IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

A.52/82

BETWEEN DUNLOP JOINERY & FURNITURE LIMITED a duly incorporated Company having its registered office at Invercargill and carrying on business as Joinery Manufacturers

Plaintiff

A N D INVERCARGILL CITY COUNCIL of Invercargill, Local Body

Defendant

Hearing: 7 November 1983

Counsel: S.M. Harrop and B. Fletcher for Plaintiff
R.H. Ibbotson for Defendant

Judgment: 3-4-84

JUDGMENT OF HARDIE BOYS J.

The plaintiff company seeks an order of mandamus and an award of damages against the defendant Council as a result of the Council's continuing refusal to grant the company a building permit. The permit is needed to enable the company to connect together two commercial buildings in Invercargill erected on land which it leases from the Council.

By registered lease dated 9 October 1969 the Council leased to the company under its then name of Dunlop Furniture Co Ltd, the property known as 53 Mersey Street. The lease is for a term of 21 years from 1 August 1969, with perpetual rights of renewal for like terms. There is a prohibition against assignment or subletting without the lessor's consent. There is no provision for increase in the rent, save in respect of each new 21 year term. When the rent is so fixed, no account is to be taken of any improvements at any time effected by the lessee. The improvements presently on the land comprise principally a factory, in which the plaintiff has carried on its

business of manufacturing aluminium windows and doors.

Late in 1981 the company had the opportunity to purchase from Smith & Smith Ltd its interest as lessee in the adjoining property, no.47 Mersey Street, also held under lease from the Council on terms so far as is presently relevant identical to those contained in the lease of no.53, except that the term runs from 29 February 1968. The company's purpose was to amalgamate the building on this land with its existing premises and thus obtain much needed additional storage and manufacturing space. The two buildings have a common boundary wall, and the company proposed simply to create two openings in this wall to allow ready access from the one building to the other.

This proposal required the consent of the Council in two respects. Firstly, the leases prohibited assignment without the prior written consent of the Council as lessor, and so that consent was necessary to enable the company to acquire the leasehold interest from Smith & Smith Ltd. Secondly, the opening of the boundary wall and associated work could not lawfully be undertaken without a building permit issued by the Council. Before committing his company to the purchase, Mr J.H. Dunlop, one of the directors, discussed the proposal with Mr Miller, the Council's building engineer. There were differences in recollection as to what was said in that discussion, but it is sufficient to record that Mr Dunlop understood there would be no difficulty and accordingly the purchase proceeded. In due course, the Council gave its formal consent to the assignment of the lease and the company then became registered as lessee of the Smith & Smith premises.

The difficulties that have eventually led to these proceedings arose over the issue of the building permit. The effect of opening up the dividing wall was, in terms of the bylaws (NZS.1900 Chapter 5: 1963, Ch. 5.2.1), to create one fire compartment instead of two. There would be no problem about that whilst both buildings had a common occupancy, but if they were to revert to separate occupancies then it would become necessary for the dividing wall to

comply with the fire partition requirements of the bylaws. This could be achieved simply by appropriately blocking up the openings, and so restoring the wall to its original condition. Mr Miller was concerned that the Council retain control over the situation, so that it could ensure that the proper steps were taken should there in the future be a reversion to separate occupancies. He was not prepared to accept an undertaking by the company that it would reinstate the wall, but instead decided that the terms of the leases would have to be made co-extensive. He described this requirement as being a building permit amalgamation. This is the term used where a council exercises the power conferred by s 643 of the Local Government Act 1974. That section deals with the situation where application is made for a permit for a building to be erected over two or more allotments of an existing subdivision, and its effect is to enable the council, as a condition of the grant of the permit, to require that the allotments shall not be transferred or leased separately without the council's consent. The condition is registrable against the titles to the land concerned. The section of course does not apply here, for what the company proposed was not the erection of a building over two or more allotments, but simply the amalgamation of existing buildings by creating two openings in an existing wall.

