IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

No. A.132/84

5/9

NZLR

No Special Consideration

1034

BETWEEN OUTDOOR LIVING LIMITED a duly incorporated company having its registered office at Taupo and carrying on business as retailer of sporting and leisure goods

Plaintiff

A N D GEORGE MARLOW of Taupo, Retired

First Defendant

A N D ROSS DOUGLAS BOWDEN of Taupo, Drycleaner, and JENNIFER RAE BOWDEN his wife, and DOUGLAS BOWDEN of Taupo, Real Estate Agent

Second Defendants

A N D KEITH ARTHUR HOY of Taupo, Chartered Accountant, and JOHN DAVID LEEMING CORRY of Atiamuri, Solicitor

Third Defendants

Hearing: 24th August, 1984.

Counsel: A. P. Christiansen for Plaintiff.
A. F. S. Vane for First and Third Defendants.
R. F. Annan for Second Defendants.

Judgment: Delivered - 4 SEP 1984

T.J. McSKORY
Deputy Registrar

JUDGMENT OF TOMPKINS, J.

The Plaintiff seeks an interim injunction against the First, Second and Third Defendants.

The Third Defendants are the owners of land situated on the corner of Horomatangi and Ruapehu Streets, Taupo, upon which are erected two buildings containing shops. The First Defendant is the agent of and advisory trustee of the Third Defendants.

The Plaintiff is the lessee of a shop in one of the buildings owned by the Third Defendants pursuant to a lease

dated the 4th May, 1981. The lessor in the lease is the First Defendant, but it appears clear that he entered into that lease as the agent of the owners, the Third Defendants.

The Second Defendants are the lessees of another shop in a building separate from the building containing the Plaintiff's shop, but on the same block of land.

Since the commencement of the Plaintiff's lease on the 1st June, 1981, the Plaintiff has carried on business as a sports and outdoor centre selling a range of sporting and outdoor goods. The Second Defendants have, since 1983, and in partnership with similar but not identical members since 1978, carried on a dry-cleaning business from their shop.

The Plaintiff claims that in May, 1984, it decided to expand its stock to include the retail of bicycles and to operate a bicycle repair service.

In June, 1984, the Second Defendants learned that a sports goods and bicycle business in Heu Heu Street, Taupo, Bernie O'Donnell Sports Ltd., had been placed in receivership and that the receiver wished to sell the company's assets. The outcome of negotiations between the Second Defendants and the receiver is an agreement pursuant to which the Second Defendants have agreed to purchase from the receiver the plant, equipment and stock in trade, but not the goodwill.

Mr. Bowden, on behalf of the Second Defendants, approached the First Defendant to advise him that it was then the Second Defendants' intention to alter the Second Defendants' shop to enable it to carry on the cycle assembly and repairs consequent upon its purchase from the receiver. Mr. Marlow agreed to this alteration and also agreed to carry out alterations to the shop to enable this to be done. The solicitor for the

Second Defendants, who was also the First Defendant's solicitor, then prepared a new lease that was intended to replace the existing lease. It was for a three year term from the 1st August, 1984, but with rights of renewal making a total term available of ten years.

The Plaintiff became aware of these developments. As a result its solicitors then wrote to the First Defendant's solicitors objecting to the events that occurred and claiming that the landlords would be in breach of their lease to the Plaintiff if they allowed the Second Defendants to carry on a business in competition with the Plaintiff. In that letter it pointed out that it had plans to retail bicycles in the immediate future and that the proposed bicycle retailing business to be carried on by the Second Defendants would therefore be in competition with the Plaintiff's business. As was pointed out in the letter, the Plaintiff not only retails sports goods but also retailed exercycles and bicycle accessories.

The First Defendant's solicitors replied denying that the First Defendant's actions in approving the Second Defendants' proposals could in any way constitute a breach of the Plaintiff's lease or of any other obligation owed to the Plaintiff.

The writ of summons and statement of claim was issued out of this Court on the 9th August, 1984. Then on the 17th August, 1984, there was filed the notice of motion for interim injunction. In its amended statement of claim the Plaintiff seeks the following remedy:-

> " (a) That the First Defendant and/or the Third Defendants may be restrained by injunction or order from this Honourable Court from permitting or continuing to permit the Second Defendants from selling the sporting goods described in Paragraph 12 herein from the Second Defendants premises upon the subject land described in Paragraph 2 herein.

