IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP 33/94

[redacted]

BETWEEN REPCO MERCHANTS LIMITED

Plaintiff

AND NATAL HOLDINGS LIMITED

Defendant

Hearing: 14 July 1994

Counsel: K F Gould for the Plaintiff
K G Parker for the Defendant

Judgment: 18 July 1994

RESERVED JUDGMENT OF HAMMOND J

SOLICITORS:

K F Gould (Auckland) for the Plaintiff
Tompkins Wake (Hamilton) for the Defendant

INTRODUCTION

This is an application for an interlocutory mandatory injunction.

THE BACKGROUND FACTS

The plaintiff ("Repco") is the lessee (by way of a Deed of Assignment) of certain commercial premises in Tristram Street, Hamilton. That lease will formally expire on the 1st April 1995, although it is common ground between the plaintiff and the defendant that because of clause 46 of the lease, the effective termination date of the lease (at the earliest) would be the 1st April 1996.

Clause 34 of the lease provides as follows:

QUIET ENJOYMENT

34. The tenant paying the rent and performing and observing all the covenants and agreements herein expressed and implied shall quietly hold and enjoy the premises throughout the term without any interruption by the landlord or any person claiming under the landlord.

Clause 47 of the lease provides as under:

47. Road re-alignment is currently taking place affecting Milton Street. As a result, the Hamilton City Council has offered for sale to the Landlord an area of 438 square metres located between the premises and the road. If the offer is declined, proper access from the premises to the road will be preserved. If the offer is accepted, then the area of land will be amalgamated with the premises with the following consequential effects:

    (a) The premises shall not include the additional land (other than for the purposes of access from Milton Street) and the provisions of clause 10.2 shall continue to apply;
    (b) The proportion of rates payable by the Tenant shall reduce from 100% to 65%;
    (c) By reasonable notice, the Landlord may restrict the Tenant to the use of four carparks on the vacant land of the premises (with an appropriate rental abatement) and thereafter the provisions of clause 10.2 shall not apply;
    (d) During the currency of this lease, the Landlord shall give to the Tenant the first opportunity of leasing the additional land and any buildings erected on it PROVIDED THAT this paragraph is acknowledged by the parties as recording an expression of intent and not a binding obligation.

As that clause recites, road realignment was in fact taking place in what was then Milton Street - subsequently to become Tristram Street, Hamilton.

The lease under which Repco occupies its premises had been entered into on the 5th May 1992. The Deed of Assignment was dated the 25th November 1993. In May 1994 the defendant (landlord) acquired the 438 square metres mentioned in clause 47 as a result of the road realignment.

The practical effect of all of this was that Natal is now the registered proprietor of one parcel of land fronting onto Tristram Street (Certificate of Title 52B/332). The defendant's premises are at the rear of that parcel of land. On the front portion of the land, Natal has erected a used car lot.

Prior to the road alignment Repco's premises had had direct street access to what was then Milton Street. Once the Milton Street - now Tristram Street - alignment had taken place, the situation changed. Access to the Repco premises necessarily had to take place along a driveway (on Natal's land) which runs along the side of the used car lot. Under the lease a right of access had been preserved, notwithstanding the realignment.

Since it may be of some assistance to any other person who has occasion to peruse this judgment - and in matters of property interests that is sometimes so - I am annexing a copy of Certificate of Title 52B/332 as Appendix A to this judgment. I have indicated approximately thereon where the car yard is, where Repco's premises are, where the driveway is situated, and where the edge of Milton Street used to be.

Natal accepts that there is no question that it is obliged to provide access for Repco to its premises. But it had its own kinds of problems. As the proprietor of a used car lot, it was obliged to ensure adequate fencing and security for insurance purposes. So it fenced the entire perimeter of its land with what appears to be a wrought iron - certainly metal - fence (photographs were produced to me) with rather fearsome looking spikes on the top of each railing. At the entrance to the driveway from Tristram Street two gates were erected. Natal's proposition - which it has put into place - was that these gates would be opened during normal business hours. Natal contracted Waikato Security Limited to open the gates at 6.00am and close them at 6.30pm which is when Natal's business operation closes for the day, and from 8.00am to 6.00pm on Saturday. Given that Repco's normal office hours are between 8.00am and 5.00pm, it was thought this would not disturb Repco's business in any way during normal business hours. As Mr Parker says, "the greater comprehends the lesser." But there was also the problem that the nature of Repco's business is such that occasionally it may be necessary for persons to have resort to Repco's premises after hours from time to time, or for emergencies. And so Natal provided Repco with a key to unlock the gate in an after hours situation. I pressed counsel at the Bar as to whether any limitation had been placed on the use of that key. I was assured that it would have been open (and still is open) to Repco to have as many copies of that key cut as it might think to be necessary for its employees, given the nature of its operations.

