IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 995/89

BETWEEN: INVERELL PROPERTIES LIMITED a duly incorporated company having its registered office at Wellington and carrying on business as property investors

Plaintiff

AND: R.J. MOLYNEUX TILES LIMITED a duly incorporated company having its registered office at Paraparaumu

First Defendant

AND: ALLAN GEORGE BARNES of Paraparaumu, Company Director

Second Defendant

AND: JOHN HUTTON WEST of Paraparaumu, Solicitor

Third Defendant

AND: RONALD JOSEPH MOLYNEUX of Paraparaumu, Company Director

Fourth Defendant

AND: BERNARD WILLIAM KERR of Silverstream, Company Manager

Fifth Defendant

AND: MICHAEL THOMAS SHEERIN of Paraparaumu, Systems Manager

Sixth Defendant

Hearing: 27 February 1990

Counsel: Mr A S McIntyre, for plaintiff
Mr R D Guy for defendant on 27 February
Mrs M A Dewar for defendant on 28 February

Judgment: 28 February 1990

ORAL JUDGMENT OF MASTER J H WILLIAMS, QC

In this case the plaintiff, Inverell Properties, sought summary judgment against each of the defendants when this matter was commenced.

Inverell Properties is the owner and lessor of property at 3-5 Ihakara Street, Paraparaumu and on 16 April 1984 it leased that property to the first defendant, R.J. Molyneux Tiles Limited. That lease was also executed - but whether or not the execution was effective remains to be considered - by a Mr Barnes, a Mr West and a Mr Molyneux, the second, third and fourth defendants.

By Deed of Assignment dated 8th November 1985, Molyneux Tiles assigned its interest in the lease to a company called Aotea Tiles Limited by Deed of Assignment and on the same day a Deed of Guarantee of Tenant was executed pursuant to which Mr Kerr, Mr Barnes and Mr Sheerin purported to guarantee Aotea Tiles' obligation, they being the second, fifth and sixth defendants in this proceeding.

It will be necessary to consider the terms of all three of those documents in greater detail.

According to the Statement of Claim, the rent for the property was not paid between February and June 1989 and there are also arrears of rates, payment of rates being a tenant's obligation. Inverell Properties also claims to be entitled to charge the tenants or the guarantors for real estate agents' commission on the re-letting of the property, that entitlement being said to arise out of the usual clause entitling a lessor to remedy defaults by a lessee at the lessee's cost. Whether or not Inverell Properties is so entitled is not a matter for concern in this claim. Interest is also claimed on the unpaid rent, rates and, if payable, real estate agents' commission, giving a total claim of $21,336.11 as at 31 October 1989 plus continuing interest since that date.

It is necessary to say a little of the history of the proceeding. It first came before the Court on 13 February 1990 and at that stage, on the plaintiff's application, Inverell Properties claim for summary judgment against Mr Molyneux, the fourth defendant, was dismissed. The Court was given no reason for that course being sought. On the same day an amendment to para 18 of the Statement of Claim was granted, that paragraph being imprecise in its original terms, and summary judgment was entered in favour of the plaintiff and against the first and fifth defendants, Molyneux Tiles and Mr Kerr, for the sum claimed, $21,336.11, plus interest of $897.75 giving a total judgment against those defendants of $22,233.86 plus costs. The third defendant, Mr West, sought and was granted leave to file a notice of opposition and supporting affidavit one day out of time. Costs in favour of the plaintiff of $150 were ordered and the balance of the application was adjourned to 27 February. On that date, and before the defended hearing as regards Mr West, the plaintiff sought and was granted leave to have both the application for summary judgment and the proceeding as against the second and sixth defendants, Messrs Barnes and Sheerin, dismissed. The Court was advised that the proceeding had been settled as regards those two defendants. No terms of settlement were advised. That matter will again be required to be dealt with later in this judgment.

The salient provisions of the lease as regards the one continuing application for summary judgment, namely against Mr West, are as follows. There is the usual demise and obligation to pay rent and it is to be noted that the parties include Messrs Barnes, West and Molyneux described as and defined as "guarantors". In the definitions the lease provides that where obligations are to be performed by two or more persons those obligations shall "bind those persons jointly and severally" and the lease goes on to provide that the covenant of the guarantor (if any) includes the guarantor's successors and executors and administrators.