Mr Miller also proposed that the leases should be varied so as to include a clause requiring reinstatement of the dividing wall in appropriate circumstances. He did not however intend to make this a permit requirement. As he put it in his evidence: "I only suggested that wearing my other hat as technical adviser to the landlord". I confess to some difficulty in following his reasoning, for I would have thought a covenant was the appropriate solution from the permit point of view, rather than co-extensive leases. In any event, the prohibition against assignment or subletting without consent should enable effective monitoring of changes in occupancy. Mr Miller however appears to have been concerned to guard against the possibility of the company renewing one lease and not the other, in which case, he said, the Council in resuming occupation of the land of which the lease was not renewed would be in breach of its own bylaws.

Following correspondence and discussions about these matters between the parties, the details of which I need not traverse, on 20 May 1982 the Town Clerk, Mr Jones, wrote to Mr Dunlop in these terms:

> "PERMIT APPLICATION NO 8276 AT 47 MERSEY STREET
>
> Further to our telephone conversation and in regard to your letter of 18 May 1982, to the City Engineer, the building permit cannot be uplifted unless my Council's consent, as owner of the land, is obtained.
>
> As indicated earlier, consent will be given provided the two existing leases at 47 and 53 Mersey Street are cancelled and replaced by two new leases as from the date of the issue of the building permit, with a rental review, and subsequent rental reviews every seven years. In addition there will have to be a new clause in each lease requiring the reinstatement of the party wall in the event of different parties acquiring separate ownership of the buildings. The actual wording would be drawn up by the City Solicitor.
>
> If your Company wishes to operate both buildings as separate entities without a break in the party wall then, of course, no building permit is necessary and Council has no jurisdiction in the matter. We have already consented to the transfer of the lease from Smith & Smith Ltd.
>
> Would you please advise me whether you accept the above conditions. On receipt of that advice I will instruct the City Solicitor to draw up the new leases urgently."

It is to be noted that this letter deals with two distinct topics. First, it indicates the terms upon which the building permit will be granted, namely the obtaining of the Council's consent as owner of the land. That is the only condition referred to. Secondly, it indicates the terms upon which that consent will be given, namely the execution of new leases, containing provisions substantially different from and more advantageous to the Council than those of the current leases. This letter manifests a quite understandable confusion between the Council's differing roles, which has affected its attitude throughout. The letter also resulted, Mr Miller said, from a misunder-

standing between him and Mr Jones. Mr Jones had understood that Mr Miller's requirement as engineer, "to preclude the lessee from assigning either two leases independently without reinstatement of the boundary fire wall" was twofold, first that there be a building permit amalgamation in the sense of co-extensive leases, and secondly that covenants as to reinstatement be included in the leases; whereas, as already mentioned, only the first of these had in fact been put forward as a permit requirement.

Mr Jones' letter of course went further than Mr Miller had suggested. This was in an attempt to deal with an entirely different problem. The Council's leases have always been for 21 year terms with perpetual rights of renewal, but prior to 1968 they all provided for rental reviews at seven-yearly intervals. This provision was apparently unpopular with lending institutions and eventually as a result of pressure from the business community the Council decided to delete it from all future leases, including renewals of existing leases. Thus there is no such provision in the two leases involved here. By 1975 it had become clear that due to rapidly increasing land values the Council was losing a large amount of potential revenue. Moreover vendor lessees were capitalising on the situation by obtaining substantial goodwill payments from purchasers. The Council therefore resolved that it would as a matter of general policy restore a provision for seven-year rental review in all new leases, and that it would insist on acceptance of such a provision as a condition of the granting of its consent whenever that might be required under an existing lease. Mr Jones (and his view was confirmed by his Council) thus saw what was understood to be the engineer's building permit requirement as an opportunity to implement this fiscal policy in respect of the company's two leases. For although it was accepted that the Council's consent as lessor was not required to the physical alteration of the premises, it was of course required to any alteration of the leases. Mr Jones acknowledged that he could not have called for the rent reviews had the engineer not required the existing leases to be varied.

