certain meaning can be found, they are capable of being regarded as, in effect, an offer to each tenant which it was open to that tenant by his conduct to accept, thus adding to the existing contract evidenced by the licence an additional term. The question must be, what meaning is to be attached to the words used; in particular, the words".... a factor taken into consideration ... when properties are publicly offered".

In considering them, one must first have regard to the powers contained in the Act granted to the Land Settlement Board in respect of the disposal of land, Section 52 gives general power to the Board to alienate Crown land on any tenure under the Act, either by calling for applications or without competition in accordance with the provisions of the Act, and also the Board may offer any land for acquisition under the Act by public auction at an upset price or rental value or by public tender at a minimum price or rental value. There is provision in Section 53 whereby the Board, by public notice, may call for applications and Section 54 gives power in certain circumstances to allot land without competition; of the circumstances set out in Subsection (1), the only one suggested as possibly having application in the case of any of the present plaintiffs being:-

"(f) Where because of the special circumstances of

> the applicant and the hardship which would be caused to him by the calling of public applications it would be equitable to allot him the land without competition."

Disposal may be for cash (Section 64) or by deferred payments (Section 65) and the conditions which apply in either case are set out in those sections.

When a person wishes to make application for land, the procedure is set out in Section 73, a written application is required accompanied by a declaration and it appears that the same procedure pertains when, by reason of two or more applicants, a ballot is required.

Section 75 then empowers the Board to reject applications, Subsection (2) being as follows:-

> "(2) Before taking a ballot or otherwise disposing of any application for land the Board may, in such manner as it thinks fit, inquire into all matters affecting an applicant's suitability or his right of preference under this Act, and may reject any application where the applicant refuses or fails to answer any such inquiries to the satisfaction of the Board."

Where there is more than one application within the time specified, the task of the Board is first to endeavour to determine the most suitable applicant for the land. The considerations to be taken into account are set out in Section 77(2):-

> "(a) The purpose for which the land is suited or intended to be used:
>
> (b) The ability, having regard to his experience, financial resources, and any other relevant matters, of the applicant to use the land for the purpose for which it is suited or intended to be used:
>
> (c) The land which the applicant already holds or in which he has an interest within the meaning of section 175 of this Act."

If two or more applicants are equally suitable, the allotment is to be by ballot.

While, as indicated, there are detailed provisions relating to applications for land which may lead to ballot, the powers in relation to auction or tender appear to be limited to Subsections (5) and (6) of Section 52:-

> "(5) The Board may refuse to accept any bid or tender for any reason for which it may refuse or reject any application under section 75 or section 175 of this Act.
>
> (6) Subject to the provisions of this section, every alienation by public auction or public tender under this section shall be subject to such conditions as the Board may prescribe."

Section 175 has no present relevance but the reference to Section 7 brings in the power of enquiry referred to above in respect of applications.

Returning to the letter, it is easy when considering a matter such as this to concentrate on the particular passage and to exclude the balance of the text. In this case the writer was concerned with the problems arising from the long retention of the land; in particular, the control of noxious weeds. He is exhorting those tenants who, in the view of the Department, have not co-operated. He mentions their obligations and the penalty that may result in the case of a tenant who does not observe them. He then goes further - "also" - and points out that the way land is looked after may have a bearing on what the tenant wishes in the future; the inference is that it may be to a tenant's advantage, if he has looked after the land well, but, by the same token, a disadvantage to him if he has not. He may not have had auction in mind. Indeed, Mr Chalmers, the senior field officer who drafted the letter, made it clear that he did not, but upon any application for land, or upon the submission of a tender or a bid at auction, the Board may take into account

"all matters affecting the applicant's suitability" (Section 75) and I see no reason why this should not include consideration of the way in which a tenant, who makes application or otherwise seeks to acquire Crown land, has looked after that land and complied with the terms of his licence. Possibly that may be relevant under Section 77 (which does not apply to sale by auction or tender) but it would have to be as a "relevant matter" under Section 77(2)(b) and it seems to me that the matters set out in that subsection (as opposed to Section 75, which still has application) to which the Board is to have consideration are of a different nature with reference rather to farm land and the capabilities and resources of a person wishing to acquire it.

If the wording in the letter does go further than the Act, I can only say that the difference is too uncertain and is not capable of sufficient definition to be construed as a term of the contract between a plaintiff and the Crown, assuming such plaintiff, by his conduct, may be said to have accepted the offer.

As for the plaintiffs' claim that, by virtue of the letter, they are entitled either to preferential allocation in the manner set out above, or to special consideration so far as their effort and expense is concerned - to be given first opportunity to be allotted the land pursuant to Section 54(1)(f) without competition - I can only say that the wording in the letter is ".... when the properties are publicly offered". This to my mind is the antithesis of any method of disposal which would afford the plaintiffs the preferential treatment which they seek, the latter of necessity being in the absence of the competition which any public offering is intended to produce.

