Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Reginald Palmer Greville and another v. *Crespin Parker, from the Court of Appeal of New Zealand; delivered the 18th March,* 1910.

Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

This is an Appeal from a decision of the Court of Appeal of New Zealand overruling a decision of Chapman, J., in favour of the lessor in an action brought by the lessee claiming specific performance of a covenant in the lease to renew for a further term of 10 years The point for determination is thus stated by Edwards, J., who delivered the Judgment of the Court :—

C.A.:—"This is an action for specific performance of an agreement for a lease embodied in a proviso contained in a prior lease from the Respondents to the Appellant giving to the Appellant an option of renewal, and a notice in writing electing to exercise such option, given by the Appellant to the Res-

[14] P.C.J. 235.—L. & M.—100.—9/3/10. Wt. 98.

pondents pursuant to such proviso. The clause giving the option makes the observance by the Appellant of his covenants contained in the lease by which the option is given a condition precedent to his right to a renewed lease. The defence raised is that the Appellant was guilty of divers breaches of his covenants contained in the prior lease, and therefore he has not performed the conditions precedent on his part to his right to a renewed lease under the clause to which we have referred. The learned Judge in the Court below has found that divers breaches of covenant on the part of the Appellant have been proved, and has pronounced judgment in favour of the Respondents.

" It does not appear to be necessary or profitable to discuss the evidence on this point or the finding of the learned Judge in the Court below upon it. It is sufficient to say that in our opinion this Court could not disturb those findings without departing from the principles laid down in Coglan *v.* Cumberland and Montgomerie & Co. *v.* Wallace James, upon which we ought to act. These cases, in our opinion, must be treated as exhaustively laying down the rule upon this point. It may, however, be as well to remark that, with reference to the construction of the covenant as to the eradication of the shrub called 'Tauhinu," we do not understand the learned Judge in the Court below to have differed from the interpretation placed by this Court upon a similar covenant with respect to furze in Smith *v.* Barnitt. Counsel for the Appellant admit that, breaches of covenant having been established, the Appellant, apart from recent legislation and the decisions of the Courts therein, could not maintain the action. They contend, however, that the protection of 'The Property Law Act, 1908, Secs. 93 and 94 as interpreted by recent decisions is that the Appellant is entitled to a Decree for specific performance, making compensation in money for any damages sustained by reason of his breaches of covenant. . . . . The question turns upon the construction of Secs. 93 and 94 of 'The Property Law Act, 1908,' under the head of 'Forfeitures' Sec. 93 is merely an interpretation clause. It provides that for the purposes of the next three succeeding sections 'lease' includes an original or derivative under lease, 'a grant securing a rent by a condition and an agreement for a

> lease where the lessee has become entitled to have his lease granted.' The words 'where the lessee has become entitled to have his lease granted' in this definition, have been interpreted by Mr. Justice Denniston in Shodroske *v.* Hadley, 27 N.Z.L.R. (S.C.) 377—383, as meaning where the lessee has become entitled 'to have his lease granted had there been no forfeiture.' We think that this interpretation is correct."

The Court throughout their Judgment seem to attach no importance whatever to the question whether, assuming that they had jurisdiction to relieve against forfeiture based on failure to perform a covenant, performance of which was by its terms a condition precedent to the right to claim the extended term, there was anything in the circumstances of the breach to found an equitable claim for relief. Their Lordships are unable to find any such elements in the circumstances of the present case which seem to evidence a persistent course of wilful neglect on the part of the lessee. In view of this attitude on the part of the Court it is perhaps worth while to cite an observation of Lord Justice Romer where thoughtlessness on the part of a lessee or failure on his part to realize the gravity of the breach were urged as grounds for relief against forfeiture. He says in Eastern Telegraph Co., *v.* Dent, 1899, 1 Q. B. at p. 839.

> "The suggestion that it is ground for relief in equity against the enforcement by the landlord of his legal right that the tenant has committed the breach of covenant either through thoughtlessness or because he thought the breach unimportant has no foundation in principle or authority."

But their Lordships are not prepared to admit that the circumstances of this case did in fact, bring it within the legislation of 1908. The lessors were not in fact seeking to enforce a right of re-entry or forfeiture, by action or other-

wise, under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease. They had brought no action and were apparently willing to let the term run out by effluxion of time, and merely set up the failure of the lessees to perform a condition precedent as an answer to their claim for specific performance. The Court themselves admit that apart from the special legislation which they rely upon, the failure to perform a condition precedent was a complete answer to the claim for specific performance. There are no words in Sec. 94 which in terms purport to enable the Court to give relief against failure to perform a condition precedent, and in view of the admitted state of the law on this subject both at home and in New Zealand up to that date, (see the cases cited by Chapman, J.), one would expect to find clear words used by the legislature if it was intended to confer relief of so novel a character on persons not specially meritorious. But so far from such being the case, the Court can only find a provision for relief against forfeiture by reason of failure to perform a condition precedent by reading it into the enactment by means of a rather bold *petitio principii*, involving a heavy strain upon the natural meaning of the sentence. Thus, by construing the definition of lease above cited from Sec. 93, as it was construed by Denniston, J., as meaning "where the lessee has become entitled to have his lease granted had there been no forfeiture." They give by intendment of law what the statute does not in terms enact, viz.: that a person who, by failure to perform his obligation, is disentitled to have his lease granted, is to be treated as though he had not become disentitled.

A little later in the Judgment, the Court, after pointing out that the case of Nash *v.* Preece 20 N.Z.L.R. (C.A.) 141 is binding on the Court,

invokes Sec. 25 of the Supreme Court Act, 1882, pointing out that under that section the Court may relieve against a forfeiture of any lease or of any right to purchase where the purchaser is in possession for the breach of any covenant, condition or agreement if the Court is of opinion that such breach has been committed through accident or mistake. If that section has any bearing on this case it is difficult to see why such considerations might not be equally important here.

Their Lordships will humbly advise His Majesty that the Appeal be allowed with costs here and below, and that the Judgment of Chapman, J., be restored.

In the Privy Council.

REGINALD PALMER GREVILLE AND ANOTHER

v.

CRESPIN PARKER.

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