The company has refused to accept the validity of the condition to the issue of the permit imposed in the letter of 20 May 1982, and on 17 November 1982 it issued these proceedings challenging its validity. Because it had been incurring continuing losses through its inability to use the new premises in the way it had intended, it finally took matters into its own hands, and early in December 1982 carried out the work without the permit. The Council did not know that until Mr Dunlop disclosed it whilst giving his evidence at this hearing.

The company was willing to accept an amendment of the leases to provide for reinstatement, although it has throughout insisted that a covenant in some other form would be equally satisfactory, and it is not I think greatly concerned if the leases are made to run concurrently. What does concern it is the attempt to use the occasion to introduce a rental review provision. However the validity of that is not the first question to be considered in the case. Two others must precede it. The first is whether the Council was entitled as a condition of issuing a building permit to require that it consent thereto in its capacity as owner of the land. Although this question really begs the issue as it has developed between the parties, it becomes the first question because the Council itself has so put it in the first paragraph of its letter of 20 May 1982. However whilst a negative answer would strictly dispose of this aspect of the case, I think it proper in the circumstances to go further and deal with the second, which states the issue directly, and it is whether the Council was entitled as a condition of issuing a building permit to require an amendment to the lease in either of the respects Mr Miller had in mind. It is right to record that the case is not one of the deliberate improper use of power. The Council has not imposed the condition for the purpose of forcing the rent review onto the lessee. Rather it has applied its previously determined policy to what it believes is a situation properly available for its application. And it is only if the Council has the power to impose the condition that it becomes necessary to consider whether it is entitled to avail itself of the opportunity so presented in order to obtain the rent review.

The Council's power to require a building permit to be obtained for the proposed alteration derives from s 684, if not s 649, of the Local Government Act 1974. The former section enables a Council to make such bylaws as it thinks fit for a wide variety of purposes, including "regulating and controlling the construction, alteration, and repair of buildings" (subs (1)(22)). The latter section requires a Council to make bylaws in respect of the prevention of fire. The powers so conferred must be exercised for the purpose for which they were conferred and not for any collateral purpose. In Quinlan v Mayor, Etc, of Wellington [1929] NZLR 491, 495, Ostler J said:

> "It has been decided by the House of Lords that the only ground upon which a local authority can legally refuse a permit to build is that its by-laws or some statutory requirement has not been complied with: See Robinson v Barton Eccles Local Board 8 AC 798. The books are full of instances where mandamus has been granted against local authorities who have refused to grant the permit applied for on some other ground. .... If the applicant has complied with all the requirements laid down in the authority's own by-laws, and has not contravened any statutory prohibition or requirement, the local authority has no general discretion to refuse to grant the permit, and cannot refuse on the ground that it requires the land."

And in McKenna and Gifford v Palmerston North City Council [1952] 767, 772 Fair J said:

> "...the use of power given for one purpose in order to forward the achievement of other purposes, in respect of which the Legislature never intended the power to be used, is an unauthorized exercise of the power."

Dicta in some of the earlier cases must be read in the light of the wider powers now conferred by town planning legislation, but the basic principle remains. The Council's discretion must be exercised in accordance with legal principles, here most importantly that "it should not be influenced by considerations other than those strictly relevant to the application" (Ashburton Borough v Clifford

/1969/ NZLR 927, 942). Thus the imposition of conditions, whilst a necessary part of the function of regulation and control, must also be directed to the purpose for which the power is conferred and not to any collateral purpose. And of course the conditions must be reasonably necessary and reasonably related to attaining the objectives for which the Council is given its regulatory powers.

In order to avoid confusing the Council's roles as lessor on the one hand and controlling authority on the other, and because I recognise that the Council was not deliberately setting out to use the powers given to it in the one capacity to further its interests in the other, the proposed conditions must be considered in a more general context, as if the Council were not the lessor. For the fact that it is the lessor cannot validate what would be invalid in the case of some other lessor.

