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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Butterworths

1101

CA 136/84
M on Appeal 30.8.84

Appeal reported
[1985] 1 NZLR

A.6/84

BETWEEN GARRY DENNING LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a retailer

Plaintiff

AND CALVIN WAYNE VICKERS of Auckland, Police Constable

Defendant

Hearing: 22nd August, 1984

Counsel: Dugdale and Dugdale for Plaintiff
Bogiatto for Defendant

Judgment: 27 AUG 1984

JUDGMENT OF SINCLAIR, J.

By a memorandum of lease No. 27501 from Her Majesty the Queen, the Defendant is possessed of an interest for a term of years in a parcel of land situated in Newmarket being the land comprised and described in Certificate of Title Volume 2D, Folio 1411 (North Auckland Registry), the land being situated at 290 Broadway, Newmarket.

By a deed of sub-lease dated 2nd July, 1981 the Defendant sub-leased the land to a company Hallmark Floor Coverings Ltd for a term of 15 years commencing on the 1st November, 1980. After Hallmark took possession it decided that it did not, for its own purposes, require the whole of the premises and decided to sub-let or sub-lease a portion of them.

Consequently, through the agency of Beltons Real Estate an agreement was entered into between Hallmark and the Plaintiff company for the Plaintiff company to sub-lease a portion of the premises for 12½ years from the 30th September, 1983. That agreement envisaged a payment of $23,000 by the Plaintiff company to Hallmark and the agreement was expressed to be conditional upon the landlord/lessor approving the granting of a sub-lease to the Plaintiff by 5 p.m. on the 23rd September, 1983.

A sub-lease was drawn up and the term of that sub-lease was slightly less than that provided for in the agreement for sale and purchase being for a term of 12 years and 30 days and that sub-lease was duly executed by both the Plaintiff and Hallmark and bears a date of the 14th October, 1983 with the term of the sub-lease commencing from the 30th September, 1983.

On the 21st October, 1983 Hallmark passed a resolution to go into voluntary liquidation, but by that date the Plaintiff company was in possession of the portion of the premises which it had agreed to sub-lease from Hallmark.

On the 9th November, 1983 the Defendant re-entered the premises and took possession of the same and Hallmark in no way took any action to contest the action of the Defendant. From the evidence which I heard it was obvious at that time that there was a deficit in the asset-liability situation of Hallmark and it is little wonder that the liquidator took no action in respect of the re-entry by the Defendant.

In consequence of the action of the Defendant the Plaintiff has commenced these proceedings, seeking relief

pursuant to the provisions of S.119 of the Property Law Act 1952. The Defendant for his part contends that the Plaintiff is not entitled to any relief pursuant to that statutory provision.

I heard evidence from Mr Denning of the Plaintiff company, Mr Daley who was formerly a director of Hallmark and from the Defendant and his agent, K. F. Wendell.

From the evidence which was tendered it became obvious that Mr Denning at no time himself came into contact with the Defendant, his agent or legal adviser at any time prior to going into possession of the premises in question and that he believed from conversations which he had had with Mr Daley that Mr Vickers had approved the sub-lease to his company.

Mr Daley's evidence was to the effect that at some time round about the time the Plaintiff company was going into possession, Mr Vickers was at the premises and saw that some alterations were going on, those alterations being necessary to separate the Plaintiff's business from that of Hallmark. Mr Daley stated that he showed Mr Vickers what was being done and that he offered to introduce Mr Vickers to Mr Denning, but that Mr Vickers declined the invitation. It is apparent from Mr Daley's evidence that towards the end of Mr Vickers' visit Mr Daley asked Mr Vickers how he felt about the proposition and that he received merely an "oh yes" answer. From that Mr Daley concluded that Mr Vickers had given his approval.

