

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CP22/99



BETWEEN HOROMATANGI PROPERTIES
(No.21) LTD

Plaintiff

AND JOSEPH TE POROA MALCOLM,
TE RANGUIRA BRIGGS, TE
RAUOTEHUIA CAMERON,
STANLEY PIO KEEPA AND
TUTEWEHIWEHI KING

Defendants

Date of Hearing: 12 October 1999

Counsel: M Schamroth for the Plaintiff
G J Dennett for Defendants
M McKechnie for Third Parties

Date of Judgment: 18.10.99.

RESERVED JUDGMENT OF PATERSON J

Solicitors:
Le Pine & Co., P O Box 140, Taupo
Dennetts, P O Box 644, Rotorua
McKechnie Quirke & Lewis, Rotorua

[1] The plaintiff, Horomatangi Properties (No. 21) Ltd (Horomatangi), applies for an interim injunction to restrain the defendant who are the trustees of the Okataina No. 10 Trust (the trustees) from reletting an area of 513.5340 hectares known as the Okataina 10 Block (the land). Horomatangi also seeks orders that the lease of the land dated 21 February 1994 between the trustees as lessors and Tudor Holdings Ltd (Tudor) as lessee (the lease), subsists, that Horomatangi is entitled to continued occupation of the land on an interim basis, and that the trustees be restrained from interfering with or in any way preventing Horomatangi from occupying its farming operation from the block. The trustees have counter-claimed seeking by way of summary judgment an order that Horomatangi deliver up to the defendants vacant possession of the land and a declaration that the lease has expired and no longer exists.

Factual Background

[2] On 24 September 1997, Tudor entered into a written agreement to sell to Mr Fraser or his nominee the lessee's interest under the lease in the land. The lease which was registered against the title of the land, was initially for a six year term from 1 June 1993 and included a normal provision under which Tudor covenanted that it would not "*assign ... without the consent of the lessors in writing first had and obtained*". It also included a right of renewal clause providing that if Tudor kept and performed the covenants expressed or implied in the lease, and had given the trustee written notice to renew the lease at least three calendar months before the end of the term, it would be entitled to a renewal.

[3] On the same date, Mr Fraser entered into an agreement under which he or his nominee as purchasers agreed to purchase an adjoining property of 265.9796 hectares from Arbridge Developments Ltd (Arbridge) for a price of \$2.4 m. The consideration expressed in the agreement for the sale of the lease of the land was "*[i]n consideration of the Purchaser entering into an Agreement to purchase the land in C/T 44C/237.*" Apparently, Tudor and Arbridge were related companies and both agreements were signed on behalf of the vendors by Mr T C Liao.

[4] Two relevant clauses in the agreement for the sale from Tudor to Mr Fraser of the leasehold interests were:

18.0 THIS AGREEMENT IS SUBJECT TO AND CONDITIONAL UPON the Vendor obtaining the consent of the Lessor Joseph Te Poroa Malcolm, Te Rangiuna Briggs, Te Rauotehuia Cameron, Stanley Pio Keepa and Tutewehiwehi Kingi as Trustees pursuant to Section 215 Te Ture Whenua Maori Act 1993 under Lease B.301241 such consent to be obtained within three (3) months from the date hereof or such later date as the Purchaser may agree to.

18.1 Pending consent pursuant to Clause 18.1 hereof the Vendor will hold the said Lease as agent and on behalf of the Purchaser as if consent had been obtained and the Purchaser will take possession on the possession date as agent for and on behalf of the Vendor.

[5] Possession of both properties was taken on 1 October 1997 and it is a reasonable inference that the parties would not have had time to obtain the consent of the trustees to the assignment before possession date. Mr Fraser nominated Horomatangi as his nominee to complete the purchases from Tudor and Arbridge.