A condition that a lessee obtain the lessor's consent to a proposed building alteration may perhaps be justified in some circumstances as an exercise of the Council's regulatory power, but it cannot be justified in this case, where no bylaw requiring such a consent was produced, where the lessor acknowledges that it has no interest in or control over the structure of the buildings, and where its consent is manifestly not required for any purpose related to the proposed alteration. I think it more than likely that the imposition of the condition in this form arose from inadvertence in the drafting of the letter, rather than from any belief as to entitlement, and I say no more about it, for it is not the real issue in the case.

May then the Council refuse a permit until the leases are varied in the two respects required? The first point to note is that the proposal submitted for approval entirely complies with the bylaws. It was not that proposal in itself that troubled the engineer. It was the situation that would arise in the future should the two buildings cease to have the one occupier. The Council has powers under the bylaws to deal with that situation if and when it arises, and I have some doubt whether it is entitled now to guard against such a future possibility. However this point was not argued,

and I will assume in favour of the Council that it does have that right. The second point to be made is that the two conditions are directed towards the same end, namely to ensure reinstatement in the eventuality contemplated. They may therefore be considered together.

I have already referred to s 643 of the Local Government Act and expressed the view that it has no direct application to this case. Nor I think may it be drawn on by way of analogy. Certainly the power specifically conferred by the statute in respect of the circumstances it describes cannot be treated as having been conferred in respect of analogous situations. Indeed the fact that Parliament considered it necessary to enact such a provision may suggest that local authorities are not intended to have similar powers in analogous cases. But that is not a strong argument, particularly in view of the very extensive registration provisions of s 643, which on their own would require legislative authority. I think it better to treat the section as being of no assistance either way. If the condition is sustainable, it must be on the basis that it is reasonably necessary to secure compliance with the bylaws. In my view it is not. The Council is able to ensure reinstatement in other ways, by obtaining for example a covenant from the company. There is no warrant for it to interfere in contractual relationships between lessor and lessee. Indeed were it not itself the lessor, a direct covenant with the company would be more effective than either co-extensive terms or reinstatement covenants in the leases, for neither of these would of itself impose any direct obligation on the company vis-à-vis the Council. If then the Council would not be entitled to require lease variations where another party was the lessor, it can have no greater right - as permit issuing authority - to require them where it happens itself to be the lessor. When the only result of so doing, not attainable by methods available in the case of different lessors, is the obtaining of some advantage for itself as lessor, it will be seen, albeit unintentionally, to be using its statutory powers for collateral purposes, and that is not permissible.

I therefore conclude that in attempting to obtain variation of the leases as a condition of granting the building permit the Council was acting beyond its powers. For another equally effective measure is available to it. It can obtain a covenant to reinstate from the company in almost exactly the same terms as it proposed to include in the leases. Given the control it has through the covenants not to assign or sublet without consent, and the fact that as lessor it will know whether or not the lessee intends to renew under one or both leases, such a covenant will, so far as I can see, be equally as effective as the covenant proposed for inclusion in the leases. I do not of course go so far as to hold that a covenant is the only measure the Council may adopt. That is for it to decide. This judgment goes no further than to hold that it may not require the leases to be amended.

In view of this conclusion, it is not necessary for me to decide whether the Council was entitled to include the provision as to rent review among the amendments to the lease upon which the issue of the permit was made conditional. It could require that only as lessor. But the case revolves entirely around its role as permit issuing authority, and although there was some argument as to its rights as lessor, I do not regard that as a relevant topic and accordingly do not examine it.

For the reasons given, the company is entitled to a mandamus; but, as Mr Harrop acknowledged, it cannot be in the form sought in the pleadings, i.e., "compelling the defendant to grant the building permit sought", for the Council must have the opportunity to reconsider the application in the light of conditions it may lawfully impose (see the Quinlan case at p 497). The order I make therefore is that a writ of mandamus issue to the Council to consider and determine the permit application on its merits in accordance with the principles of law explained in this judgment.