Clause 8.1 of the lease provides for the usual prohibition on assignment or transfer of the lessee's interest without the lessor's prior written consent and sets out the regime which requires to be followed in effecting an assignment. That regime provides that if the proposed transferee is a company:

> " ... the lessor may require the written personal guarantee by Deed of the payment of the rent and the terms of this Lease by a person acceptable to the Lessor.

and the clause also requires the execution of a Deed of Covenant in the following terms:

> " (c) The Lessee shall procure the execution by the transferee of a Deed of Covenant with the Lessor that the transferee will at all times duly pay the rent hereby reserved at the times and in the manner herein provided and observe and perform the covenants conditions and agreements herein contained or implied on the part of the Lessee to be observed and performed but without thereby releasing the Lessee from the Lessee's obligation to pay the rent reserved hereby and to observe and perform the other covenants and conditions on the part of the Lessee herein contained or implied."

Clause 16 of the Lease contains the guarantee on which the plaintiff relies in this matter. That clause reads as follows:

> " 16.1 <u>Guarantee and Indemnity by Guarantor</u>:
>
> Each Guarantor covenants with the Lessor that each Guarantor will duly and punctually pay all rent interest and other moneys now or hereafter payable pursuant to the within Lease or any renewal thereof as and when the same shall become payable and will fulfil observe perform and keep all and singular the covenants in the within Lease and any renewal whether contained or implied and it is hereby agreed and declared that although as between the Lessee and each Guarantor the latter may only be a surety yet as between each Guarantor and the Lessor each of them shall be deemed a principal debtor and the winding up of the Lessee or the giving of time or any indulgence by the Lessor to the Lessee or any other person or persons or the exercise or non-exercise or waiver by the Lessor of any of its powers expressed or implied hereunder or the

> variation of this Lease (including pursuant to any rental review) shall not exonerate or release any guarantor from his liabilities hereunder nor shall any Guarantor be released by any other act omission matter or thing whatsoever whereby a surety only would be released.

The lease is executed by Inverell Properties and Molyneux Tiles. In each case the seals of those companies are witnessed by directors and secretaries. In the case of Molyneux Tiles, Mr West has witnessed the sealing by that company in his capacity as a "Director" and Mr Barnes has witnessed it as "Director/Secretary". Messrs Barnes, West and Molyneux have each signed alongside the attestation clause referring to them as guarantors but none of those signatures is witnessed.

Turning then to the Deed of Assignment of Lease. The parties to that document are Molyneux Tiles as assignor, Aotea Tiles as assignee and Inverell Properties as landlord. The deed provides for the landlord's consent "to the assignment but without prejudice to the Landlord's rights powers and remedies under the lease" and in the Second Schedule to the document para 4 provides:

> " The Assignor covenants with the Landlord that the covenants of the Assignee are not in substitution for and do not reduce prejudice or vary the liability of the Assignor under the lease."

And Clause 5(a) extends the expressions "the Assignor", "the Assignee" and "the Landlord" to include their "executors administrators successors and assigns." The deed was prepared by a firm of solicitors called Simpson West & Co. Mr West, the third defendant in this proceeding is a member of that firm. He has signed the Deed of Assignment of Lease but again in his capacity as Director of Molyneux Tiles.

The Deed of Guarantee of Tenant was also signed on 8th November 1985 between Inverell Properties as Landlord and Messrs Kerr, Barnes and Sheerin as guarantors. It contains terms as to the guarantee relating to the rent and the performance of the

tenants covenants and an indemnity to the landlord in the event of disclaimer of the lease. It provides that "no release delay or other indulgence given by the Landlord to the Tenant..." will release the guarantors and provides:

> " As between the Guarantor and the Landlord the Guarantor may for all purposes be treated as the tenant and the Landlord shall be under no obligation to take proceedings against the Tenant before taking proceedings against the Guarantor.

That document is signed by Messrs Kerr, Barnes and Sheerin and their signatures are witnessed by a Mr West in his capacity as "Solicitor, Paraparaumu". The document does not disclose by whom it was prepared but its identity of date and similarity of type-face both suggest that it, too, was probably prepared by Messrs Simpson West & Co.

Before dealing with the legal consequences of those documents, there is one other matter to which reference ought to be made. According to Mr West in his affidavit, Mr Fraser of Inverell Properties told him when they discussed possible proceedings against Aotea Tiles, that he, Mr West, would no longer be liable to Inverell Properties pursuant to the original guarantee. There is a dispute about who initiated that discussion and its terms and the date on which it occurred. It seems more probable that that discussion took place in May 1989 rather than in November, but nothing hangs on that as far as this case is concerned. In any event, that conversation can be regarded as no more than part of the narrative. It was not submitted that it had any legal consequences as far as this matter is concerned.

