LOW PRIORITY

CP 39/94

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

14/4

327

BETWEEN ECLIPSE HOLDINGS LIMITED
Plaintiff

AND THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED
Defendant

Hearing: 7 February 1995

Counsel: C.J. Walshaw for the Plaintiff
Pamela J. Andrews for the Defendant

Judgment: - 4 APR 1995

JUDGMENT OF MASTER J.C.A. THOMSON

This is an application for summary judgment. The defendant, a trustee company, who acts on behalf of Maori owners, is the registered owner of all the land in certificate of title 12A/953 Wellington Registry. The land is situated in Palmerston North.

By a memorandum of lease dated 13 June 1989 the defendant leased the land to the Young Men's Christian Association of Palmerston North Inc. for a term of 10 years, from and including 1 September 1980, together with rights of renewal for successive terms of 21 years. By a memorandum of extension of lease dated 23 August 1990 the term of the head lease was extended to 31 August 2011. In 1994 the head lease was transferred to Hardham Management Ltd as lessee, and then to Resource Investments Ltd, in each case with the defendant's consent. It was then further transferred to Okaihae Forests (2) Ltd. That transfer was also consented to by the defendant.

Okaihae Forests (2) Ltd, on 16 May 1994, changed its name to that of the present plaintiff, Eclipse Holdings Ltd. It appears that over the years the building on the land outgrew its usefulness as a hostel for the Young Men's Christian Association, and in April 1994 the plaintiff approached the defendant with a view to demolishing the existing building and constructing new premises on the land, which it proposed to sub-lease to a Government department, namely New Zealand Income Support Services. An initial proposal was set out by letter dated 14/4/94 from the plaintiff to the defendant. The defendant replied by letter dated 28/4/94. I set out the terms of that letter in full.

> "PALMERSTON NORTH MAORI RESERVE
> YMCA PROPERTY
>
> Thank you for your letter of 14 April which has been considered on behalf of the trustees of the Reserve. They are prepared to agree as follows:
>
> 1. Demolition of the existing buildings and construction of the proposed new building are approved, subject to prior written approval by the lessor of teh plans for the new building.
>
> 2. The rental is to be reviewed on 1 September 1997 and thereafter every 7 years, to current market rental.
>
> 3. The term of the lease shall remain the same, i.e. 21 years from 1 September 1990, perpetually renewable.
>
> 4. The current rental of $22,480 plus GST is to remain.
>
> 5. The trustees are not legally entitled to offer a right or option to purchase.
>
> 6. A variation of lease is to be drawn by the solicitors to the trust and signed by the parties. The reasonable fees of those solicitors in connection with the variation and the Maori Land Court confirmation is to be met by the lessee together with stamp duty, registration fee and other disbursements.
>
> 7. Agreement is subject to confirmation of the variation of lease by the Maori Land Court.

8. In agreeing to your proposal, the trustees reserve their rights in the event that the Government pursue proposals to introduce legislation to amend the perpetual nature of Maori leaseholds.

9. The Eclipse Wire Building will be looked at separately."

The dispute between the parties arises out of proposed condition 2, which specifies that the rental was to be reviewed on 1 September 1997 and thereafter every seven years to current market rental.

By letter dated 29 April 1994 the plaintiff attempted to negotiate better terms than those appearing in the defendant's letter of 28 April 1994. The letter is of importance because it refers in paragraph 3 to the issue of rent review as follows:

> "Maybe as a compromise your clients would be prepared to consider reducing the rental from now until 1 September 1997 to say $7,500 per annum and then as per your letter of 28 April the rental gets reviewed 1 September 1997 and thereafter every seven years to a current market rental."