(b) That this Honourable Court order the Second Defendants not to sell or to discontinue selling the sporting goods described in Paragraphs 9 and 10 herein from their premises upon the subject land described in Paragraph 2 herein. "

The motion seeks interim injunctions in similar terms.

During the course of the argument it became apparent that the amended statement of claim did not disclose a cause of action by the Plaintiff against the Second Defendants. Mr. Annan, for the Second Defendants, then applied for an order that the Second Defendants be dismissed from the action. Mr. Christiansen, for the Plaintiff, acknowledged that, having regard to the manner in which the pleadings had been prepared, he was unable to resist Mr. Annan's application. I accordingly made an order that the Second Defendants be dismissed from the action. Costs were reserved.

To appreciate the nature of the Plaintiff's claim against the Third Defendants as landlords, I need to refer to two clauses in the lease.

Clause 4 provides:-

" 4. THAT subject as hereinafter provided the Lessee will not without the consent in writing of the Lessor first had and obtained (which consent shall not be unreasonably or arbitrarily withheld) carry on or permit to be carried on upon the demised premises any business or trade other than one that does not compete with other tenants namely auctioneering, land agency or drycleaning but in any case with the prior written approval of the landlord. "

This is a curiously drafted clause. It is clear that it is a lessee's not a lessor's covenant. It (without consent) prevents the lessee from carrying on on the demised premises any business or trade other than one that does not

compete with the tenants named, namely, auctioneering, land agency or drycleaning. Then it goes on to add the phrase "but in any case with the prior written approval of the landlord". It is very difficult to see what, if any, meaning this phrase can have. The earlier part of the clause seems to make it clear that the lessee can, if it obtains the consent of the lessor, carry on a business of the prohibited kind, namely, auctioneering, land agency or drycleaning. So the added phrase would seem to have no effect. An alternative construction is that the lessee cannot carry on any business at all without the prior written approval of the landlord (with no provision that that approval shall not be unreasonably withheld). But such an interpretation would render the lease itself nugatory. It would be strange indeed if the lessee entered into a lease that contained a covenant that it could not carry on any business at all without the landlord's consent. I cannot accept that that was the intention of the parties. However, in the context of the present case, whether that final phrase can be given an intelligible meaning may not be significant.

Clause 16 is a normal "quiet enjoyment" clause. It provides:-

> " 16. THAT the Lessee paying the rent hereby reserved and observing and performing the covenants on the part of the Lessee herein contained and implied shall have quiet and undisturbed possession of the demised premises without any interruption by the Lessor or anyone claiming by through under or in trust for the Lessor. "

There is no express covenant in the lease by which the lessor covenants not to enter into a lease in any other part of the Third Defendants' premises to a tenant who would be in competition with the Plaintiff.

The amended statement of claim refers inter alia

to clause 14 and 16 of the lease and pleads that if the Third Defendants give to the Second Defendants consent to the Second Defendants selling sporting goods including bicycles and bicycle accessories, they commit a breach of various provisions in the lease. However, in the submissions before me, Mr. Christiansen accepted that the particular provision that, in those circumstances, the Plaintiff claimed would be breached was clause 16. It is therefore the Plaintiff's contention that if the Third Defendants give their consent to an existing tenant or enter into a new lease with a tenant, as a result of which that tenant would be in competition with the Plaintiff, then the Third Defendants are in breach of clause 16 in that such action would interfere with the Plaintiff's right of quiet possession. By doing so, he contended, the Third Defendants were derogating from their grant to the Plaintiff. He adopted the statement of the principle in Mount Cook National Park Board v. Mount Cook Motels Ltd. (1972) N.Z.L.R. 481, and in particular in the judgment of Woodhouse, J. where he said at p.496:-

> " The general rule is that a lessor must not voluntarily prejudice the rights which he has created and he will not be permitted to do anything which is inconsistent with the purpose for which the demised premises are let. In a word he may not derogate from his grant. "

Mr. Christiansen very properly referred to me an authority contrary to the submission he was making. In Port v. Griffith (1938) 1 All E.R. 295, Luxmoore, J. was faced with practically identical facts. The defendants had let a shop to the plaintiff who covenanted to use it for the retail business for the sale of wool and general trimmings. The defendants later let an adjoining shop, subject to a similar covenant, the business stated being for the sale of tailor and dressmaking trimmings and cloths. The plaintiff contended that this was a derogation from the grant of the lessor as frustrating the purpose for which, in the contemplation of both parties, the premises were let to the Plaintiff.