There apparently being no dispute on the question of quantum, the crux of this case is whether Mr West remains liable to Inverell Properties. Mr West submitted that he did not for three principal reasons. First, he said that any liability which he may have had as an original guarantor of the lease, had been varied without his consent or substituted by the

guarantee of Aotea Tiles' obligations upon assignment. Secondly, he said there was no consideration for the original guarantee and allied with that was the question as to whether the execution of the lease complied with the Property Law Act 1952 s 4. And thirdly, though raised only at the hearing of this matter, he claimed to be entitled to a defence to this proceeding by virtue of the settlement which Inverell Properties had apparently reached with Messrs Barnes and Sheerin.

Dealing with each of those in turn, the question as to whether a guarantor of an original tenant remains liable to the landlord notwithstanding a later assignment or assignments, is not a matter where the law is clear. What is clear, as the learned authors of Hinde McMorland & Sim put it (para 5.130 p 557) that:

> " ... the assignment of a lease does not prejudice the personal contract between the landlord and the original tenant, so that the original tenant normally remains liable for the payment of rent and the performance of the other covenants in the lease notwithstanding the assignment. It follows that if one of the covenants in the lease is broken after the date of the assignment the landlord may sue either the original tenant or the assignee who held the lease when the breach occurred..."

And the authority for that, still good law, is the old case of Barnard v Goodscall (1612) Cro Jac 309; 79 ER 264. But while that principle of law is undoubted and serves both to perpetuate Molyneux Tiles' liability to Inverell Properties, a liability where judgment has already been entered, it is by no means as clear that a guarantor's liability persists beyond assignment.

The learned authors of Hill & Redman Law of Landlord and Tenant 18th ed para 1571 p A707 are clear that the liability does persist. They say:

> " A guarantor of the rent payable under a lease is normally liable for the duration of the lease whether or not the lessee assigns his interest.

But they go on to say:

> " However, this liability does not survive the contractual termination date even though the lease is confirmed by virtue of the provisions of Pt II of the Landlord and Tenant Act 1954. The surety cannot normally revoke his guarantee since the consideration has moved once and for all."

The provisions of the Landlord and Tenant Act 1954 UK referred to do not appear to affect the legal question before this Court. In broad terms they amplify the English provisions concerning holding over by tenants and the continuation of tenancies somewhat akin to the Property Law Act 1952 s 105. Rowlatt on Principal and Surety 4th ed p 221 is of a similar view. The learned authors state:

> " In the case of a business tenancy protected under Part II of the Landlord and Tenant Act 1954, most of the contractual terms survive the contractual termination date of the lease. However, unless the contrary is specifically agreed, the surety's obligations will end at the contractual termination date. This applies to future rent or breaches of the lease, but the surety remains liable for past breaches."

The authorities cited in support of that proposition however, may not be quite as clear as that expression of principle. The main authority cited in support is Junction Estates Ltd v Cope and Others (1974) 27 C & PR 482. In that case, Junction Estates leased premises to Company A and Company A's obligations were guaranteed by Mr Cope and another. Company A later assigned its interest in the lease to Company B and at that stage two parties, a Miss Yates and a Miss Whitford entered into a guarantee but not, it seems, a guarantee of Company B's performance of its obligations as tenants but a covenant to indemnify the original guarantors, Mr Cope and the other guarantor. Company B remained in occupation of the premises following the termination of the lease but later gave up possession and the claim related to whether the original guarantors were liable to the plaintiff and whether Miss Yates

and Miss Whitford were liable to Mr Cope and his fellow guarantor. In the Judgment of MacKenna J the point at issue was whether on the true construction of the terms of the guarantee signed by Mr Cope, he and the other guarantors were liable for rent beyond the termination of the original grant. It was held by the learned Judge that they were not so liable and therefore that Miss Yates and Miss Whitford had no liability either. Seen in that light, the Junction Estates Case is not perhaps as clear an authority for the principle stated in the two texts referred to as might at first stage be thought.