[6] It was Mr Fraser's evidence given by affidavit that he pursued Tudor to obtain the consent to the transfer but to the best of his knowledge, Tudor took no active steps to comply with its obligations under the agreement for sale and purchase. The trustees' evidence was that the first request that they received from Tudor in respect of the assignment to either Mr Fraser or Horomatangi was a letter from Tudor signed by Mr Liao dated 7 April 1999, more than eighteen months after possession was taken, which said:

“OKATAINA 10 LEASE

With reference to the above LEASE, I wish to advise you that since I am not in ROTORUA most of the time and also inactive in farming and Peter Fraser has been working and managing the farm together with me for the past 18 months.

I now decide to quit farming totally and I wish to assign the farm to Peter who has been a farmer all his life and I am sure he will manage the farm in a proper manner. THE LEASE will be assign (sic) to him with no consideration of payment whatsoever.

I hope that my request will be well considered.”

[7] On the same date, Tudor had written to the trustees seeking a renewal of the lease in the following terms:

“Tudor Holdings wish to continue the lease and as requested and attach (sic) is the plan to manage the property prepared and submitted by Peter Fraser, for your perusal.”

[8] The evidence establishes that there appears to have been no request before 7 April 1999 for consent to the assignment of the lease. In an affidavit, Mr Fraser stated that on numerous occasions, he had urged Mr Liao to take care of the assignment and asked him to make sure he had given notice to the trustees as to both the assignment and latterly, as to exercising his right of renewal of the lease. Why Mr Liao failed to request that consent be granted to the assignment is not the subject of direct evidence as Mr Liao did not give evidence. Mr Dennett submitted that the Court could draw from the failure to apply for consent and the terms of Clause 18 of the agreement which have already been cited, the conclusion that no request for consent was made because Mr Fraser was aware that he would not be given consent. Mr Schamroth rejected this submission on the basis that Mr Fraser’s companies had paid \$2.4 m. to purchase the Arbridge adjoining property and Mr Fraser was obviously a man of substance. There may be something in both these submissions but I cannot draw any conclusion from the affidavit evidence. It is sufficient to say at this stage that the general and unspecified nature of some of Mr Fraser’s evidence suggests that there may have been some relevant background evidence which was not put before the Court. Why a request for consent to an assignment was not made when Mr Liao and Mr Fraser met the trustees on 25 March 1999 and why Mr Liao advised the trustees in his letter of 7 April 1999 that “*Peter Fraser has been working and managing the farm together with me for the past 18 months*” are questions which lead the Court to the view that Mr Fraser has been less than frank with it.

[9] Mr Fraser’s evidence was that in mid February, he telephoned Mr Liao who was in Auckland and advised him of the need to sign and send a letter to the trustees exercising his right of renewal. He followed this up on or about 20 February 1999 by faxing to Mr Liao a short form of notice which he asked Mr Liao to give to the trustees. That notice was in the following terms:

“Tudor Holdings Ltd hereby gives you notice that it intends to renew its lease dated 21 February 1994.”

Strangely, against the background of Horomatangi’s case, Mr Fraser was asking Mr Liao to give the notice of renewal on behalf of Tudor and did not ask that the trustees also be requested to consent to an assignment to Horomatangi.

[10] On 25 March 1999, Mr Liao and Mr Fraser attended a meeting with the trustees to discuss the lease. The secretary of the Okataina No. 10 Trust (the trust), exhibited a copy of the minutes of this meeting to an affidavit. They record that Mr Liao and Mr Fraser joined the meeting to discuss the lease position. They say that Mr Liao advised that Mr Fraser was farming the property in partnership with himself. The Chairman of the trust advised Messrs Liao and Fraser that as the result of a recent inspection, the trustees were concerned at the condition of the land. After Messrs Liao and Fraser left the meeting the trustees discussed the position further and their Chairman, Mr Malcolm, advised that he was interested in submitting a proposition for leasing the land. He said he was concerned about conflicts of interest and would stand down from any discussion on his potential lease. The options discussed were either to renew Mr Liao’s lease upon the undertakings to bring back the land into good condition or not to renew Mr Liao’s lease and claim for compensation against him, and negotiate a new lease for Mr Malcolm. One action which the trustees agreed to take was for the secretary to write to Mr Liao asking him to put in writing his request to renew the lease and his outline program for remedying the breaches of lease. As a result, Mr Liao forwarded the two letters of 7 April 1999, details of which have already been given. Attached to the letter referring to the plan to manage the property was the letter from Mr Fraser referring to the meeting of 25 March in which he said

“I am writing to brief you on what I have done and plan to do. It was October 1997 when I first became involved with the lease when I purchased Crater Lake Farm off Lawrence Liao. Crater Lake Farm was the adjoining property.”

