30/10 NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY M.308/84

1302

IN THE MATTER of Section 71 of the District Courts Act 1947

BETWEEN AUSTRALIS HOUSE LIMITED a duly incorporated company having its registered office at Auckland

Appellant

A N D WHA KEE TSANG of Mangere, Restaurant Proprietor

First Respondent

A N D VERNON BRUCE BOOTH of Glen Eden, Company Director, a n d CARRIE JULIEN BOOTH of Glen Eden, his wife.

Second Respondents

Hearing: 4 October 1984

Counsel: D Carden for Appellant
R E Bartlett for First Respondent
S J Tee for Second Respondent

Judgment: 24 October 1984

JUDGMENT OF HENRY J.

This is an appeal against a judgment given in the District Court at Auckland against the Appellant which, as Plaintiff, had sought to recover arrears of rent and other monies alleged to be due under a certain lease of premises situated in Auckland.

The lease, dated 2 March 1971, names the Appellant as lessor and Wynbar Holdings Limited as lessee, and provides for a term of 10 years commencing 1 March 1971 and terminating on 28 February 1981. During its currency there were a number of assignments, duly assented to by the Appellant, the last of the assignees being Enterprise Foods Limited. That company defaulted in payment of rent as a result of which the Appellant exercised its right of re-entry on 31 January 1980 and terminated the lease.

The present proceedings named Mr and Mrs Cross as first and second defendants (they being guarantors of Enterprise Foods Limited in respect of the assignment to that company); the First Respondent as third defendant (he being an assignee from Booth & Kilmister Limited; and the Second Respondents as fourth and fifth defendants (they being guarantors in respect of the assignment to Booth and Kilmister Limited. Judgment by default was entered against Mr and Mrs Cross, and after allowing for payments received from them following a settlement negotiated after the entry of judgment against them and after allowing for monies obtained following the exercise of the power of distraint, there is now due and owing to the Appellant under the lease a balance of $3664.26.

The claim against the First Respondent is based on a Deed of Covenant entered into by him dated 28 October 1977,

being the date of the formal assignment to him by Booth and Kilmister Limited. That Deed of Covenant is in the following terms:

> "THIS DEED made the 28th day of October 1977 BETWEEN AUSTRALIS HOUSE a duly incorporated company having its registered office at Auckland (hereinafter called "the Lessor") of the one part
> A N D WHA KEE TSANG of Auckland, Restaurant Proprietor (hereinafter called "the Assignee") of the other part
>
> WHEREAS by a certain Deed of Lease dated the 2nd day of March 1971 the Lessor did lease to WYNBAR HOLDINGS LIMITED a duly incorporated company having its registered office at Auckland those premises situated in part of the basement area of the building known as Australis House as described in the said Deed of Lease
>
> AND WHEREAS by divers Deeds of Assignment the Lessee's estate and interest in the said Deed of Lease is now vested in BOOTH AND KILMISTER LIMITED a duly incorporated company having its registered office at Auckland
>
> AND WHEREAS the said BOOTH AND KILMISTER LIMITED has requested that the Lessor consent to an assignment of the said lease to the Assignee which the Lessor has agreed to do upon the Assignee entering into these presents
>
> "NOW THIS DEED WITNESSETH that in consideration of the premises the Assignee doth hereby covenant with the Lessor that the Assignee shall and will duly and punctually pay to the Lessor on the respective due dates thereof all rent and other monies payable under the said Deed of Lease and will duly and punctually observe perform and keep all and singular the covenants conditions and agreeements therein expressed or implied and on the part of the Lessee thereunder to be observed and performed

> "PROVIDED ALWAYS that nothing herein contained or implied shall operate or be construed to release or discharge the said BOOTH AND KILMISTER LIMITED under or in respect of the covenants conditions agreements or obligations in the said Deed of Lease expressed or implied."

The assignment was pursuant to a provision in the lease, in common form, which entitled the lessor to require an assignee to enter into a Deed of Covenant to perform and observe all the obligations of the lessee.

