

Privy Council Appeal No. 4 of 1977

Ewen Neil Ross - - - - - - - - *Appellant*

v.

John Samuel Lester Henderson - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER 1977

Present at the Hearing :

LORD SIMON OF GLAISDALE

LORD SALMON

LORD RUSSELL OF KILLOWEN

LORD KEITH OF KINKEL

SIR GARFIELD BARWICK

[*Delivered by LORD SIMON OF GLAISDALE*]

This is an appeal from a judgment of the Court of Appeal of New Zealand dismissing an appeal and allowing a cross-appeal from a judgment of Beattie J.

On the 24th May 1971 a Memorandum of Lease was signed between the appellant as lessor and the respondent as lessee. The subject matter was a dairy farm of some 345 acres. It was leased by the appellant to the respondent for five years at an annual rental of \$3,000. There was expressly no right of compensation for improvements and there was no right of renewal. Clause (vv) contained an option to purchase in the following terms:

“ If the lessee shall at any time during the term hereof have given to the lessor two calendar months previous notice in writing of his intention to in that behalf the lessee shall have the right to purchase the whole of the land hereinbefore described at the expiry of the said notice at the price of *SIXTY FIVE THOUSAND DOLLARS* (\$65,000·00) which sum shall thereupon be payable as to the sum of *SIX THOUSAND FIVE HUNDRED DOLLARS* (\$6,500·00) upon the giving of the said notice and as to the balance and usual apportionments in cash at the expiry *PROVIDED HOWEVER* that the purchaser within fourteen (14) days of the giving of such notice either prepare and file with the District Land Registrar Hamilton a declaration in accordance with the requirements of the Land Settlement Promotion and Land Acquisition Act 1952 or shall otherwise

supply sufficient declaration in accordance with the requirements of the said Act to enable application to be made for the consent of the Administration [sic] Division of the Supreme Court for the consent thereto.”

Their Lordships will set out hereafter the relevant provisions of the Act referred to, which they will call “the Land Settlement Act”.

In relation to the Memorandum of Lease itself a declaration pursuant to section 24 of the Land Settlement Act was purported to be made, which was deposited with the District Land Registrar at Hamilton. It was on a statutory form. A side note enjoined that the nature of the transaction should be set out; this was done as follows (their Lordships italicise the typed inserts):

“In the matter of *Lease* . . .”

and then the date, the parties and the official description of the land were duly set out. The declaration continued:

“I, *John Samuel Lester Henderson* . . .

solemnly and sincerely declare:

1. That I am the [“purchaser” deleted] (or lessee) above-named of the land above described.
2. I have entered into the transaction solely on my own behalf as the person beneficially entitled thereunder.
3. I do not own, lease, hold, or occupy in fee simple or under any tenure of more than one year’s duration, either severally, jointly, or in common with any other person, any farm land, as defined in the Act, outside a city or borough or town district, and I have no estate or interest whether legal or equitable and whether vested or contingent, under any trust, will, or intestacy, in any such farm land.”

There followed the statutorily required declaration that the respondent’s wife had similarly no interest in any such land, nor any company of less than ten members of which the respondent or his wife was a member; and that the respondent had not transferred any estate or interest in farm land in trust for any person. The declaration set out other matters required by the Land Settlement Act.

The respondent had already moved into possession of the land, where he has remained at all material times.

By letter dated the 3rd July 1974 the appellant’s solicitors wrote to the respondent that the appellant was not prepared to proceed with the option which the lease purported to give pursuant to clause (vv), on the ground that section 23 of the Land Settlement Act had not been complied with, in that the filed statutory declaration related solely to the lease and not to the option to purchase.

In consequence the respondent started proceedings in the Supreme Court seeking a declaration that the option contained in clause (vv) was valid and enforceable; alternatively, if the option were unlawful, that it should be validated by an order under the Illegal Contracts Act 1970.

The relevant provisions of the Land Settlement Act as amended are in Parts II and IIA (Their Lordships italicise the words which are of particular significance in interpretation.):

“ PART II

CONTROL OF SALES AND LEASES OF FARM LAND TO PREVENT UNDUE AGGREGATION AND ENSURE PERSONAL RESIDENCE

Consent of Court Required to Certain Transactions

[Italics as printed]

“ 23. **Transactions to which this Part applies**—(1) Subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement—

(a) For the *sale* or transfer of any freehold estate or interest in farm land, whether legal or equitable :

(b) For the *leasing* of any farm land for a term of not less than 3 years :

. . . .