Shortly after, Mr Wendell appeared on the scene and his attitude was fairly blunt in that he openly stated that the Plaintiff company had no right to be in the premises and

wanted to see it vacate them. Mr Wendell went so far as to have steps taken to close the premises off to the Plaintiff, but that move was defeated by the Plaintiff taking retaliatory action. On the 4th November, 1983 notice was given by Mr Wendell as agent for the Defendant for Hallmark to vacate the premises on the grounds that there had been a breach of clause 25(c) of the lease in that on the 21st October, 1983 there had been passed a resolution for the winding up of the company.

Mr Wendell gave evidence that on the 29th October, 1983 as a result of a visit to the premises he had delivered a letter to Mr Denning which stated that the Defendant did not recognise the sub-tenancy and required the Plaintiff company to vacate or finalise a new tenancy within 14 days. Mr Denning denied having received that letter but on the balance of probabilities I am satisfied it was delivered. Be that as it may, it does not alter the real situation at all.

Subsequent to the attempt by the Defendant to take possession of the premises injunction proceedings were issued by the Plaintiff and an interim order was made restraining the Defendant from taking possession, but on a basis which preserved the Defendant's contention that he was not to have been taken to have consented to a sub-lease or to have in any way prejudiced the position he claimed to be in as at the making of the interim injunction, namely the 10th February, 1984.

No evidence was given at all that there had been submitted to the Defendant, or his legal advisers, any documents relating to the formal consent of the Defendant to the sub-lease, nor was any evidence given that any particulars in relation to the Plaintiff company had ever been delivered to the Defendant or his legal advisers or agent so that consideration could be given as to whether or not the Plaintiff was acceptable as a sub-tenant.

The question for determination by the Court is whether, having regard to the above facts, the Plaintiff is entitled to relief pursuant to S.119 of the Property Law Act 1952. That section reads as follows:

> "119. Protection of underlessees on forfeiture of superior leases -
>
> Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease, or any part thereof, either in the lessor's action (if any) or in any action brought by that person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease, or any part thereof, in any person entitled as underlessee to any estate or interest in that property, upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, the giving of security, or otherwise as the Court in the circumstances of each case thinks fit; but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original underlease."

By S.117 an "underlease" is defined as including an agreement for an underlease where the underlessee has become entitled to have his underlease granted, while "underlessee" is defined as including any person deriving title through or from an underlessee.

Mr Dugdale contended on behalf of the Plaintiff that the Court had jurisdiction to entertain the application despite the lack of written consent from the Defendant and he put forward two arguments to support his contention. The first argument was that if regard is had to the actual wording of S.119 of the Statute, he maintained that a power was given to any person to bring a claim for relief if that person claimed to be an underlessee. He maintained that such a person does not have to prove that he is an underlessee in any precise sense and that as long as the person making the claim could show that he was within that category of persons then he was entitled to apply for the relief which could be granted.

Mr Dugdale relied upon a decision in Moore v. Smee & Cornish (1907) 2 K.B. 8. That case involved a consideration of whether, having regard to the circumstances outlined in the decision, one party could claim to be a "tenant" within the meaning of S.212 of the Common Law Procedure Act 1852. I do not think that that decision assists the Plaintiff's argument at all as it must be looked at in the context of the facts which were shown to exist and the Statute which was to be interpreted.

In the instant case I am of the view that an underlessee, for the purposes of S.119, is a person who in all respects has become by contract or otherwise an underlessee, or who has completed all the formalities of becoming such a person, but for some technical or other reason there has been an occurrence which has precluded the person concerned from becoming an underlessee although in all other respects he is entitled to become such a person.

The original lease between the Defendant and Hallmark contained an express provision in relation to subletting and it is in the following terms:

"ASSIGNMENT

15. THAT the lessee will not assign, sublet or part with possession of the leased premises or any part thereof:

(a) Without having first delivered to the lessor a Deed of Covenant executed by the proposed assignee or sublessee covenanting to observe and perform all the covenants conditions and provisions on the lessee's part therein contained and implied such Deed to be prepared and stamped by the lessor at the cost and expense in all things of the lessee but the execution of any such Deed shall not release or discharge the lessee from liability hereunder.