[11] It is noted that Mr Fraser did nothing to disabuse the trustees of the statement which Mr Liao had made, namely, that he and Mr Fraser were farming the land in

partnership. In his affidavit, Mr Fraser, referring to Mr Liao's comments to the trust regarding the partnership said:

“The minutes record the fact that the Trustees were advised that Mr Liao and I were farming the property in partnership. This was never the situation. Mr Liao and I have never been and are not partners. Mr Liao however has had some difficulty in understanding this and has attempted over the past eighteen months or so to remain involved in the operation of the leasehold property. I assume that this is because he and his wife personally guaranteed the Lease.”

[12] The actions of Mr Liao and Tudor appear to have been inconsistent with Tudor's obligations under Clause 18 of the agreement for sale and purchase. There is no written evidence which suggests that either Mr Fraser's solicitors or Mr Fraser endeavoured to get Tudor at an earlier stage to comply with its stated obligations under Clause 18 of the agreement. On the evidence before the Court, it is not appropriate at this stage to speculate or draw inferences on the true reason for the request to assign the lease not being progressed in a timely manner.

[13] On receiving Tudor's letters of 7 April 1999, the trustees obtained a credit report on Mr Fraser dated 15 April 1999. As a result of this report, the trustees resolved that they were not satisfied that Mr Fraser was a reputable and solvent assignee and were therefore not prepared to consent to the assignment. The secretary of the trust advised Tudor by letter of 20 April 1999 that the request contained in its letter of 7 April 1999 had been considered by the trustees and the secretary was requested to advise that the trustees did not consent to the assignment of the lease to Mr Fraser. The trustees also noted that they accepted that Mr Liao wished to quit farming and would not be renewing the lease beyond 31 May 1999.

[14] On 5 May 1999, Mr Liao wrote to Mr Fraser referring apparently to the draft notice which Mr Fraser had asked Mr Liao in February 1999 to send to the trustees. Mr Liao advised Mr Fraser that his legal advisor had, in effect, advised him not to get involved and that he had fulfilled his obligation by requesting the trustees to assign the lease to Mr Fraser. Mr Fraser's solicitors became involved on 12 May 1999 when they wrote to the secretary of the trust and advised that their client did not accept the trustees' refusal to consent to the assignment. This appears to have been the first date on which the trustees were advised that the proposed assignee was

Horomatangi, as the letter from Mr Liao had referred to Mr Fraser as being the assignee. The trustees were advised that unless they reconsidered their decision and consented to the assignment, proceedings would be issued. On the same date the solicitors wrote to Tudor requiring it to continue to hold the lease on behalf of Horomatangi until such time as consent was available. This obligation included a renewal of the lease in accordance with Clause 23, which was the renewal provision in the lease. On 15 May 1999 Tudor did write to the trustees requesting them to reconsider their decision declining the request for assignment to Mr Fraser. The trust's secretary wrote to Horomatangi's solicitors on 18 May 1999 advising that they did not consent to an assignment to Horomatangi as the lessee had not proved that the proposed assignee was a reputable and solvent assignee. Horomatangi's solicitors replied to the trustees by letter of 20 May 1999 giving details of Mr Fraser's position and stating that Horomatangi and Mr Fraser were reputable and solvent assignees and asking for confirmation that the consent to the assignment was available. When no reply was received, this letter was followed by a further letter on 28 May 1999. The secretary of the trust replied to Horomatangi's solicitors on 31 May 1999. He said:

- “1. Tudor Holdings Ltd have not exercised the lease renewal as they failed to give notice before 1st March 1999 as provided in the lease.
2. The lease expires today on 31 May 1999 and the Trust will take occupation on 1 June 1999.
3. The Trust will not grant any lease to your client and he should ensure all stock and equipment and possessions are removed from the property forthwith.
4. The Trustees do not expect to receive further communications from your client on this matter.”