(e) For the *granting of an option* to purchase or otherwise acquire any freehold or leasehold estate or interest in farm land as aforesaid or to take any lease as aforesaid.

. . . .

(3) Except as provided in section 30 of this Act [since repealed], nothing in this Part of this Act shall apply with respect to—

(a) Any transaction entered into before the passing of this Act, or the *exercise of any option* granted before the passing of this Act :

. . . .

(q) Any contract or agreement for the sale or transfer or lease of any estate or interest *pursuant to an option to which the consent of the Court* has been granted under this Act :

. . . .

“ 24. **Consent of Court not required in certain cases**—(1) Notwithstanding anything in this Part of this Act, the consent of the Court shall not be required to any contract or agreement to which this Part of this Act applies where—

(a) The *purchaser or lessee* enters into the transaction solely on his own behalf as the person beneficially entitled thereunto and *does not own, lease, hold, or occupy* in fee simple or under any tenure of more than 1 year’s duration . . . *any farm land* outside a city or borough or town district; and

(b) The *purchaser or lessee* has not after the passing of this Act transferred, granted, leased, or otherwise disposed of any estate or interest in farm land to any person as a trustee for any person or created any trust in respect of any estate or interest in farm land; and

(bb) The transaction is not subject to Part IIA of this Act . . .

. . . .

- (d) The *purchaser or lessee* makes a statutory declaration as to the matters provided in paragraphs (a), (b), and (bb) of this subsection, and deposits that declaration with the District Land Registrar . . .

“ 25. **Prohibiting transactions without consent of Court**—(1) Where any transaction to which this Part of this Act applies is entered into, the transaction shall be deemed to be entered into in contravention of this Part of this Act, unless—

- (a) The transaction is entered into subject to the consent of the Court and an application for the consent of the Court to the transaction is made within 1 month after the date of the transaction . . . ; or
- (b) In any case to which section 24 of this Act applies, the statutory declaration referred to in that section is deposited with the District Land Registrar . . . within the time specified in that section.

(2) No person shall

- (a) Enter into any transaction in contravention of this Part of this Act whether as vendor, purchaser, lessor, lessee, *or other party*, and whether as principal or agent; . . .

. . . .

(4) Where any transaction is entered into in contravention of this Part of this Act . . . the transaction shall be deemed to be *unlawful* and *shall have no effect*.

. . . .”

Section 29 (which deals with consent after hearing) and section 31 bear out by enacting provisions the heading to Part II—namely, that that Part of the Act is concerned to prevent undue aggregation of farm land and to ensure personal residence. Section 31, however, is so important to the relevant construction of the Act that part of it must be set out:

“ 31. **Matters to be considered in determining whether undue aggregation**—(1) In considering whether the acquisition of the land affected by any application to the Administrative Division of the Supreme Court for its consent will cause an undue aggregation of farm land, the Land Valuation Committee shall have regard to the following matters:

- (a) Whether in any case where the *purchaser or lessee* is an individual the farm land already owned, leased, held, or occupied in fee simple or under any tenure of more than 1 year’s duration by the purchaser or lessee, either severally, jointly, or in common with any other person, is sufficient to support the purchaser or lessee and his wife and such of his children as are dependent on him in a reasonable manner and in a reasonable standard of comfort; . . .”

Part IIA of the Act was inserted by section 5 of the Land Settlement Promotion and Land Acquisition Amendment Act 1968. Section 1 of that Act reads—

“1. **Short Title**—This Act may be cited as the Land Settlement Promotion and Land Acquisition Amendment Act 1968, and shall be read together with and *deemed part of the Act* heretofore cited as the Land Settlement Promotion Act 1952 (hereinafter referred to as the principal Act).”

Section 2 altered the title of the principal Act to “The Land Settlement Promotion and Land Acquisition Act 1952”.

Part IIA so inserted in the 1952 Act is concerned with the control of acquisition of land in New Zealand by citizens or corporations from overseas. Its provisions run parallel to Part II of the 1952 Act. Section 35B reads:

“(1) Notwithstanding anything in this Act, . . . this Part of this Act shall apply to every contract or agreement:

- (a) For the *sale* or transfer of any freehold estate or interest in land, whether legal or equitable:
- (b) For the *leasing* of any land for a term of not less than 3 years:
- (c) For *sale* or transfer of any leasehold estate or interest in land, whether legal or equitable, of which not less than 3 years is unexpired:
- (d) For the *granting of an option to purchase* or otherwise acquire any freehold or leasehold estate or interest in land as aforesaid,—

in any case where:

. . . .

