11/10

IN THE HIGH COURT OF NEW ZEALAND A. 1058/84

AUCKLAND REGISTRY

No Special Consideration

1232

BETWEEN DYNASTY RESTAURANT LIMITED

PLAINTIFF

A N D L.S.M. BRACK

FIRST DEFENDANT

A N D SILVERWOODS HOLDINGS LIMITED

SECOND DEFENDANT

- a n d -

M 1241/84

BETWEEN DYNASTY RESTAURANT LIMITED

PLAINTIFF

A N D L.S.M. BRACK

FIRST DEFENDANT

A N D OLIPHANT & BELL INVESTMENTS LIMITED

SECOND RESPONDENT

Judgment: 9 OCT 1984

Hearing: 2 and 3 October 1984 (in Chambers)

Counsel: B. Littlewood for Dynasty Restaurant Limited
R.S. Chambers for L.S.M. Brack
G. Hubble for Silverwoods Holdings Limited

JUDGMENT OF CASEY J.

In an oral judgment of 26th September 1984 Hillyer J. ordered that pending the further order of the Court, Mr Brack be restrained from transferring or otherwise

dealing with the property occupied by Dynasty without further granting to that company a lease giving effect to an agreement entered on 11th April 1984, and that Silverwoods be restrained from purchasing the property until that lease has been granted. He also made an order that a caveat by Dynasty do not lapse. This was to preserve the position pending resolution of the dispute - primarily at that stage between Mr Brack and Dynasty - on the latter's claim that it had a valid agreement for a new lease of its restaurant premises in Mr Brack's building at Customs Street, Auckland, for a term of 20 years at an annual rental of $28,000, and which was held under an existing lease expiring on 30th September 1984, with a right of renewal for a further five years.

Earlier negotiations did not get very far until Mr Brack gave an ultimatum on 11th April, resulting in Dynasty paying him a premium of $5,000 for the new lease plus an amount said to cover the difference in monthly rental. The agreement was then written out and signed by those two parties. Hillyer J. recorded that discussions then proceeded in a somewhat leisurely fashion between their respective solicitors about drawing up a formal lease. On 30th August 1984 Mr Lai (Dynasty's Manager) learnt that Mr Brack was selling the building to Silverwoods, who had rather different ideas about the proposed lease, particularly its duration and the need for a demolition clause. A number of issues were traversed before Hillyer J., who concluded there was a serious question to be argued, and if the sale proceeded it would be very difficult to assess what damages Dynasty might suffer by being confined to a term of five years instead of twenty.

The matter came before me as one of urgency on 2nd October in the form of a Memorandum by Mr Brack's Counsel supported by a lengthy affidavit from his solicitor (Mr Ross) detailing the negotiations with Dynasty's solicitor (Mr

Littlewood) up to the stage where his client was forced to capitulate to the latter's terms (his own expression) for the new lease so that he could be ready to settle the unconditional sale agreement on 28th September. However, late on the afternoon of 1st October he was told that Dynasty would not sign unless the purchaser accepted the lease. Mr Chambers submitted that Mr Brack's decision to offer the lease complied with the conditions to which the injunction and the caveat were subject. It is now frustrated by Dynasty's refusal to sign because Silverwoods will not give approval. He considers the injunction no longer restrains him but, lest he be held in contempt, he seeks a ruling from the Court that he has complied with its terms. He also seeks removal of the caveat. There is no suggeston in Mr Ross's affidavit that Dynasty was offered a registerable lease. Mr Chambers referred to an exchange between Hillyer J. and Mr Littlewood at the end of his oral judgment, in which His Honour was quoted as saying there was no requirement for registration because the agreement of 11th April did not provide for it. He submitted that nothing further remains to be done by his client to meet the conditions laid down.

It was clear from my discussions with Counsel in Chambers that the short notice had embarrassed Mr Littlewood, whose concern was to ensure that his client obtained leasehold rights which would be legally effective against Silverwoods. He had strong reservations about whether the equitable principles normally operating to protect an agreement to lease would apply in this case, having regard to the latter's denial of Mr Brack's right to grant it in terms of their agreement for sale and purchase. They also challenge its legality under the Rent Freeze Regulations, a point strongly relied on by Mr Brack until his so-called capitulation. When Silverwoods learned he was about to grant the new lease, they moved ex parte for an injunction on 2nd October restraining him from signing it or any renewal of the current lease. The supporting affidavit from their

Director, Mr Bagnall, exhibited the agreement for sale and purchase describing the purchaser as him "and/or nominee", and he has nominated the company, in which he is the beneficial holder of the shares. Clause 12.6 provides:-

> "The Vendor will give the Purchaser the sole right to renegotiate leases, subject to his approval, up to the date of settlement."