Luxmoore, J., in his judgment, referred to a number of earlier authorities relating to the derogation of a grant and, in particular, to the judgment of Parker, J. in Browne v. Flower (1911) 1 Ch.219, where he said at p.226:-

> " It is to be observed that in the several cases to which I have referred the lessor had done or proposed to do something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this. Indeed, if the implied obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all. "

Parker, J. went on to state at p.227:-

> " It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose. But it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort. "

Luxmoore, J. applied these dicta from the judgment of Parker, J. by stating the question to be determined to be whether the defendant's letting the shop to the other tenant rendered the plaintiff's shop unfit or materially less fit to be used for the purposes for which it was demised. He answered the question thus at p.299:-

> " The presence of a trade rival in premises next door to those occupied by the trader may, or may not, be a detriment to any particular business. I do not think that I should be justified in saying that the presence of a trade rival next door must of necessity be a detriment, but, whatever the view may be, the presence of a trade rival next door does not render the premises on which the trader is carrying on his business unfit for that purpose, although it may incidentally reduce the profit ratio to be earned in that business. "

In my view this is precisely the situation here. Indeed, in one sense, the Plaintiff's claim is not as strong as the plaintiff in Port v. Griffith. The Plaintiff's lease does not state the nature of the business to be carried on by the Plaintiff. The only restriction on the business that the Plaintiff can carry on is that it does not (without consent) compete with the named tenants, namely, auctioneering, land agency or dry-cleaning. Thus, if the Plaintiff's argument were accepted, the Plaintiff could carry on any sort of business other than those three and then if the Third Defendants let another one of their shops to a like business the Third Defendants would be in breach.

I adopt Luxmoore, J's approach. I accept that if the Second Defendants convert their business into one that involves the sale of sports goods, then they may well be in direct competition with the Plaintiff. If it retails bicycles and if the Plaintiff pursues its plans to expand its business into the retailing of bicycles, then they will be in competition in that area also. There is a possibility - although it is not necessarily so - that this competition could reduce the Plaintiff's profit from what it would be without the competition. But that does not, in my view, render the Plaintiff's shop unfit or materially less fit for the purpose for which it was demised. I accept that although the lease is silent on the use to which the Plaintiff may put the premises (other than to the extent I have indicated), it was certainly in the contemplation of the parties when the lease was entered into that the Plaintiff would use the premises for the purposes it has.

If the Plaintiff wished to protect itself against competition from other tenants of the Third Defendants, then it should have bargained for that right when it negotiated its lease. Such a restrictive covenant will be construed strictly (Kemp v. Bird (1877) 5 Ch.D.974, Rother v. Colchester Corporation

(1969) 2 All E.R. 600). But this the Plaintiff failed to do. Its lease contains no express restrictive covenant preventing the Third Defendants from leasing a shop to a tenant in competition with the Plaintiff.

It follows that for the reasons I have expressed if the Third Defendants either give their consent to the Second Defendants, or grant a lease to the Second Defendants, in a manner or on terms that enable the Second Defendants to compete with the Plaintiff, the Third Defendants have not derogated from the grant contained in the Plaintiff's lease. They are not in breach of clause 16 of the Plaintiff's lease. The Plaintiff has therefore failed to establish that the evidence before the Court discloses a serious question to be tried. It has stumbled at the first hurdle that needs to be cleared to justify the grant of an interim injunction.

The application for an interim injunction is therefore refused. Counsel may file memoranda as to costs. In the meantime costs are reserved.

Solicitors:

Hole, Christiansen & Royfee, Taupo, for Plaintiff.

R. H. Le Pine & Co., Taupo, for First and Third Defendants.

Annan, Kellaway & Co., Hamilton, for Second Defendants.