THE NATURE OF REPCO'S CLAIMS

Repco says that, as the tenant, it is paying Natal rent seven days a week and that it is entitled (in the words of clause 34) to "hold and enjoy the premises throughout the term without any interruption by the landlord ...". Repco says that its rights to quiet enjoyment are affected in that there is not unrestricted access at

all times. It further suggests that Natal's prospective purchasers on occasion have come down the driveway and parked their cars on Repco property, when resorting to the used car lot to view vehicles.

For its part, Natal denies that it is in breach of clause 34 of the lease; it says that it offered a perfectly reasonable and operable solution to the problem of access which was rejected by Repco; and that the real reason for Repco's proceedings are a quite unreasonable refusal by Mr Docherty, the General Manager of Repco, to use a key to open the gate in after hours situations.

THE PRINCIPLES APPLICABLE TO MANDATORY INTERLOCUTORY INJUNCTIONS

Some reference was made by counsel to the appropriate principles to be adopted in relation to an application for relief of the character sought before me. Neither was aware of my decision in *Faumui v AFS (NZ) Ltd* (High Court, Auckland, CP 500/93, 20 August 1993). I put to counsel what I had said at pp 7-8 of that judgment, viz:

> The general principles for the grant of an interlocutory injunction are so well known that I do not propose to rehearse them at length here. In the case of prohibitory injunctions, the first question is whether there is a serious question to be tried, in the sense that such is not frivolous or vexatious; then the balance of convenience as between the parties is to be considered; and the overall justice of the case is also to be kept firmly in mind.
>
> Mandatory injunctions are quite rare; mandatory interlocutory injunctions are particularly rare. The practical reason for this is that normally an interlocutory injunction is brought to preserve matters much in the state in which they were, pending a final resolution of the Court; a mandatory interlocutory injunction is much more intrusive and routinely disturbs the status quo.
>
> However, there is no doubt that this Court has jurisdiction to issue a mandatory interlocutory injunction. Perhaps the best known cases are those where a defendant's conduct has been contumelious (*Cuff v London County Land and Building Co* [1912] 1 Ch 440), or where a defendant is attempting to forestall a Court order (*Daniel v Ferguson* [1891] 2 Ch 27).

> In point of principle, I think a Court should start with the same tests in the case of a mandatory interlocutory injunction as a prohibitive one, but in the application of those tests, routinely the fact that the relief sought is mandatory will tilt the balance of convenience in the defendant's favour. As I understand it, this was the approach Hoffmann J took in *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772, and that of Gummow J in *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499.
>
> There has been some discussion as to how those cases (and perhaps others) "sit" with *Locabail International v Agro Export* [1986] 1 All ER 901 (CA). In that case Mustill LJ emphasised that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases. Examples would be where the Court thought the matter had to be dealt with at once; or where the defendant is attempting to steal a march on the plaintiff (see p 906, line d).
>
> I do not think it necessary, and in any event there is not the time here, to mount an extensive analysis as to any possible conflict between those authorities. I simply say this. In practical terms *Locabail* is important because it is a useful reminder of the real caution which generally ought to be exercised before granting a mandatory interlocutory injunction.

Both counsel said that they took no issue with the statement of principles there expressed.

QUIET ENJOYMENT

As to the law relating to quiet enjoyment, *Halsbury's Laws of England* Vol 27 (4th ed), para 412 states as follows:

> **Breach of covenant for quiet enjoyment.** The covenant for quiet enjoyment operates according to its terms to secure the tenant, not merely in the possession, but in the enjoyment of the premises for all usual purposes; and, where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts or omissions of the landlord or those lawfully claiming under him, the covenant is broken, even if neither the title to, nor the possession of, the land is otherwise affected. Whether this interference has taken place is, in each case, a question of fact. The covenant may be broken by the lawful or unlawful act of the landlord, but in the case of a covenant against interruption by a class of persons, it is broken only by lawful acts of such persons.