In conclusion on this aspect of the matter, I am unable to find that the letter is capable of introducing any new term into the contract between the plaintiffs and the Department, and this claim so far as it is based on breach of

contract must fail.

Action in Tort:

The plaintiffs' allegations in support of their cause of action based on negligent misrepresentation, include the following (the reference to "the representation" being to the paragraph of the letter of 13th August 1981 as quoted above):-

> "20. THE Defendant made the said representation when it was known or ought to have been known that the Plaintiffs or any of them would rely upon it and in the knowledge that the Plaintiffs or any of them would assume that the Defendant knew what the future policy or conduct of the Department of Lands and Survey would be in relation to the land the subject of the licences when it was known or ought to have been known that in reliance on the representation the Plaintiffs could be expected to expend time and effort maintaining and improving their respective properties in reliance upon the said representation.
>
> 21. IN the circumstances the Defendant was under a duty of care to the Plaintiffs and each of them and in breach of such duty of care the Defendant:-
>
> (a) Made the said representation when it knew or ought to have known that the policy of the department was not or might not be to give any preferential consideration to the Plaintiffs.
>
> (b) Failed to make any or adequate investigation or enquiry as to the policy of the department in relation to the method of disposal of the said land.
>
> (c) Made the said representation in such circumstances that it was not known whether the promise express or implied therein could be fulfilled.
>
> (d) Took no or no adequate steps when the time came to give effect to the promise expressed or implied in the said representation.
>
> (e) As a consequence of the breaches of such duty of care the Plaintiffs and each of them have suffered the loss and damage or will suffer the loss and damage hereinbefore set out."

For the defendant, Mr Panckhurst conceded that the relationship of the parties is one that is susceptible to liability in negligence; that there is a sufficient degree of proximity and no policy consideration that would negative responsibility. He submitted that the principle is to be found in the judgment of Cooke J in Meates v. Attorney-General [1983] N.Z.L.R. 308 at 379. Having considered two principal submissions in relation to the duty of care, the second being that a duty of the Hedley Byrne kind had never been extended beyond the giving of information, opinion or advice and that requests or assurances of future action or promises were in a different category, then said:-

> " As to (ii), a mere request, however pressing, does not necessarily amount to giving information, opinion or advice. The same is true of a mere promise or assurance of future action. But that is not the end of the matter. I think that there can be occasions when a reasonable person, on receiving such a request, promise or assurance from someone acting within the particular sphere of his authority, is entitled to assume that the speaker has taken and will take reasonable care to safeguard the interests of the person he has sought to influence, if that person acts as suggested. And if the speaker in authority has indicated that certain assistance or other benefits will follow, he will be bound to do what is reasonably within his power, consistently with his other responsibilities, to bring about that result. This is not an absolute duty or a guarantee, which belongs to the realm of contract. It depends simply on what a reasonable man would regard as his duty to his neighbour."

While Cooke J found against the appellants, unlike the majority of the Court, there appears to be no significant variation in the views on this point. I did not understand Mr Atkinson to suggest that the principle so stated was not appropriate to the present case.

Mr Panckhurst then submitted that the paragraph relied upon does not support the alleged course of action; that when read in a reasonable way it does not contain any

assurance or promise capable of doing so.

As with the claim in contract it is necessary to find in the letter some offer of preferential treatment capable of acceptance by the tenant, so here the problem is to determine what representation, what promise or assurance, the letter may be said to contain. It seems that it would have to be some promise or assurance as to the course the Land Settlement Board would follow when the time came to dispose of the land, limiting it to some particular course of action which, by way of preferential consideration, would benefit a tenant who, heeding the assurance, acted in the manner which he understood would bring him the advantage; so that although not contractually bound, the Department would be under a duty to do what it reasonably could to procure for the particular tenant the benefit he was thus led to expect. Possibly there is some distinction between this and a right arising in contract, but if so the distinction seems slight. For the reasons which are given above, I am unable to see that the statement in the letter can be so construed. Certainly it cannot be said to be a promise or assurance that the property would be disposed of other than by a public offering; to my mind its effect is no more than I have expressed above and I am unable to see that the plaintiffs can succeed on these grounds either.

Accordingly, I make the findings that the plaintiffs cannot succeed in either contract or tort. In all other respects the proceedings stand adjourned for such further hearing as may be necessary. Questions of costs are reserved. I recognise that a question in relation to discovery is to be determined before the review aspect of the plaintiffs' claim can proceed.

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