- (e) The *purchaser or lessee*,—
 - (i) Being an individual and not being a trustee, is not a New Zealand citizen; or
 - (ii) Being a body corporate and not being a trustee, is an overseas corporation; or
 - (iii) Is a trustee under a trust any beneficiary of which is not a New Zealand citizen or is an overseas corporation: . . .”.

The other Act with which this appeal is concerned is the Illegal Contracts Act 1970. The relevant provisions are as follows:

“6. **Illegal contracts to be of no effect**—(1) Notwithstanding any rule of law or equity to the contrary, *but subject to the provisions of this Act and of any other enactment*, every illegal contract *shall be of no effect* and no person shall become entitled to any property under disposition made by or pursuant to any such contract:

. . . .

7. **Court may grant relief**—(1) Notwithstanding the provisions of section 6 of this Act, *but subject to the express provisions of any other enactment*, the Court may in the course of any proceedings, or on application made for the purpose, grant to—

- (a) Any party to an illegal contract;

. . . .

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

. . . .

(7) *Subject to the express provisions of any other enactment*, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

. . . .”

The action in the Supreme Court was tried by Beattie J. Four issues fell for determination: (1) whether the declaration procedure of section 24 of the Land Settlement Act is available when a contract or agreement is for the granting of an option to purchase; Beattie J. answered Yes: (2) whether the statutory declaration made and deposited by the respondent complied with section 24(1)(d) of the Land Settlement Act in respect of the option to purchase; Beattie J. answered No: (3) whether the Court has jurisdiction under section 7 of the Illegal Contracts Act to validate a contract which has been rendered unlawful and of no effect by section 25(4) of the Land Settlement Act (as Beattie J. held this contract to have been by reason of his answer to issue (2)); Beattie J. answered Yes: (4) if so, whether, in the circumstances of the instant case, the Court should exercise its discretion to validate the option; Beattie J. answered Yes. He therefore entered judgment for the plaintiff (the instant respondent).

The appellant appealed to the Court of Appeal of New Zealand from Beattie J.'s judgment on issues (1) and (3). The respondent cross-appealed against the judgment on issue (2). The appellant did not challenge in the Court of Appeal the judgment of Beattie J. on issue (4); and this has therefore not been an issue on the further appeal to this Board. The appeal to the Court of Appeal in the instant case was heard together with the appeals in *Harding v. Coburn* [1976] 2 N.Z.L.R. 577 and *Broadlands Rentals Ltd. v. R. D. Bull Ltd.* [1976] 2 N.Z.L.R. 595, which too raised issue (3) as to the construction of the Illegal Contracts Act. The Court of Appeal, in agreement with Beattie J., answered issue (1) Yes; but, in disagreement with Beattie J., also answered issue (2) Yes. It was therefore unnecessary in this case for the Court of Appeal to determine issue (3) on the construction of the Illegal Contracts Act. Had it been necessary, they would, in agreement with Beattie J., have answered Yes for the reasons they gave in *Harding v. Coburn*.

The argument for the appellant before their Lordships consisted, as it did apparently before Beattie J. and the Court of Appeal, in a close analysis of the language of the Land Settlement Act, on which a great number of points were raised. Being in general agreement with the Court of Appeal, their Lordships will not attempt to deal with every point raised on behalf of the appellant: since, in their view, on ultimate analysis none told in favour of the appellant, they trust that they will not thereby be thought discourteous to counsel in his meticulously careful argument. Their Lordships propose to deal with the major points which are in their view decisive of the issues which fall for judgment.

I. *Is the declaration procedure applicable to options?*

The general statutory objectives of the Land Settlement Act were, first and paramount, to control undue aggregation of farm land and absentee

landlordism, and secondly (by amendment) to control acquisition of land by citizens and corporations from outside New Zealand. The statute provided two alternative methods for achieving the first objective, each for its own appropriate case: first, obtaining the consent of the Court to the relevant transaction; or, secondly, the clearing of the relevant transaction by the declaratory procedure laid down in section 24. The purpose of the legislature in providing this alternative procedure by way of declaration in appropriate cases must itself have been twofold: first, to enable the “landless man” (a plain case) to avoid the expense and delay of recourse to the Court; and, secondly, to obviate the Court’s being troubled with such plain cases. These considerations apply just as strongly to options as to ordinary sales and leases. It would be an anomaly were the “landless man” unable to use the declaration procedure if he were acquiring land by the grant of an option rather than by plain purchase or lease. The obvious statutory objectives point strongly against the appellant’s contention that section 24 is not available in the case of an option.