In his judgment, the learned District Court Judge held that on its true construction the covenant created a liability on the part of the First Respondent only "so long as the assignee has any interest in the lease". The First Respondent's possession of the premises having ceased following his assignment to Enterprise Foods Limited, it was held that the Appellant had no entitlement to recovery as against him because the breaches of covenant relied upon occurred after he had in turn assigned the lease. This resulted, it was said, because there was neither privity of estate nor privity of contract. The short point is whether the learned District Court Judge was correct in this construction of the Deed of Covenant, that being as I have said the only basis for the Appellant's claim against the First Respondent.

The original lessee's continuing obligation, even after assignment, is clear both from the terms of the lease itself and from the provisions of s.64 of the Property Law Act 1952. An assignee's continuing obligation, following a subsequent assignment by him, is dependent upon any contractual provisions between him and the lessor. In my opinion, the provisions of this Deed of Covenant are clear and unequivocal. They require the assignee, inter alia, to pay "all rent and other monies payable under the said Deed of Lease". The rent payable under the lease is and can only be the rent for the term of the lease. To construe it otherwise, so as to restrict the requirement to pay only during the assignee's period of possession or until such time as he may assign to another person, is to add words which are not only absent in their entirety, but which add a material qualification to their plain meaning. Reference was made to J Lyons and Company Limited v Knowles [1943] KB 366, which concerned an assignment of a lease and a covenant from the assignee which contained the following provisions :

> "(3) The assignee hereby covenants with the lessor that he will henceforth during the residue of the term granted by the lease pay the rent thereby reserved and observe and perform the covenants and conditions on the part of the lessee therein contained and in particular will not at any time after the completion of the said assignment transfer or underlet or part with the possession of the demised premises or any part thereof without the

> consent in writing of the lessor for that purpose first had and obtained."

Lord Greene M.R. had no hesitation in construing the covenant as applying to the whole term of the lease, notwithstanding the fact that the assignee had himself subsequently assigned the lease to another person who had defaulted, in the same way as happened in the present case. He said, at p.368 :

> "I am quite unable to follow the argument that on its true construction the covenant entered into by the defendant with the lessors does not extend during the whole term of the lease. What other language could have been used by the parties who desired to make the covenant extend during the whole of the term I am unable to imagine. The form of the covenant is one by which the assignee of a lease puts himself into the same relationship contractually with the lessor as that of the original lease. That is its whole object."

The same observations can I think be made in respect of the Deed of Covenant in question, and I do not see how it could be given the restricted meaning claimed for it. It is an obligation undertaken in absolute terms for the duration of the lease. It was submitted that the latter part of the covenant relating to the performance of all covenants and conditions in the lease demonstrated that the intention was to confine its operation to the period of possession. I do not agree. The assignee was putting himself in the shoes of the original lessee, and that, as Lord Greene said, was the whole object of the covenant. It is to be noted that the covenant in Lyons was worded in

very similar terms, the only difference being that there there was an express reference to "the residue of the term". To my mind, the covenant in issue here is equally as explicit. There is no need to add words to the express provisions to give them meaning. There would be need to add words to give the restricted meaning contended for, and in my view that addition is not justified by the principles of construction.

Reference was also made to the proviso to the Deed of Covenant, and to the failure to produce in evidence the assignment from the First Respondent to Enterprise Foods Limited and any supporting covenant, it being submitted that the absence of proof of such a provision supported the restrictive construction of this covenant. I do not think that is of any assistance. It is simply not known what is contained in any covenant by Enterprise Foods Limited, and perhaps more importantly the provisions of any such covenant between that company and the Appellant, entered into in 1978, cannot possibly assist to construe the covenant of 28 October 1977 between the Appellant and First Respondent.

The claim as to liability of the Second Respondents was based on a written form of guarantee in the following terms :

"To: AUSTRALIS HOUSE LIMITED the Lessor under the Deed of Lease dated the 2nd day of March 1971.