[15] On 1 June 1999, the solicitors for the trustees wrote to the solicitors for Horomatangi advising:

- “1. Tudor Holdings Limited, the lessee, did not exercise its right to renew the lease.
- 2.. Tudor Holdings Limited has confirmed that to be the position.
3. The lease has expired.
4. The lease was not legally assigned to Horomatangi Properties (No.21) Limited or any other assignee.
5. The Trust did not, and will not, agree to the assignment of the expired lease to your client company.
6. Tudor Holdings Limited has confirmed that the position is accepted by it.

7. The Trust will not grant a new lease, tenancy or possession to your client company.
8. The Trust reserves its rights to take action for breaches of the lease prior to its expiry.”

[16] These proceedings were issued originally on an ex parte basis on 2 June 1999.

[17] The proceedings have had somewhat of an unfortunate history. The ex parte application was declined and an inter partes application was filed on 4 June 1999. The matter came before Randerson J on 30 June 1999 at which time Horomatangi had filed its application for summary judgment. Time was given to file affidavits. Randerson J directed that there be a two hour fixture allocated in about four weeks time. His minute noted that “*there are, of course, time limits for seeking relief against forfeiture and the plaintiff should be aware of these.*” The matter was given a fixture for 30 August 1999 but because of an administrative error in the Rotorua High Court, the fixture was vacated and a new fixture made in late September 1999. Mr Schamroth was going to be overseas at that time and his instructing solicitors requested that the matter be adjourned until he returned and consequently, it was adjourned until 11 October 1999 and heard in Auckland.

The Interim Injunction

[18] This is a case which, in my view, can be resolved upon the basis of whether or not there is a serious question to be tried. There is evidence before the Court which would suggest that if Horomatangi had some right as an equitable lessee, it was in serious default under the lease. On its own evidence, it was paying rent to Tudor which was on-paying the rent to Horomatangi. The last payment it made brought the rent up to date to 30 November 1998 and there would have been at least six months rent due. Under the terms of the lease the rent was payable by equal quarterly instalments in advance. A report from a farm management consultant suggested that there were serious breaches of the terms of the lease. On the evidence before the Court there must be serious doubt as to whether Horomatangi could resist the trustees’ refusal to consent to the assignment. Even if it could overcome this problem and become the lessee, Horomatangi may have problems in obtaining relief

against forfeiture because of the alleged breaches of the lease. However, if these had been the issues which determined the matter I would have held that there was a serious matter to be tried, albeit that the strength of Horomatangi's position appears, on the evidence, to be somewhat weak.

