IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. No. 2067/89

BETWEEN FERRAND & MASON LIMITED

Plaintiff

A N D ELDERS PASTORAL LIMITED

Defendant

Hearing: 19th March 1990

Counsel: Mr Illingworth for the Plaintiff
Miss Bradley for the Defendant

Judgment: 22 March 1990

RESERVED JUDGMENT OF MASTER TOWLE

This application for Summary Judgment sought a declaration that the Plaintiff and Defendant were parties to a valid agreement to lease in respect of certain premises in Dargaville, following upon notice given by the Defendant on the 1st March 1989 purporting to cancel the agreement. The prayer in the statement of claim also sought an order that the Defendant effect specific performance of the terms of the agreement to lease by executing the lease document, together with judgment for unpaid rental from the 1st April 1989, or alternatively an inquiry into damages.

At the hearing I was advised by Counsel that a new tenant had been recently found to occupy the building and that depending upon the outcome of the present hearing relating to the validity of the original agreement to lease, the parties would probably be able to negotiate a settlement. Judgment accordingly was not sought at the hearing except on the matter of the validity of the agreement.

Late in 1985 or early in 1986 the Defendant through its property manager Mr Lamason, approached Mr Mason, a director of the Plaintiff company, concerning the development of a new building which might be suitable for occupation by the Defendant for conducting its stock and station business. In the negotiations which followed, the Plaintiff agreed to erect a building to the Defendant's specifications and on the 6th March 1986 a letter was written by Mr Lamason confirming the Defendant's agreement to enter an agreement to lease the proposed new building. It was to be subject to the terms of the lease being agreed but with an estimated rental of approximately $32,300 plus GST with final the details to be worked out when the drawings for the buildings were completed. In communicating this acceptance Mr Lamason

stressed the urgency of possession being given and the matter being settled by the 30th June 1986.

The Plaintiff accepted this agreement and duly proceeded to erect the building, which was completed in sufficient time for the Defendant to go into possession in July 1986. Rent was actually fixed at a figure of $39,131.40 including GST plus a proportion of rates. The Defendant continued in possession until March 1989 and throughout that time paid the rental and performed the various other obligations under the agreement.

Mr Mason deposed that negotiations continued between himself and Mr Lamason between March 1986 and December 1987 to finalise the terms to be included in the formal lease and it was agreed that once all matters had been arranged the Plaintiff's solicitors were to be instructed to draw up the lease documents. Mr Mason claimed that all outstanding issues were resolved but time had passed and it was not until the 14th December 1987 that the Plaintiff's solicitors sent the draft lease to the Defendant for perusal by its solicitors and execution in due course. As there had been no reply, on the 19th February 1988 the Plaintiff's solicitors wrote again to the

Defendant, which by this time was represented by Mr Sykes, Mr Lamason having left the company's employment about the end of 1987. Correspondence then took place between the Plaintiff's solicitors and the Defendant conducted by Mr Sykes, who on the 2nd May 1988 returned the lease documents executed by the Defendant but with certain amendments. On the 13th June 1988 the Plaintiff's solicitors advised that all the amendments suggested were accepted save two and the lease documents were again returned to the Defendant.

On the 16th June 1988 the Plaintiff's solicitors however advised that the objection to the two amendments in question was no longer to be pursued by the Plaintiff and asked that the lease should be returned to them again with all the amendments included that the Defendant had requested.

The evidence shows that repeated letters were sent by the Plaintiff's solicitors to try and expedite the return of the documents but without response. It seems clear that the Defendant must have undergone a change of heart relating to its operations in the Dargaville area for on the 1st March 1989 Mr Sykes wrote to Mr Mason in these terms:

> "As you are aware our company is not currently occupying your premises in Dargaville. We have now decided that we have no current or future use for the premises. We consider that in the absence of any executed formal lease that our tenancy is monthly, we therefore give one month notice of our intention to cancel our agreement."

This contention was rejected by the Plaintiff's solicitors. The Defendant continued to perform all its obligations and paid the rent to the 31st March and the Plaintiff issued the present proceedings in September 1989. The matter came before me for first call in the Summary Judgment list on the 26th October but by that date the Defendant had not filed any notice of opposition or affidavit in reply. When the matter was came before me on adjournment on the 9th November there was insufficient time for a hearing but I did order an amount of $400 costs to be paid to the Plaintiff on the two adjournments within 14 days. That sum has not been paid.

The Plaintiff filed one lengthy affidavit by Mr Mason deposing to the factual situation I have outlined. In response the Defendant has filed an affidavit by Mr Sykes but none is to be noted by Mr Lamason who was the prime figure who negotiated the original arrangement on its behalf. Mr Sykes had

of course no personal knowledge of the events of 1986 or 1987.

Mr Illingworth for the Plaintiff submitted that all the terms of the agreement had been settled as between Mr Mason and Mr Lamason during 1986 and 1987 and were refleeted in the agreement sent by the Plaintiff's solicitors to the Defendant in December that year. He submitted that the various amendments subsequently proposed were all eventually accepted by the Plaintiff as a concession to the Defendant. I am quite satisfied on the evidence that all the essential terms of the lease were identified and not disputed by the parties and my decision must involve a consideration of the doctrine of part performance. In this case the building in question had been built to the Defendant's own specification, it had had occupation from the agreed date of completion for a period of some 21 months and both parties had honoured their obligations in terms of what had been tentatively agreed, even though there was no formal lease executed to record the terms of that agreement. I have been referred to such authorities as the decision of Mahon J in Boutique Balmoral Limited v. Retail Holdings Limited [1976] 2 NZLR 222 and the well known House of Lords

decision in Steadman v. Steadman [1974] 2 All England Reports 977.

I am satisfied that the Plaintiff has acted in a substantial way to its detriment and that those acts were performed in execution of its obligations under the agreement reached between Mr Mason and Mr Lamason.

For the Defendant Miss Bradley submitted that there was never anything more created beyond a tenancy at will which the Defendant was entitled to terminate upon the giving of one month's notice as it did on 1st March 1989. She submitted that the letter signed by Mr Lamason on the 6th March 1986 to Mr Mason was no more than an agreement to enter an agreement and that as the formal agreement was never signed there remained only an informal arrangement determinable on one month's notice.

There is no evidence adduced by the Defendant to show that there was any point of disagreement between the parties and the Defendant did in fact honour the terms agreed upon during the period of its occupation even though no formal lease was ever executed. It follows that the Plaintiff can call in aid the doctrine of part performance to

establish an agreement going far beyond a mere tenancy at will.

On the evidence placed before me the Plaintiff can readily discharge the onus of showing that the Defendant has no reasonably arguable defence to the making of a declaration as sought that the Plaintiff and Defendant are now parties to a valid agreement to lease the premises for a term of 12 years in terms of the agreement to lease prepared by the Plaintiff's solicitors and as subsequently varied by consent.

It follows from this that I would be prepared to make a formal order that the Defendant effect specific performance of the terms of the agreement to lease if need be but Counsel for the Plaintiff indicated that if the status of the lease contended for by the Plaintiff were confirmed the parties would probably be able to negotiate a settlement with the proposed new tenant.

Accordingly I make the declaration sought by the Plaintiff in terms of the first prayer in the Statement of Claim with leave to the Plaintiff to apply for further orders if need be, if the parties cannot negotiate a settlement.

As to the question of costs, and bearing in mind that the $400 costs previously awarded have not been paid, I allow a total figure of $1500 to the Plaintiff plus disbursements to be fixed by the Registrar.

MASTER R P TOWLE

Solicitors

Hammonds, Dargaville, for the Plaintiff
McElroy Milne, Auckland, for the Defendant