The appellant, however, relied strenuously on the facts that section 23(1) deals separately in the three paragraphs which their Lordships have quoted with respectively sale, lease and option, whereas section 24(1)(a) mentions only (by conspicuous contrast, the appellant would say) “purchaser or lessee”. Even to this purely linguistic contention, there are however, in their Lordships’ view, a number of convincing contrary arguments.

First, to quote Beattie J.:

“The opening words of s.24(1) refer to ‘any contract or agreement’ to which Part II of the Act applies. Then, s.23(1) reads ‘subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement’ . . . (b) for leasing, (e) for the granting of an option to purchase. In my view the words in s.24(1) must therefore include a contract or agreement for an option.”

Secondly, their Lordships respectfully agree with the Court of Appeal that the word “purchaser” is susceptible of being read proleptically to include one who may acquire by purchase through the exercise of an option to purchase; and that this meaning fits both the statutory objectives and the other linguistic indicia.

Thirdly, section 31 sets out the matters to be considered by the Court in determining whether there is undue aggregation. For this purpose it refers to “purchaser or lessee”. On the appellant’s argument (that these statutory words do not extend to the grantee of an option to purchase) the Court is (conspicuously, anomalously and absurdly) given no direction as to the matters to be considered in determining whether there is undue aggregation where the acquisition may be by way of option. Section 35B is undoubtedly drafted on the assumption that “purchaser or lessee” includes the grantee of an option. The Court of Appeal placed considerable reliance on section 35B. But it was argued before their Lordships on behalf of the appellant that it was not permissible to use an amendment inserted in 1968 for the construction of a provision which was part of the original Act of 1952. In view of the fact that in their Lordships’ view section 31, which was part of the original Act, itself puts the appellant’s argument out of court, it is not necessary to express a view on this contention. See, however, *Kirkness v. John Hudson & Co. Ltd.* [1955] A.C. 696, 735.

Their Lordships finally in this part of the appeal, advert to a subsidiary argument on behalf of the appellant. This was to the effect that where an option to purchase is contained in a lease, a declarant cannot truthfully declare that he has no other interest in land: he is already a lessee at the time he makes the declaration. This argument fails when one remembers the main statutory objective. This is to control undue aggregation of farm land—*i.e.*, to control the aggregation of land the subject of the declaration with *other* land, not with the *same* land. Section 24 is available whenever the declarant has no relevant interest in other land.

Their Lordships therefore respectfully agree with Beattie J. and the Court of Appeal on the first issue.

II. *Did the instant declaration satisfy section 24?*

Save that their Lordships venture to think that the Acts Interpretation Act does not assist in the instant case, their Lordships respectfully agree with the Court of Appeal on this issue too. In particular, their Lordships attach importance to the fact that the statutory regulations do not prescribe a separate form for option holders, and that the declaration complied strictly with section 24(1)(d).

Their Lordships would merely add, in relation to the appellant's contention that the declaration should have specified "lease including option to purchase freehold", that such a formula in no way advances the main objective of the Act, which was to prevent undue *aggregation of land*.

III. *The Illegal Contracts Act*

Since their Lordships agree with the Court of Appeal on the first two issues, the third issue does not arise for necessary decision by their Lordships, any more than it did for the Court of Appeal in the instant case. Nevertheless, having heard full argument on this issue, their Lordships think it right to say that they are in respectful agreement with the conclusion of the Court of Appeal in *Harding v. Coburn* and with Beattie J. in the instant case that the Illegal Contracts Act was available in relation to the illegality under the Land Settlement Act which was admittedly in question in *Harding v. Coburn* and the sort of illegality which Beattie J. held to have occurred in the instant case—namely, arising from a declaration which does not sufficiently comply with the requirements of the statute.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.

In the Privy Council

EWEN NEIL ROSS

v.

JOHN SAMUEL LESTER HENDERSON

DELIVERED BY

LORD SIMON OF GLAISDALE