[19] There is, in my view, a fundamental problem in respect of the relief sought. Clearly, Tudor requested the consent of the trustees to the assignment and it is also accepted by the trustees that Tudor requested a renewal, albeit that the request in its letter of 7 April 1999, was in somewhat vague terms. Assuming for the moment that Horomatangi is entitled to an assignment of the lease and is able to stand in the shoes of Tudor and claim any relief to which Tudor is entitled, it has, in my view, a fundamental problem under the provisions of s 121 of the Property Law Act 1952 (the Act). The request for a renewal of the lease was clearly refused both by the secretary of the trust in his letter of 31 May 1999 and the trust's solicitor in the letter of 1 June 1999. The secretary's letter clearly stated that the renewal had not been exercised because of the failure to give notice before 1 March 1999 as provided in the lease and that the lease therefore expired on 31 May 1999 and on the following day, the trust would take occupation. It then said that the trust will not grant any lease to "*your client and he should ensure all stock and equipment and possessions are removed from the property forthwith.*" Mr Schamroth submitted that the reference to "*he*" was a reference to Mr Fraser and not Horomatangi. In the circumstances refusal should be strictly construed and this could not be a refusal of a renewal exercised by Horomatangi. With respect, I cannot agree. The reply was to a letter requesting an assignment to Horomatangi. The earlier correspondence had referred both to Mr Fraser and to Horomatangi. Horomatangi's solicitors in their letter of 12 May 1999 to the secretary of the trust had advised that they acted "*for Mr Peter Fraser and his company, Horomatangi Properties (No. 21) Ltd.*" Clearly, the secretary was replying to a letter in which the solicitors not only sought consent to the assignment but noted that "*our client Company gives notice that it proposes to renew the Lease.*" If there was any doubt that Horomatangi was refused the right to renew the lease by the secretary in the letter of 31 May 1999, which I hold there was not, the doubt would have been dispelled in the trustees' solicitor's letter of 1 June 1999 which responded to a letter on behalf of Horomatangi. It made it quite clear that the trust would not grant a lease to Horomatangi. At the latest, the refusal was

communicated on 1 June 1999 although, in my view, it was communicated the day earlier.

[20] The substantive pleadings in this matter seek the same orders as are sought in the interim application. They do not seek relief against forfeiture under the provisions of s 120 of the Act. The interim relief sought cannot give any benefit to Horomatangi unless it can get itself in the position of the lessee under a lease, which has now expired, and obtain relief against forfeiture under s 120 of the Act. Section 121 of the Act states:

(1) Application for relief in accordance with the last preceding section may be made at any time within 3 months after the refusal of the lessor to grant a renewal of the lease or to grant a new lease or to assure the reversion, as the case may be, has been first communicated to the lessee.

[21] Under this section, any application for relief against forfeiture was to be filed by 31 August 1999. No such application has been filed. It is well established in cases such as *Vince Bevan Ltd v Findgard Nominees Ltd* [1973] 2 NZLR 290, and *Henderson v Ross* [1981] 1 NZLR 417, that the three month period is a limitation period and provided that the refusal has been communicated with sufficient clarity to cause a reasonable person in the shoes of the lessee and aware of his statutory rights to understand that the period of three months in which he can apply for relief has begun to run, then relief must be applied for within the three month period. As was noted in *Boyden v New Zealand Guardian Trust Co. Ltd* [1995] 3 NZLR 208, 211, if relief is to be sought under s 120 of the Act, compliance with the provisions of s 121 is mandatory.

[22] As I have found that the trustees communicated with sufficient clarity the refusal to grant a renewal on 31 May 1999, and as no application for relief against forfeiture has yet been filed, I am of the view that to grant the interim relief sought by Horomatangi would achieve no purpose. It cannot ultimately obtain a lease. For this reason the application for interim relief will be refused.

[23] In view of the Court's role in setting aside a fixture, this result is unfortunate. If the matter had been heard on 30 August 1999, there may have still been time for

Horomatangi to have applied for relief against forfeiture. However, s 121 is mandatory and as already noted, the strict time limits of the section were referred to by Randerson J in his minute of 30 June 1999.

Summary Judgment

[24] As the lease expired on 31 May 1999 and as I have found that it will now not be possible for Horomatangi to avail itself of the right of renewal in that lease, it follows that the trustees are entitled to summary judgment in the terms sought. Horomatangi can not resist giving up possession of the property.

Decision

- (a) The plaintiffs' application for interim relief is declined.
- (b) The defendants' counterclaim seeking summary judgment succeeds and judgment is given in its favour. As there is no subsisting lease there will be an order that the plaintiff deliver up to the defendants vacant possession of all the land referred to in paragraph 2 of the statement of claim.
- (c) The defendants are entitled to costs and there shall be an order that the plaintiff pays to the defendants the sum of \$2500 plus disbursements to be fixed if necessary by the Registrar.
- (d) Leave is reserved to the third parties to apply for costs if they consider it appropriate.



B J Paterson J