The defendant however refused to compromise and as a result by letter dated 12 May 1994 the plaintiff's solicitors, Wadham Goodman & Co. advised that "Our instructions are to request that you instruct your solicitors to prepare the variation of Lease embodying the terms set out in your letter of 28 April". The defendant responded by a letter of 13 May 1994 advising they had instructed their solicitors, Kensington Swan, to prepare the appropriate documetation. It sought information as to the financial status of the lessee company and the names of its directors and shareholders. It referred to paragraph 1 of its letter of 28 April whereby approval for the demolition of the existing buildings had been given subject to prior approval of plans for the new building being obtained from the defendant. It noted that demolition had already commenced, and therefore the defendant looked forward to

receiving copies of the plans for the new building as soon as available. As a result plans were sent and they were approved by the defendant by letter to the plaintiff of 23 May 1994. By letter of 13 June 1994 the defendant's solicitors sent a memorandum of variation of lease to Messrs Wadham Goodman for perusal, and if in order, for execution. As can be seen from a perusal of the proposed variation of lease it is a comprehensive document imposing conditions concerning the erection of a new building. It introduces a new rent regime. The existing lease provided for 21 year rent reviews under the Maori Reserved Land Act 1955. In paragraph 2 it sets out the conditions upon which it is proposed that rent is to be reviewed. Basically rent is to be reviewed every seven years. The lessor is required to give written notice of its desire to review the rent not earlier than three months prior to the review date. The lessee has 28 days in which to object if it disputes that the proposed new annual rent equates current market rent. Any dispute is to be resolved by arbitration of valuers. Particulars are set out in the clause. Clause 2.1(ii) includes a ratchet clause that the new rent shall not be less than the annual rent payable during the period of 12 months immediately preceding the relevant review date.

By letter dated 27 June 1994 Messrs Wadham Goodman & Co. wrote to Kensington Swan objecting to the variation of lease in three respects. The first objection related to the inclusion of the ratchet clause. Messrs Wadham Goodman advised that it had been specifically negotiated between Mr Green of Eclipse Holdings Ltd and the New Zealand Guardian Trust Palmerston North representatives that the rent would not be ratcheted on review.

By letter dated 11 July 1994 Kensington Swan advised regarding the requested amendments that the two objections raised, other than the ratchet clause had been agreed to. They denied any understanding of the

defendant that on a rent review there would be no right to ratcheting, and said that the defendant always intended that a ratchet clause would be included. The plaintiff however refused to agree to a ratcheting clause, or to a compromise proposed by the defendant by a later letter dated 9 August 1994 that the ratchet clause would not be insisted upon if a provision was included that the annual rent would at no stage fall below the level of the then present rental.

The response to that was a letter of 19 August 1994 whereby Messrs Wadham Goodman & Co. advised as follows:

> "It appears out clients cannot reach an agreement and accordingly our client instructs that the provisions of the existing lease (as varied by Variation dated 16/12/93) whereby rent is to be reviewed at 21 year intervals in accordance with the provisions of the Maori Reserved Land Act should remain. Our client is not prepared to accept a variation of the lease providing for the rent to be ratcheted in any circumstances or in any manner. Our client withdraws its request for a variation in the rent review periods. Would you please advise your client accordingly."

By letter dated 29 August 1994 Kensington Swan rejected any suggestion that the plaintiff was entitled to withdraw its request for a variation of the rent review periods, and said:

> "From the outset your client indicated that seven yearly rent review intervals were prepared (we refer to your clients letter to our client of 14 April 1994) and it was on this basis that our client agreed to enter the arrangement with your client.
>
> The terms of the variation to the lease were sent out in our client's letter to your client of 28 April 1994, and it was agreed that your client may commence demolition and building work on the site as part and parcel of, and provided that, a variation of lease would be entered into incorporating the details of that letter. It is not open to your client to now alter that agreement.
>
> We note that your client is not prepared to accept a provision for the rent to be ratcheted in any circumstances or in any manner. We are instructed

> that our client is prepared to forego the ratchet provision and that clause 21.1.1 should be amended accordingly. We enclose a copy of the clause as amended. Please confirm that your client will execute the variation of lease in this form."

On 2 September 1994 Messrs Wadham Goodman replied:

> "We refer to your letter of August 29th. Our client does not accept that entry into a Variation of Lease was a pre-condition to commencement of demolition and building work on the site in Grey Street, Palmerston North. We refer to your client's letter to our firm of May 13th wherein it is clearly stated: "Lastly, paragraph 1 of our letter of April 28th granted approval of the demolition of existing buildings, subject to prior approval by the Lessor of the plans for the new building. We note that the demolition has commenced and look forward to receiving copies of the plans for the new building as soon as they are available."
>
> It has always been our understanding and that of our client that the matters related to demolition and commencement of the new building, the variation of the lease and the situation regarding development of the Eclipse Wire site were separate and not inter-dependent matters, and the correspondence indeed reflects that."