And, Hinde McMorland & Simm, *Land Law*, Vol 1, para 5.050 states:

> **Quiet enjoyment.** The covenant for quiet enjoyment is an undertaking against interruption in the possession of the property leased. In this context the word "quiet" is used in the sense of "peaceful" and not in the acoustic sense: it does not

> mean that the landlord impliedly undertakes that the tenant will be free from the nuisance of noise. The word "enjoy" refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it. There are two aspects of the covenant for quiet enjoyment: first a limited undertaking as to title; and secondly an undertaking against interruption of possession.

Hence, the covenant for quiet enjoyment broadly put is an assurance against interruption and possession of that which is demised, but substantial interference in the full benefit of the land demised is also caught by the covenant.

I was referred also to *Owen v Gadd* [1956] 2 All ER 28; *Browne v Fowler* [1911] 1 Ch 219; *Kalmac Property Consultants Ltd v Delicious Foods Ltd* [1974] 2 NZLR 631 (CA); *Kenny v Preen* [1962] 3 All ER 814; and *McCall v Abelesz* [1976] 1 All ER 727.

Counsel were (unsurprisingly) not able to refer me to any case in which the facts were anything like that with which I am confronted in this case. In one sense that surprised me - as I said during argument, one would have thought that there might have been cases in which houses on farm properties had been leased with questions of access through gates and so forth, particularly in rural New Zealand, but it would appear that the Court has to address this matter by the application of basic principle. And I suppose that in at least some leases of the kind I have just mentioned, there would be quite detailed access provisions.

THE MERITS

I can dispose of the first question - whether there is a trivial question before the Court - quite readily. Although Mr Parker suggested that it was petty and insignificant matters which brought the plaintiff to this Court, I do not think the

question whether the plaintiff is getting the access it is entitled to is itself a trivial or frivolous one and I am not prepared to dismiss the application on that ground.

That brings me to the second ground - that of the balance of convenience. Repco is effectively seeking by this application to put an end to what it regards as an unlawful barrier to access, here and now. It does not seek to maintain the status quo pending a hearing. Clearly if I order the removal of the gates, to comply with its insurance obligations Natal will have to erect further fencing (at a cost of more than $8,000) alongside the driveway. And, since it is probable that the lease has only a limited time to run, when the lease does terminate such a fence along the driveway would be of no use to Repco - indeed it would be a positive hindrance - and would have to be taken out, at further expense.

Repco does not have rights of ownership over this driveway. Neither does its lease extend over that land. Repco became landlocked by Natal's acquisition of the 438 square metres from the Hamilton City Council. But Natal has said - as indeed it must - that it will give access through the driveway in a proper (which is a term used in the lease) and responsible manner. This case does not involve a breach of enjoyment of the lease in the larger sense of that term which is protected by a covenant for quiet enjoyment: the question as I see it is whether Natal is complying with a fundamental obligation - perhaps the most fundamental obligation under a lease - to give undisturbed possession, in this case by provision of proper access. There is, of course, no issue as to the leased building itself.

Because of the acquisition, Repco can only get to that building over Natal's (non-leased) land. Repco has said, unlimited access can and is being given during the working hours I described earlier in this judgment. And after that period, as of

right, by key. In these somewhat unusual circumstances that seems to me to be a reasonable proposition. Such interference as there is can certainly not be said to be substantial.

Thirdly, the Court has to stand back and look at the overall justice of the situation. Given the factors I have just recited, I cannot see any currently compelling justice issue that should lead to Natal having to remove these gates with the ancillary consequences that I have already discussed.

Finally, at the end of the day the Court has to exercise a discretion. Essentially Repco's argument is that it has an absolute, totally untrammelled right of access across contiguous land in respect of which it is neither the owner nor the lessee. It may be that on much fuller argument at a trial the plaintiff could sustain that argument - though I have to say that I very much doubt it. And, this is not a situation in which Repco entered the lease (or rather took an assignment) without being aware of the complications that the Milton Street realignment could pose - clause 47 of the lease itself was express notice, and in at least part of that provision refers to "proper" access.

When I set the substantial expenditure which would be inflicted on the defendant now against the relatively minor inconvenience to Repco of having to resort to a key after hours, my view is that the balance of convenience does not presently favour the mandatory relief sought by the plaintiff. Whether the plaintiff would fare any better on a merit trial depends, of course, entirely upon such evidence as might be produced at that hearing and the decision of the trial judge after hearing submissions thereon.

