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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.262/85

(3) X

No Special Consideration

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BETWEEN ENTERPRISE CARS LIMITED
Plaintiff

AND SPOONER MOTORS LIMITED
Defendant

Hearing: 25 March 1985

Counsel: M.S. Cole for Plaintiff
T.N.B. Wilson for Defendant

Judgment: 25 March 1985

(ORAL) JUDGMENT OF BARKER, J.

This is an application for an interim injunction to restrain the defendant from entering into or otherwise dealing with leasehold premises situated at 172-178 Mokoia Road, Birkenhead.

The relevant facts are that the defendant granted the plaintiff a lease of the premises by agreement to lease dated 30 July 1981. The term of the lease expires on 31 March 1989. The rental is $13,250 per annum, payable in monthly installments. The rent has always been paid promptly throughout the term of the lease.

The demised premises appear visually to be integrated with the defendant's motor garage business. Apparently, both the defendant's garage business, which concentrates on petrol sales, and the premises leased by the defendant to the plaintiff, were once in the common ownership of Lyon Motors Limited which sold both lots to the defendant.

Under the Operative District Scheme for the City of Birkenhead, at the time the lease was entered into, car sales premises were a permitted use of the property in terms of a specified departure granted under the 1953 Town and Country Planning Act. A car sales yard is a conditional use of the property under the current Birkenhead District Scheme.

In May 1983, the plaintiff vacated the premises and did not return. It had previously operated a car sales yard on the site. There is some contention as to whether the plaintiff acquiesced in the defendant's abandonment of the business and whether this acquiescence was demonstrated by the defendant's seeking to use the premises for the storage of some vehicles. However, this is not a matter on which I need to make a ruling.

It seems, on the face of it, that there could be breaches of two clauses in the lease which provide (a) that the plaintiff would operate the premises as a used car sales yard and maintain the goodwill of the business throughout the term of the lease, and (b) that the tenant would keep in full force all licences required in respect of the business of the tenant or in respect of the premises or use thereof or any other licence, permit or authority which may be required from time to time by any Governmental Licensing Authority or other Authority having jurisdiction.

It is submitted by counsel for the defendant, with some force, that the plaintiff is in grave breach of the first covenant; it closed down its car sales business and did not maintain the goodwill of that business for a significant part of the term of the lease. Moreover, the plaintiff's licence for the premises was not renewed from year to year as required; it has recently been revoked by the Motor Vehicle Dealers Registration Board until such time as planning consent is available for the land.

At the time the lease was entered into, and at the time the plaintiff abandoned the premises, the use as a car sales yard was an "existing use" under s.90 of the Town and Country Planning Act 1977. In terms of that Act, that use enured for some 6 months; thereafter it lapsed by operation of law. It is acknowledged by the plaintiff that to remedy any breach in the lease, it must now apply to the Birkenhead Council for conditional use approval to use the premises as a car sales yard. It is realistically anticipated that this permission will take 2 to 3 months to be granted, given the rights of public notification and objection conferred by the Town and Country Planning Act. Thereafter, there will be a further lapse of some weeks whilst the Motor Vehicle Dealers' Board gives approval to the plaintiff to operate from these premises.

The plaintiff issued 3 notices under s.118 of the Property Law Act 1952. The first of these, dated 5 February 1985, alleged that the defendant was in breach of the lease; that it had failed to operate from the premises the business of a car sales yard. Quoting the relevant covenant in the lease, the notice gave until 25 February for the breach to be remedied.

The second notice, dated 18 February 1985, purported to terminate the lease. It alleged a breach of the covenant, in the plaintiff's allowing the existing use to run out. In passing, I am not sure whether there is a requirement in the lease that existing use rights be actively maintained by the tenant; the clause deals with positive licences granted by a Licensing Authority as distinct from rather negative permission given by the existing use rights. However, I do not have to decide that point.

The second notice purported to terminate the lease; it did not give any period of time within which it could be remedied. It was agreed by counsel that this notice is

not effective. The third notice, dated 22 February 1985, again relied on the clause in the lease regarding licensing and gave until 26 March 1985 for compliance.

Mr Cole, for the plaintiff, submitted that there was a serious question to be tried in respect of the validity of the notice, and that the notice should have given sufficient time for the plaintiff to have applied for planning permission and thereby rectified its breach.

Mr Wilson, on the other hand, referred to Ellis v. Hutcheon, (1928) GLR 162 where Sim, J. quoted from the decision of Lord Russell C.J. in Horsey Estate Ltd v. Steiger (1899) 2 QB 79, 91, as follows on the subject of the statutory notice:

> "The object seems to be to require in the defined cases (1) that a notice shall precede any proceeding to enforce a forfeiture, (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether he ought to offer any, and, if so, what compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

It seems to me in the circumstances, that it is not by any means certain that the notice gave inadequate time.

However, I consider that an injunction has to be granted in the present case purely from the point of view of preserving the plaintiff's right to apply for relief against forfeiture. The plaintiff has applied in terms of the Property Law Act 1952; it will be necessary for the

Court determining that application to know whether the breach is capable of being remedied; it will be capable of being remedied if the Birkenhead City Council permits the plaintiff to use the land for exactly the same purposes as those granted under the earlier permission which ran out. Alternatively, it may be for the Planning Tribunal on appeal to make that decision.

I think that an injunction must be granted on very strict terms to enable the plaintiff to make its application to the Birkenhead City Councl. Otherwise, its right to apply for relief against forfeiture, conferred on it by the statute, will be nugatory.

I have considerable sympathy for the defendant in all the circumstances; it appears to have acted reasonably. There is some force in Mr Wilson's submission that the plaintiff should have acted much more promptly, particularly when its application to the Council was made about a month after the notice was given by the defendant.

I also state that no judgment of mine can be thought to prevent the defendant from applying to the Court for damages caused to it by the plaintiff because of what seems to me to have been a breach of covenant 1.21; i.e.

> "THAT the tenant will operate fully and efficiently on the said land the business of a Car Sales Yard and will make available to the public to the best of the Tenant's ability a full efficient and economic service in respect of the said business and will keep and maintain the goodwill of the said business throughout the term of the Lease."

I find it impossible to see how the plaintiff could say that it has given a full efficient and economic service in respect of a business and has kept and maintained the goodwill of the business throughout the term of the lease. However, there may be an answer, as Mr

Cole indicates, based on the alleged acquiescence of the defendant. That will be a matter for the Judge to determine on the hearing of the application for relief against forfeiture.

I therefore grant an injunction restraining the defendant from entering into possession of the demised premises comprised and described in the agreement to lease between the parties dated 30 July 1981 pending further order of the Court on the following terms:

1. The plaintiff willl prosecute with the utmost diligence its application for conditional use approval currently before the Birkenhead City Council.

2. The defendant will file any amended statement of defence and counterclaim on or before 4 April 1985.

3. Discovery by both parties is to be made on or before 18 April 1985. If both counsel consent, then discovery can be informal.

4. Liberty to apply is reserved including liberty to apply for an urgent hearing once the decision of the Birkenhead City Council is known.

Costs are reserved.

R. D. Barker J.

SOLICITORS:

Simpson Grierson, Auckland, for Plaintiff.

Rennie Cox Garlick & Sparling, Auckland, for Defendant.