I interpolate here that it seems that as well as negotiating for a redevelopment of the Young Men's Christian Association site the plaintiff was also negotiating for redevelopment of another property managed by the defendant and on which a company known as Eclipse Wire carried on business.

On 16 September 1994 Kensington Swan advised as follows:

> "1. The letter of 13 May was simply referring to the arrangement based on the letter of 28 April which set out eight points forming the basis on which the trustees agreed to your client's proposals.
>
> 2. Paragraph 9 of that letter indicated that the Eclipse Wire building would be looked at separately but it did not suggest that the demolition and commencement of the new building and the variation of the lease were separate issues.

> 3. Your letter to our client dated 12 May indicated acceptance of those terms and both parties have since relied on the arrangement.
>
> The variation of lease incorporating the agreed amendments will be sent to you. Please confirm that it will be signed by your client."

By letter of 20 September 1994 Messrs Wadham Goodman replied, stating that Mr Green had always believed that the matter of demolition of the previous building and variation of the lease were to be dealt with separately. In paragraph 2 of the letter the solicitors say:

> "Our client appears to have misread paragraph 2 of Mr Mahoney's letter of April 28th and the reference in that paragraph to "current market rental" was construed by Mr Green as referring to rent reviews in accordance with the provisions of the Maori Reserve Land Act and current procedures for reviewing the rent...."

How the solicitors could make that claim in the light of the extract I have quoted from Mr Green's letter of 29/4/94 to the defendant is difficult to comprehend.

The reference to the Maori Reserve Land Act 1955 is a reference as I said earlier to the fact that rental reviews were to be carried out under that Act in the original lease entered into between the Young Men's Christian Association and the defendant company. Obviously rent fixed under the Maori Reserved Land Act 1955 would result in lower rent to the defendant than seven year market rent reviews would produce.

By letter of 26 October 1994 Kensington Swan replied and in paragraphs 3 and 4 and 5 said as follows:

> "We advise that your letter does not change our client's view and our client firmly asserts that the points of agreement between our respective clients set out in our client's letter to Mr Green of 28 April 1994 are interdependent and that our client would not have agreed to the demolition as a separate matter, without being satisfied that the terms of the Variation of Lease had also been agreed.

> Our client views these matters as related, and believes that the approval of plans of the new building was a <u>further</u> precondition to granting consent for the demolition work.
>
> As to your comments that Mr Green appears to have misread the reference in our client's letter of 28 April 1994 to "current market rental", our client believes that at all times the matter was negotiated on the basis that rent reviews would be calcualted to achieve current market rental and would not in any way be linked to the provisions of the Maori Reserves Land Act 1955. This has always been our client's intention, and again our client would not have agreed to any of the other matters, including the demolition work, unless current market rental rent reviews were to be included."

The letter noted that a sublease which the plaintiff had entered into with Her Majesty the Queen acting on behalf of the Director-General of the Department of Social Welfare had been forwarded for approval and advised that the defendant was not in a position to give approval when the terms of the Head Lease were unresolved. A copy of the public sector standard lease is annexed to Mr Green's affidavit. Of interest is that that lease provides in clause 2.1 for a rent review, the rent to be current market rent. As a result of the defendant's refusal to give consent the New Zealand Income Support Service became concerned.

By letter dated 1 December 1994 Wadham Goodman & Co. wrote to Kensington Swan stating:

> "We repeat our assertions that your client company can not withhold its consent to the Sublease because of the dispute relating to the purported variation of the lease. Our instructions are:
>
> 1. To table on a without prejudice basis for acceptance within seven days from the date hereof of an offer to vary the lease to provide that rent reviews take place at seven yearly intervals commencing from 1997 and that the ground rent be reviewed to 4.5% of the unimproved value of the land and
>
> 2. That if your company does not accept this offer within the specified time period we should

> instruct a Barrister to commence proceedings to obtain a Court Order requiring your client company's consent be endorsed on the Sublease documentation."