(b) Without (in the case of any assignment or sub-lease to a private limited company) having first delivered to the lessor (in addition to the Deed of Cov-nant referred to in the last preceding paragraph) a Deed of Covenant executed by the shareholders or stockholders of the company or such of them as the lessor may direct whereby the share-holders or stockholders guarantee to the lessor (jointly and severally if more than one) the observance and performance by such company of the covenants conditions and provisions on the lessee's part therein contained or implied.

(c) Without in all cases having first submitted to the lessor the name address and occupation of the proposed assignee sublessee or other occupier together with such information and evidence as the lessor may reasonably require in order to ascertain whether his consent should be given to the proposed assignment subletting or parting with possession.

(d) Without in all cases obtaining the consent in writing of the head lessor (which consent the lessor undertakes to apply for at the Lessee's cost) and the lessor first had and obtained pro-vided such consent are not unreasonably nor arbit-rarily withheld to an assignment or subletting to a proposed solvent respectable assignee or tenant."

There was no evidence of any of the procedure required by that clause having been carried out. Therefore I do not consider that in fact the Plaintiff had become an underlessee

for the purposes of S.119 at all. This finding may be decisive of the whole action, but at least it is sufficient to dispose of Mr Dugdale's first argument which he acknowledged was not a strong argument.

His second argument was that the grant of the sublease, while in breach of the terms of the headlease, was still effective to create the estate and that the grant of the sublease amounted to nothing more than a breach of covenant. In support of that particular argument he cited a number of cases commencing with Parker v. Jones (1910), 2K.B. 32. He also made reference to the decisions in Morrison v. Hall (1923) V.L.R. 93 and Old Grovebury Manor Farm Ltd v. W. Seymour Ltd (1979) 3 All E.R. 504, and Peabody Donation Fund v. Higgins (1983) 3 All E.R. 122. When one reads each of those cases it is to be noted that the Court was dealing with an assignment of a lease or tenancy which to my mind is in a different category from a sublease of a portion of the premises involved. Where there is an assignment, if the assignment were properly carried out, then the interest of the assignor could be validly passed to the assignee. Indeed, that so appears from the decision of Cumming-Bruce L.J. in Peabody Donation Fund v. Higgins (supra) at page 126 where he said:

> "Although there was a prohibition on assignment, the effect of the purported assignment was that the interest of the assignor validly passed to the assignee, and if the landlords wished to terminate it their duty then was to serve a Section 146 Notice on the assignee and proceed against the assignee for forfeiture on the grounds of a breach of covenant in the lease."

That statement was made following a consideration of

what had been said by Lord Russell in the Old Grovebury Manor Farm Ltd's decision and which was adopted by Cumming-Bruce L.J. as being correct in law.

If the landlord does not consent to the assignment then he has certain rights which he may validly enforce against the assignee, but the cases highlight the fact that the landlord must be careful as to the manner in which he endeavours to effect his remedy.

I repeat that one must be careful to draw a distinction between an assignment and a sublease or underlease because they are not synonymous.

Here in the instant case the Court is asked to deal with an underlease of but a portion of the premises which were originally leased by the Defendant to Hallmark and the document which was signed by Hallmark and the Plaintiff, and dated the 14th October 1983, acknowledges full well that it was a sublease and not an assignment. There had been no approval at all to the sublease and the action of the Defendant on the 4th November, 1983 made it plain that the Defendant regarded that he at least still had his right of re-entry and that he was exercising that right pursuant to Clause 25 of the lease. That could have been exercised, in my view, under any one of three separate heads as subclause (c) of Clause 25 provides that the Defendant had a right to re-enter if the lessee should resolve to go into liquidation, while subclause (d) gives a right of re-entry if the lessee should suspend its business activities at or from the leased premises and; quite possibly he could also have exercised

his right of re-entry pursuant to subclause (b) of Clause 25 which gives a right of re-entry if the lessee should breach or fail to observe or perform any of the covenants, stipulations or conditions contained in the lease. Under this head it could be said that Hallmark had parted with possession of a portion of the premises without obtaining the Defendant's consent as required in the lease. Once Hallmark's right to possession had been determined by the Defendant, the Plaintiff's right of occupancy disappeared subject, and subject only to any rights which may exist under S.119 of the Property Law Act 1952.