Counsel for Inverell Properties relied on a passage from O'Donovan and Phillips The Modern Contract of Guarantee p 241 which he said covered this position and the case referred to in that work Johnson Brothers (Dyers) Ltd v Davison (1935) 79 Sol Jo 306. In that case a lease was taken by A and guaranteed by her father. The lessee's interest was later assigned. The assignee failed to pay the rent and at first instance the Court held that there had been an alteration by the assignee "sufficient to excuse the surety" from his continuing liability. The judgment is very brief. After referring to the classic case of Holmes v Brunskill (1877) 3 QBD 495, the MR Lord Hanworth MR allowed the appeal and said:

> " ... Here there was no substantial alteration. The lease contemplated that there might be an assignment and the surety knew the terms of the lease. The liability of the surety was established."

The brevity of that judgment is such that it is necessary to go back to Holme v Brunskill and to consider Mr West's position in the light of that authority. One needs also to bear in mind, as Mahon J made plain in Winstone Ltd v Bourne [1978] 1 NZLR 94, 96 that these matters depend on the construction of the documents and on the facts known to the persons who execute them. In Holme v Brunskill there was a lease pursuant to which the lessee fell into arrears. A rearrangement of the lease was undertaken between the landlord and tenant and one field was

subtracted from the demise, this variation being undertaken without reference to the guarantor of the original lease. Cotton LJ (at 505-6) held, relating to whether that variation in the lease discharged the surety:

> " The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to be the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

Brett LJ, though dissenting, expressed himself similarly when he held (at 508):

> " The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

One therefore needs to construe the terms of the lease and the assignment to consider whether, as a matter of construction and on the facts of this matter, the plaintiff has demonstrated that Mr West remains liable under his original guarantee. In favour of a finding that he did remain so liable are the facts:

1. That the original lease clearly contemplated the possibility of assignment subject to compliance with the regime set out in the document.

2. That the guarantors must have known of that possibility of assignment.

3. That the possibility of an extension of the guarantors' liability is contemplated by the terms of the definitions to which reference has been made.

Against a construction in favour of the plaintiff are the following:

1. The regime for assignment includes the possibility of the execution of a personal guarantee of a transferee company by a person acceptable to the lessor but there is no express provision there or anywhere else in the lease which provides for perpetuating any liability of the original guarantors.

2. Pursuant to the terms of the guarantee the guarantors are both sureties and principal debtors. Assignment however involves the addition or substitution of a principal debtor to the landlord and that new principal debtor, at least on the facts of this case, is one over whom the original guarantors, with the possible exception of Mr Barnes, had no control as regards its discharge of its tenants obligations.

3. In the Deed of Assignment of lease, the covenants in Clauses 4 and 5(a) to which reference has been made, specifically relate to the covenants of the assignee and the extended definition of the three parties to that deed but nowhere expressly referred to the original guarantors. As must be acknowledged, however, in that respect Mr West was clearly aware of the original

terms of the lease and was also aware of the Deed of Assignment and the Deed of Guarantee of Tenant he having executed all three although not in his personal capacity as a guarantor.

In those circumstances, the Court concludes that Mr West must have contemplated the possibility of assignment when he signed the lease and was aware of the assignment and of the terms on which it was undertaken when his firm prepared and he signed the Deed of Assignment of Lease and Guarantee of Tenant. But it cannot be said that the plaintiff has demonstrated that that variation, that is, the substitution or addition of a new tenant over which Mr West had no control, was an insubstantial change to the terms of the guarantee.

The Court therefore concludes that the plaintiff has failed to discharge the onus on it of showing that Mr West has no arguable defence on this aspect of the matter. It is noteworthy that no party has put before the Court any material whatever which suggests that the position of the original guarantors was dealt with or even considered by any of the parties at the time of the assignment to Aotea Tiles but the possibility that that matter was discussed and that there may be documents relating to it cannot be discounted. What may, however, be of importance is that the Deed of Guarantee of Tenant probably prepared by Mr West's firm, says that the guarantors of that document may for all purposes be treated as tenant which suggests that the liability of the original guarantors was extinguished.

Having regard to those findings, it may not strictly be necessary to pass on and consider the other alleged defences but less that finding be wrong, I move to consider them briefly.

The second matter is the alleged lack of consideration or execution in accordance with the Property Law Act 1952 s 4. On its face, Clause 16 does not contain anything like the

provision often found that the guarantee is entered into in consideration of the demise by landlord to tenant and the description of the parties in the lease contains no such reference either. There is therefore, on its face, no consideration apparent for the guarantors' promises. However, the necessity for such consideration of course, is overcome if the lease is regarded as a deed. It describes itself as a deed but that, it is clear, is not determinative. What amounts to a deed and what is required as regards attestation has been considered in at least two cases of this Court.