As a result of the defendant refusing its consent these proceedings have been issued. The plaintiff seeks an order that the defendant do specifically perform the head lease by granting its consent to the sublease agreed to between the plaintiff and Her Majesty the Queen.

The defendant has filed a statement of defence and counterclaim. In its counterclaim it seeks an order that the plaintiff do specifically perform the agreement between the parties by executing the Variation of lease on the terms as agreed by the parties, such terms being embodied in the letter from the defendant to the plaintiff dated 28 April 1994. In respect of its counterclaim it has issued its own notice of application for summary judgment.

It is submitted on behalf of the plaintiff that the Court is entitled to and should resolve the issue in dispute between the plaintiff and the defendant with the knowledge that there is a dispute concerning the variation of the Head Lease. However resolution of that dispute, the plaintiff submits, is not required in order to resolve the short and important legal point which the plaintiff relies on in order to obtain summary judgment. The starting point, the plaintiff says, is clause 4 of the Head Lease which provides as follows:

> "4. That the lessee will not assign sublet or part with the possession of the land hereby demised or any part thereof without the consent of the lessor in writng first had and obtained; Provided that any such consent shall not be unreasonable or arbitrarily withheld in the case of a reputable assignee, subtenant or under-lessee."

Counsel for both plaintiff and defendant are agreed that where the word "unreasonable" appears in the clause that

it is to be taken as a misprint and that the word should be "unreasonably" in order to make sense of the clause.

It is the plaintiff's position that the defendant has no difficulties with sublessee from the point of view of acceptability and solvency, and also that the defendant has raised no difficulty regarding the use of the land as an office development to be used by a Government Department. The plaintiff's contention is that the defendant's refusal to consent is therefore unreasonable and arbitrary and such refusal is based on a collateral purpose, and thus not in accord with the law.

The plaintiff relies on three cases. Firstly the English Court of Appeal decision in Bromley Park Garden Estates Ltd v Moss [1982] 1 WLR 1019, secondly, the New Zealand Court of Appeal decision, W.E. Wagener v Photo Engravers Ltd [1984] 1 NZLR 412, and lastly the English Court of Appeal decision in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] 1 Ch. 513. Mr Walshaw submits that if one looks at the terms of the covenant it is clear that its purpose is to protect the lessor against a lessee or sublessee who might be objectionable on reasonable grounds, perhaps extending to a lessee or sublessee whose proposed use of the property could be considered objectionable on reasonable grounds. In such case he argued for an objection to be valid under the clause it must be connected either, with the personality of the intended sublessee, or with the use which he is likely to make of the property. Balcombe LJ in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (supra) set out seven principles which he said can be discerned from the cases as follows:

1. The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from

having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee;

2. As a corollary to that proposition a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatsoever to do with the relationship of landlord and tenant in regard to the subject matter of the lease;

3. The onus of proving that consent has been unreasonably withheld is on the tenant;

4. It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified if they were conclusions which might be reached by a reasonable man in the circumstances;

5. It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises even though that purpose is not forbidden by the lease;

6. There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld;

7. Subject to the propositions set out above it is in each case a question of fact depending on all the circumstances whether the landlord's consent to an assignment is being unreasonably withheld.

Mr Walshaw submits that the first two propositions set out are relevant in this case. He submitted that the withholding of consent here has nothing whatever to do

with the relationship of landlord and tenant in regard to the subject matter of the lease. Instead the defendant wishes to achieve a collateral purpose unconnected with the terms of the Head Lease. Mr Walshaw is not able to find any case where refusal has been based on the tenant's objection to signing a variation of lease, which arises here.