The present application is declined; the defendant is to have costs of $3,000 together with disbursements as fixed by the Registrar.

The subject matter of these proceedings is clearly within the jurisdiction of the District Court. Pursuant to s 46(2) of the District Courts Act 1947 I direct that the file be transferred to the District Court. If the merit proceedings are to proceed further, they will do so in that Court.

Application dismissed.

R G Hammond J

FROM: GRAHAM & GRAHAM TO: 6493583053

SEARCH REGISTER "D"

27 JUN 1994

COPY

Land and Deeds 69

No. 52B/332

References
Prior C/T 133/262, 304/119 & 50D/919

Transfer No.
N/C. Order No. B.140467.8

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT

This Certificate dated the 17th day of May one thousand nine hundred and ninety three under the seal of the District Land Registrar of the Land Registration District of SOUTH AUCKLAND

WITNESSETH that JOHN NEVILLE KING and CYRIL DAVID KING both company directors and FLORENCE AUDREY KING widow all of Hamilton are seised of an estate in fee simple as tenants in common in equal shares

xxxxxxxxxxxxxxxxxxxxxxx (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial underwritten or endorsed hereon) in the land hereinafter described, delineated with bold black lines on the plan hereon, be the several admeasurements a little more or less, that is to say: All that parcel of land containing 1212 SQUARE METRES more or less situated in Block II Hamilton Survey District being Lot 1 on Deposited Plan S.64259 and Part Lot 15 on Deposited Plan 3579

ASSISTANT LAND REGISTRAR

Subject to Section 241 Resource Management Act 1991

A.L.R.

B.200672.1 Transfer to Natal Holdings Limited - 3.5.1994 at 11.22 o'c

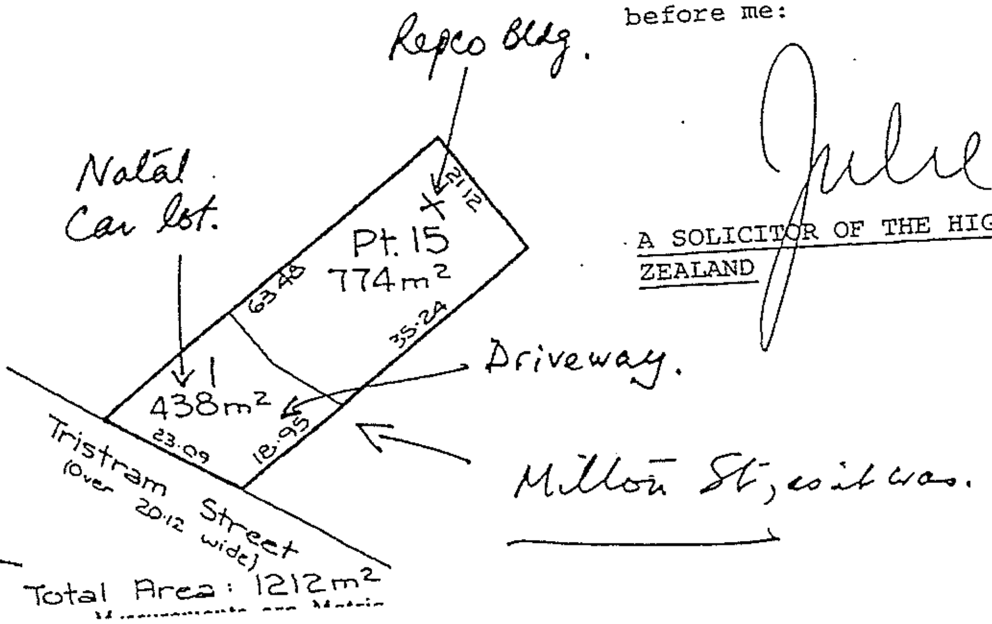
for A.L.R.

B.200672.2 Mortgage to ANZ Banking Group (New Zealand) Limited - 3.5.1994 at 11.22 o'c

for A.L.R.

THIS is the copy of the Certificate of Title, marked with the letter "D", mentioned and referred to in the annexed Affidavit of GEORGE WILLIAM BRENCHLEY WRIGHT, sworn at Auckland this 29th day of June 1994, before me:

A SOLICITOR OF THE HIGH COURT OF NEW ZEALAND



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