The annexed tenancy schedule shows a lease to Dynasty as being under negotiation.

This motion was heard at the same time as Mr Chambers' application, Mr Hubble contending that this clause meant Silverwoods had the sole right to renegotiate and settle all the terms of any lease which had not actually been concluded at the date the sale agreement was signed. Their principal concern, in view of the age of the building, was to include a demolition clause to operate after five years, giving Dynasty the right to take space in any new building. Without such a clause Silverwoods could be held to ransom because all the other leases expire before 1990. Accepting that if they were bound by the agreement of 11th April 1984, Mr Hubble further argued that the "normal terms" provided for in that agreement would include such a demolition clause in the case of an old city building. He also pointed to Mr Brack's former denials that there was an agreement, and that in any event it was illegal and unenforceable. Silverwoods do not want to see that position abandoned. Finally, they could argue they were not bound by the unregistered agreement in the absence of fraud - the same point that concerned Mr Littlewood - and that they are not bound by any inter partes arrangement between Mr Brack and Dynasty.

If the lease is signed, Silverwoods would be faced with the option of settling and suing for damages, or rescinding the contract and losing their bargain. Mr Hubble

said I cannot give my blessing to the proposed lease because what are "normal lease agreement terms" (the expression in the 11th April agreement) is a question for agreement or arbitration.

Mr Chambers argued that Silverwoods, as nominee only, cannot take the benefit of Cl. 12.6 (Lambly v. Silk Pemberton Ltd. (1976) 2 NZLR 427). He sought the peremptory dismissal of their motion on the ground that only Mr Bagnall could sue. I am not prepared to accede to that request in an interlocutory matter of this character, having regard to its urgency and the identify of beneficial interest between Silverwoods and Mr Bagnall. If necessary, I would grant Mr Hubble leave to add the latter as a party; the ultimate detriment to him would be the same as to his company if the lease is signed. Moreover, the agreement is made with him "and/or" his nominee as purchaser, and by Cl. 12.5 his full liability as a contracting party is preserved in the event of nomination. This wording may justify a different conclusion from that reached in Lambly's case; the Contract (Privity) Act, 1982 may also affect the position.

Mr Chambers conceded that if I did not dismiss the motion on this ground, then Silverwoods has an arguable case. At one stage I felt that damages might be an adequate remedy for them, either if they buy the building with such an unconventional 20-year lease, or for the loss of their bargain if they elects to rescind. On reflection I now think otherwise. They are entitled to get what they signed for - a commercial building producing income and likely to be available for development after five years, not one encumbered in this way by a long lease and a probable lawsuit. Further, as Mr Hubble pointed out, it would be almost impossible to make any realistic assessment of their damages by reference to the difference in value of the building - or on any other basis - if the proposed lease is granted and it transpires that Silverwoods were right.

The situation is complicated by the competing interests, but it is really one that Mr Brack has brought on himself. Its resolution lies in an early hearing of the substantive issues. An immediate fixture was available last week, but unfortunately one Counsel was committed elsewhere. The balance of convenience lies in holding the status quo meantime, and I record that an urgent fixture is desirable. Although Mr Brack is concerned about his overdue mortgage I agree with Mr Hubble that, having regard to the value of the property, refinancing will present no problems if the mortgagee wants to enforce its rights. His other losses will be covered by the undertaking for damages which I have no reason to believe will not be honoured.

There will accordingly be an injunction as moved on Silverwood's application until the further order of the Court, and I make no order on Mr Chambers' requests, as they have now been overtaken by these subsequent events.

Costs of all parties reserved, as is leave to any of them to apply for any further orders or directions.

McCarey J.

Solicitors:

Neumegan & Co., Auckland, for Dynasty Restaurant Limited
T.J. Doole & Partners, Auckland, for L.S.M. Brack
Holmden Horrocks & Co., Auckland, for Silverwoods Holdings Limited