IN CONSIDERATION of you consenting to an Assignment of the said Lease from GLEN CRAIG LIMITED (hereinafter referred to as "the Lessee") therein named to BOOTH & KILMISTER LIMITED (hereinafter referred to as "the Assignee") at the request of us the undersigned VERNON BRUCE BOOTH of Auckland, Company Director and CARRIE JULIEN BOOTH his wife and GRANT KILMISTER of Auckland, Company Director and SHARON KILMISTER his wife (as we do hereby admit and declare) WE DO HEREBY JOINTLY AND SEVERALLY GUARANTEE the due and punctual payment to you by the Assignee of all rent and other monies reserved by the said Lease AND also the due faithful and punctual observance and compliance by the Assignee of and with all covenants conditions and provsions therein expressed and/or implied and on the part of the Lessee to be observed and/or performed AND WE DO HEREBY DECLARE that no indulgence granting of time waiver or forbearance to sue upon your part shall in any way release us or our personal representatives from liability hereunder nor shall we be so released or exonerated from liability hereunder by the winding up of the Lessee or the Asignee or by any act omission matter or thing whatsoever whereby we as sureties only would but for this present provision be released or exonerated.

DATED this 22nd day of September 1977."

This document was signed contemporaneously with a Deed of Covenant executed by Booth & Kilmister Limited on the assignment to it of the lease. That Deed of Covenant

was in identical terms to the Deed of Covenant executed by the First Respondent already discussed. In my view, the true construction of the guarantee is that it refers to payment of rent and compliance with the covenants of the lease of Booth & Kilmister Limited for the term of the lease, and not just for the duration of the company's possession or until a future assignment by it. Again the clear words do not allow of such a restrictive or limiting construction. In particular, it is to be noted that it is concerned with the payment of "all rent and monies reserved by the said lease".

In the course of argument in this Court reference was made to the nature of the consideration expressed in the guarantee, and it was submitted that the consideration was limited to the tenure of the Company. I do not think that is so. The consent was to the assignment of the lease, which could only mean the lease for the whole of the term - that is what the company obtained, and it was the continuing obligations created by the lease which it undertook to meet. It can further be noted that the guarantee was of performance by the assignee company of its obligations which, as I have already said, on the true construction of the Deed of Covenant were obligations for the term of the lease.

Accordingly, I find that the primary ground of appeal has been made out. It was submitted on behalf of the Respondents that in the event of such as finding by this Court the matter should be remitted to the District Court for express findings on other matters of defence not ruled on by the learned District Court Judge. For the First Respondent, the only further defence related to an allegation that it was an implied term of the Deed of Covenant to the effect that the Appellant would take reasonable steps to enforce compliance by any assignee of his obligations to pay rent and, in the event of non-payment for say 30 days, then to terminate the lease. I have given consideration to whether this question should be remitted for determination, but have reached the view that it being a question of law, namely the true construction of the Deed of Covenant, the matter can be dealt with by this Court in the interests of finality. I do not consider there can be any room to imply such a term in this case. The conditions listed in B P Refinery (Westport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363, 376, as applied by the Court of Appeal in Devonport Borough Council v Robbins [1979] 1 NZLR 1, 23, are not satisfied. In particular, the term suggested is not necessary to the business efficacy of the contract; nor is it so obvious as to go without saying; neither can it be said to be necessary to make the agreement work.

For the Second Respondents, the only remaining issue was said to be the plea that the guarantee had been discharged by reason of the consent to the further assignment by the Company to the First Respondent, that amounting to a substantial variation or departure from the main contract and covenant which was not expressly consented to by the Second Respondents. Again, I think that matter can be disposed of at this stage. Once the guarantee receives the construction I have placed on it, it will be seen that there has been no variation or departure from the principal covenant. It was always envisaged that the right of assignment, conferred by the lease, could be invoked by the company, as indeed it was. The principle has no application to the present case.

Accordingly, there is no need to remit the matter to the District Court for any further findings to be made by it. The appeal is allowed and an order made that judgment be entered in the District Court for the Appellant in the sum of $3664.26 against the First Respondent and against the Second Respondents, together with costs as fixed by that Court. The Appellant is entitled to costs in this Court, which I fix at $400.00, payable as to $200.00 by the First Respondents and $200.00 by the Second Respondents.

J.

Solicitors:

Gaze Bond Carden & Munn, Auckland, for Appellant

Sheffield Young & Ellis, Auckland, for 1st Respondent

Subritzky Tetley-Jones & Way, Auckland, for 2nd Respondents