There remains the claim for damages. In the statement of claim, the claim was for special damages of $1,000 a month from 15 April 1982 (the date on which the Council first intimated that the permit would conditionally issue) to the date of judgment, together with general damages of $2,500

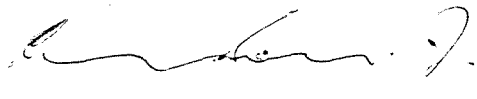
for "inconvenience and uncertainty". At the hearing, evidence was adduced directed to showing a total loss in the period up to December 1982 (when the proposed work was actually done and the continuing losses thus ended) of $14,759. Counsel sought leave to amend to this sum, and I grant that leave despite Mr Ibbotson's objection, for the defendant cannot be prejudiced thereby.

The claim is based purely on the Council's refusal to grant the permit, and in argument counsel expressed it as being for breach of statutory duty. This tort involves by definition the breach of a duty imposed by statute, resulting in damage to an individual. But more than that is required. It must appear from the statute itself that the legislative intention in creating the duty was to confer a cause of action on an individual injured through its breach. Ascertainment of that intention in a given case is often a matter of considerable difficulty - see for example Maceachern v Pukekohe Borough /1965/ NZLR 330.

There is no express statutory duty upon which the company can rely here. The Local Government Act does no more than confer the power to make building bylaws. Any duty must be found by implication. For present purposes, it must be taken to be a duty to issue a permit without the imposition of impermissible conditions. It is indeed to the performance of that duty that the order of mandamus is directed. Counsel did not refer me to any case where liability for this particular tort has been imposed - or even contended for - on the basis of a duty derived by implication from a statute conferring regulatory powers. This is no doubt because the very grounds for imposing liability cannot arise except from a duty expressly created. For the inquiry is always whether in creating the duty Parliament has also conferred a civil liability, or has provided a different kind of sanction for breach. And these are not fit subject matter for legislation by implication. I therefore conclude that the company has no cause of action in damages against the Council for breach of statutory duty.

This does not necessarily mean that a person suffering loss from the wrongful refusal of a building permit can never obtain damages. There is growing recognition of a tort of abuse of administrative or statutory powers, or misfeasance in a public office, to use the terminology of the learned editors of Salmond & Heuston on the Law of Torts 18th Ed p 33. The scope of the tort is far from clear. In David v Abdul Caden /1963/ 1 WLR 834 the Privy Council left open the possibility of a claim for damages resulting from the malicious refusal or neglect to grant a licence: founded perhaps on a breach of a duty to act bona fides. This case is discussed in Winfield & Jolowicz on Tort 11th Ed p 524 as an example of one of what are there described as "doubtful torts and doubtful wrongs". A striking example is Roncarelli v Duplessis (1959) 16 DLR (2nd) 689, in which a majority of the Supreme Court of Canada upheld an award of damages against the Prime Minister of Quebec for instructing a controlling authority to cancel the appellant's liquor licence because he was a member of a religious sect which had been causing trouble to the authorities. Another is Farrington v Thomson and Bridgland /1959/ VR 286 where it was held that it was not necessary to establish malice, but that it was enough if the defendant "acted with knowledge that what he did was an abuse of his office" (p 293). See also the article by Mr B.C. Gould in (1972) 5 NZULR 105. The present case is a far cry from the malicious or wilful abuse of power and I do not think the law has yet developed to the point where a local authority not guilty of any other specific tort such as trespass or negligence, is liable in damages for the wrongful but bona fide exercise of its functions. In any event, the case was not founded on this particular cause of action and no argument about it was embarked upon.

The plaintiff is therefore entitled to the order of mandamus already mentioned, but not to damages. The plaintiff is also entitled to costs which I set at $750 together with disbursements as fixed by the Registrar.



Solicitors:

Stout, Hewat, Binnie & Howorth, INVERCARGILL, for Plaintiff
Preston, Evans, Noble & Early, INVERCARGILL, for Defendant.