Mrs Andrews for the defendant, contrary to Mr Walshaw's submission, submits that refusal to consent has everything to do with the landlord/tenant relationship and to the subject matter of the lease. She refers to W.E. Wagener v Photo Engravers Ltd (surpa) and the judgment of McMullin J where he said at p.424:

> "Although I have taken a different view from Casey J on the two points discussed, I think that on the fundamental issue of whether the consent was arbitrarily withheld the Judge was right to hold, on the facts as he found them, that the appellant had unreasonably refused to consent to the assignment. Mr Smellie referred to us a number of cases to the effect that a landlord is entitled to look after his own legitimate interests within the terms of his own lease. With his general proposition I agree. It follows that if a landlord wishes to obtain a benefit not provided for in the lease he may be doing something more than protecting his legitimate interests. Casey J was of the clear view that the defendant's refusal to consent to the assignment was based solely on its desire to obtain better terms for itself. If that were so, and there was plenty of evidence to support the Judge's finding, the lessor's consent would be unreasonably withheld being designed to achieve a collateral purpose:"

She submits that the position in this case is materially different from the factual circumstances of the Wagener decision. The crucial distinction she says is that it cannot be said that the defendant in this instance is withholding consent in an attempt to extort "new and favourable" lease terms from the plaintiff. Rather it is the plaintiff that is resiling from the terms of the lease, as originally agreed between the parties, and the

defendant is merely responding to that in the context of the whole of the agreement between the parties.

She says that the withholding of the defendant's consent was and is done with a view to attempting to obtain execution of the variation of lease on the agreed terms. She submits that is not a matter collateral to the sublease but one inextricably linked to the existence and nature of the sublease itself. Mrs Andrews contends that the development of the lease premises involving the demolition of an existing building so that the plaintiff could erect a new building to sublease to New Zealand Income Support Service was commenced on the basis that inter alia a variation of lease would be entered into on agreed terms. The variation is part and parcel of the development agreement as much as the eventual sublease is. The grounds for the refusal may therefore be said to be integral to the relationship of lessor and lessee in regard to the subject matter of the lease.

I uphold that submission. It seems to me that the variation of lease proposed is not in the ordinary way one simply to alter rent or extend the term. The defendant's position is that it simply requires the plaintiff to sign a variation in terms of the agreement reached. In my view it certainly has a very strong argument that it is entitled to have the variation executed in the final form submitted to the plaintiff's solicitors. In the circumstances which have occurred I find that the variation of lease is fundamental to the continuance of the lease itself. Thus until the terms of the variation are agreed and it is signed there cannot realistically be a sublease which can be consented to. There is no lease which is capable of being subleased. I note that the sublease has in it a term that New Zealand Income Support Services will not assign the sublease without consent. Furthermore it appears that the variation of lease in any event requires to be confirmed

by the Maori Land Court for it to be effective. Whether that is a formality or not I know not, but clearly it would be a matter the landlord would be required to deal with before it agreed to any subleasing of the property. A refusal to confirm would create very real problems for the defendant.

Certainly for summary judgment purposes I consider this case falls within category seven of the principles outlined by Balcombe LJ in International Drilling Fluids Ltd and that all the circumstances will have to be enquiried into in order to conclude whether or not the defendant's consent was being unreasonably withheld.

The defendant further submits the plaintiff is seeking specific performance, which is an equitable remedy in nature, and requires the exercise of judicial discretion, and that the equitable maxim of he who comes into equity must come with clean hands applies. The submission is that the improper conduct of the plaintiff in refusing to fulfil its part of its contractual obligations means that it is now unable to claim relief in a court of conscience.

Mr Walshaw, in response to that argument, replies that all that the plaintiff is really seeking is a declaration in law that the defendant was and is not entitled to refuse consent and he asks that the Court make a declaration rather than order specific performance, and thus the plaintiff does not have to rely on equity. However I think I must take the application for summary judgment as I find it. It is for specific performance and thus does enable the Court to exercise its discretion, in the light of all the facts.

Furthermore, in any event there is a general discretion in the Court in summary judgment proceedings which is exercisable. Given the circumstances disclosed here I am

of the clear view that the application for summary judgment by the plaintiff should be refused. I think the defendant has more than an arguable defence. It has a strong defence.

That then leaves the application for summary judgment by the defendant for an order that the plaintiff execute the variation of lease. Both counsel agreed that I could not make a final determination on that issue because the application was filed late which meant that the plaintiff was not in a position to file documents in opposition. If it is to proceed I invite counsel to submit a memorandum as to timetabling.

The result is that the plaintiff's application for summary judgment is refused. Costs are reserved.

Solicitors
Wadham Goodman, Palmerston North for the Plaintiffs
Kensington Swan for the Defendants