The Property Law Act 1952 s 4(1) provides that:

> " Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness, and, if the deed is executed in New Zealand, the witness shall add to his signature his place of abode and calling or description, but no particular form of words shall be requisite for the attestation."

and "Deed" is defined in s 2 but not in a way which has any reference to this matter.

In Domb v Owler [1924] NZLR 532, 537 Salmond J was dealing with the precursor of s 4 and held (at 537-8) after reciting the then statutory provisions:

> " I understand these provisions to mean that signature and attestation have been substituted for sealing and delivery as the essential attributes of a deed, and that everything which, but for this enactment, might have been done by an instrument sealed and delivered may now be done with equal validity and effect by an instrument signed and attested. It is not necessary that such an instrument so signed and attested should describe itself as a deed, any more than this was necessary at common law in the case of an instrument sealed and delivered. On the other hand, every instrument which is so signed and attested is not necessarily a deed, any more than every instrument under seal was necessarily a deed at common law. A testamentary instrument, though asigned and attested, is not a deed under the Property Law Act, any more than a will sealed by the testator was his deed before that Act. In Regina v Morton 12 CCR 22, 27 it is said by Bovill CJ:

> ' Many documents under seal are not deeds - for instances, an award, though sealed. Again, a will is often under seal; so is a certificate of Magistrates, a certificate of admission to the College of Physicians, or to other learned bodies; so is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is given under the seal, formerly of the ordinary, now of the Court of Probate... but I never heard it suggested that it was a deed.'
>
> " The effect, therefore, of the Act, as I understand it, is that every instrument which is of such a nature, that if sealed and delivered it would have been a deed at commoin law, is now a deed under the Property Law Act if it is signed and attested in manner required by that Act."

A similar question came before Quilliam J in Re Wilsons' Settlements, Gibbs v Anderson [1972] NZLR 12 where that learned Judge held (at 22-23):

> " A deed is a writing on paper or parchment signed and attested in the manner required by s 4 of the Property Law Act 1952, whereby an interest, right or property passes, or an obligation binding on some person is created, or which is an affirmance of some act whereby an interest, right or property has passed."

It cannot be doubted that the lease, in this case, comes within that definition of a deed. Clearly it creates interests, rights or property in the land at 3-5 Ihakara Street, Paraparaumu and purports at least to create an obligation binding on the guarantors and on Molyneux Tiles in affirmance of the creation of that interest, right or property. The Court therefore holds that the Deed of Lease is a deed. However it is clear that the execution of the same by Messrs Barnes, West and Molyneux does not comply with s 4. Their signatures are not witnessed and there is no place of abode, calling or description appearing.

In those circumstances, the plaintiff has failed to show that Mr West has no arguable defence based on a lack of consideration and a failure to comply with the terms of the Property Law Act 1952 s 4.

I turn then to the question of the alleged discharge by virtue of the settlement between Inverell Properties and Messrs Barnes and Sheerin. As already noted, the terms on which a settlement has been reached between those parties are not before the Court but they are clearly such as to prompt the plaintiff to seek the dismissal both of the application for summary judgment and the proceedings as against those two defendants. From that, it may be inferred that in the event that Inverell Properties were successful in obtaining summary judgment against Mr West, his rights of contribution from those guarantors, one of whom was an original guarantor with him of the lease, may have been affected by the arrangement reached between Inverell Properties and Messrs Barnes and Sheerin. Such would clearly be a material variation in Mr West's obligation and in those circumstances, on that ground as well, it cannot be concluded that the plaintiff has satisfied the Court that Mr West may not have an arguable defence based on this ground in addition.

In all those circumstances, therefore, the Court formally holds that the plaintiff has failed to bring the Court to the degree of satisfaction required by R 136 and the application for summary judgment against Mr West is accordingly dismissed.

Mr West applies for costs. As is usual where an application for summary judgment is dismissed and it seems likely that the case will proceed I will reserve the question of costs noting that the hearing of this case including the delivery of judgment has occupied 2 1/4 hours.

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Master J H Williams, QC

Solicitors:

Phillips Nicholson, Wellington for plaintiff
No appearance for first, second, fourth, fifth and sixth defendants
Perry Castle, Wellington for third defendant