As was pointed out by Mahon, J. in Smallbone Nominees Ltd v. Waikune Holdings Ltd (1978) 1 N.Z.C.P.R. 5, the right of a sub-tenant to claim relief against forfeiture is exclusively statutory. In the course of his judgment at page 13 Mahon, J. said:

> "Equity always recognised the claim of a defaulting tenant for relief from the common law consequences of non-payment of rent, but equity did not intervene in aid of a sub-tenant, whose rights in that respect were therefore created by English legislation which was repeated in New Zealand by provisions now represented by S.119."

Mr Bogiatto relied strongly upon a decision of the West Australian Court of Appeal in Richardson v. Somas (1967) W.A.R. 109, which decision was described by Mr Dugdale as being in the maverick category. I gather that the real reason for that comment was that the decision tended to destroy Mr Dugdale's argument.

The facts of the case are as follows: the lessee of the shop premises had covenanted not to assign, sublet or

part with possession of them without the prior written consent of the lessor and it was a condition precedent to the granting of such consent that the lessee obtain from the proposed assignees an executed deed of covenant in the lessor's favour containing the covenants and agreements of the original lease. The lessee sold the business he was conducting on the premises and the memorandum of sale provided that the lease would be assigned to the purchasers if the lessor consented to the assignment. The lessee advised the lessor of the sale, but he put the purchasers into possession before giving the lessor time to consider the matter and before obtaining the lessor's consent and without obtaining from the purchasers an executed deed of covenant. The lessor claimed forfeiture of the lease for breach of the covenant not to assign, sublet or part with possession. The lessor succeeded and in the course of his judgment Wolff, C.J. at page 113, had this to say:

> "Lastly, Mr Toohey urges that this Court should stay its hand and give the purchasers an opportunity of availing themselves of s.5 of the Landlord and Tenant Act which reads: 'Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease the course may on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such a person for that purpose make an order vesting for the whole term of the lease or any less term the property comprised in the lease, or any part thereof, in any person entitled as underlessee...'
>
> This provision can have no application to the present circumstances. The basis of the defendants' argument is that there has as yet been no lease or sublease at law. The section applies to a pre-existing and valid sublease and to apply it in such circumstances as this would render nugatory a covenant

> "such as the present where the lessees and the purchasers go ahead in defiance of the covenant not to assign or underlet or part with possession of the leased premises."

That statement to my mind can be applied to the facts of the present case and, indeed, the facts in the Western Australian case, and those in the instant case are very close while the legislation is virtually identical.

There never has been, in my view, a valid underlease to the Plaintiff and if one were to hold that it was valid then the Defendant could find himself with a sub-tenant who he did not want and of whom he did not approve, and that the use of the premises, by reason of the sub-tenancy of a portion, may be severely restricted. For a sublease to be valid and effective where there are conditions imposed as a condition precedent to the establishment of such a sub-tenancy, then in my view the requisite procedure must be followed before a valid sub-lease can come into existence. That simply did not occur so far as this Plaintiff was concerned and in my view he cannot obtain any relief at all under the provisions of S. 119 of the Property Law Act 1952.

The $23,000 which was payable in accordance with the agreement entered into between Hallmark and the Plaintiff was paid over to Hallmark and the effect of the Court's decision will mean that the Plaintiff will have to vacate the premises. One can sympathise with the Plaintiff, but sympathy does not provide a just basis in law for a judicial decision. The situation could have been quite easily protected by a refusal to hand over the

key money until such time as the sublease had in fact been consented to by the Defendant.

Accordingly the present action fails and there will be judgment for the Defendant with costs which I allow in the sum of $800 and disbursements.

B. D. Inj.

SOLICITORS:

Kensington Haynes & White, Auckland for Plaintiff
Anthony Grove & Darlow, Auckland for Defendant