32, 1956

No. 44 of 1955.

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN :

MATTHEW JAMES McKENNA and VINCENT LEO GIFFORD *Appellants*

AND

PORTER MOTORS, LIMITED *Respondents.*

Case for the Appellants.

RECORD.

1. This is an appeal from a judgment, dated the 8th December, 1954, of the Court of Appeal of New Zealand (Gresson, Hay and Turner, JJ.), dismissing an appeal from a judgment, dated the 4th December, 1953, of the Supreme Court of New Zealand (Cooke, J.), ordering the Appellants to give to the Respondents possession of premises known as the Rangitikei Private Hotel in the City of Palmerston North. p. 41. p. 34.

2. The issue of this appeal depends upon the following provisions of the Tenancy Act, 1948 :—

TENANCY ACT, 1948 (AS AMENDED BY THE TENANCY AMENDMENT ACT, 1950 AND THE STATUTES AMENDMENT ACT, 1950).

2. (1) . . . . . .

" Dwelling-house " means any building or part of a building let as a separate dwelling; and includes any furniture or other chattels that may be let therewith; and also includes any land, outbuildings, or parts of buildings included in the tenancy; but does not include :—

(*a*) any licensed premises; or

(*b*) any premises that include more than three acres of land where the tenants income or a substantial part thereof is derived from the use of that land for agricultural purposes :

. . . . . .

" Property " or " Urban Property " means any land or interest in land or any building or part of a building let for any purposes under a separate tenancy; and includes any chattels that may be let therewith; but does not include

(*a*) any dwelling-house; or

(*b*) any property that is used exclusively or principally for agricultural purposes; or

(*c*) any premises in respect of which a publican's licence, an accommodation licence, or a tourist-house licence is in force under the Licensing Act, 1908, or any hotel maintained by a Licensing Trust constituted under any Act.

. . . . . .

24. (1) An order for the recovery of possession of any dwelling-house or urban property, or for the ejectment of the tenant therefrom, may, subject to the provisions of this part of this Act, be made on one or more of the grounds following, but shall not be made on any other ground:—

(*a*) that the tenant has failed to pay the rent lawfully payable in respect of the premises, or has failed to perform or comply with any other conditions of the tenancy:

. . . . . .

(*h*) in the case of an urban property, that the premises are reasonably required by the landlord or by one or more of several joint landlords for his or their own occupation:

. . . . . .

(*m*) that the premises are reasonably required by the landlord for demolition or reconstruction:

. . . . . .

(2) On the hearing by any Court of any application for an order to which the last preceding subsection relates, the Court shall take into consideration the hardship that would be caused to the tenant or any other person by the grant of the application and the hardship that would be caused to the landlord or any other person by the refusal of the application, and all other relevant matters; and may in its discretion refuse the application, notwithstanding that any one or more of the grounds mentioned in subsection one of this section may have been established.

. . . . . .

25. (1) An order to which subsection one of the last preceding section relates shall not be made by any Court on the grounds specified in paragraph (*g*), or in paragraph (*gg*), or in paragraph (*h*), or in paragraph (*i*), or in paragraph (*j*) of that subsection unless the Court is satisfied either:—

(*a*) that suitable alternative accommodation is available for the tenant or will be available for him when the order takes effect; or

(*b*) that the hardship caused to the landlord or any other person by the refusal of the Court to make an order for possession or ejectment would exceed the hardship caused to the tenant or any other person by the making of such an order:

Provided that this subsection shall not apply to any application for an order in respect of any dwelling-house on the ground specified in paragraph (*g*) of subsection one of the last preceding section made by a landlord who has been the landlord or one of the landlords of the dwelling-house throughout the period of three years immediately preceding the date of the application or who, being in receipt of an age benefit under the Social Security Act, 1938, has been the landlord or one of the landlords of the dwelling-house throughout the period of two years immediately preceding the date of the application; but nothing in this proviso shall be construed to limit the operation of subsection two of the last preceding section:

Provided also that this subsection shall not apply to any application for an order in respect of any urban property on the ground specified in paragraph (*h*) of subsection one of the last preceding section made by a landlord who has after the commencement of this proviso served on the tenant not less than one year's notice of the landlord's intention to make the application on that ground, and has been the landlord or one of the landlords of the premises throughout the period of two years immediately preceding the date of service of the notice; but in any such case the Court, in addition to its other powers, shall have power, upon application made by the tenant, to adjourn the proceedings for any period not exceeding six months if the Court considers that in the circumstances of the case it is just and equitable to do so; but nothing in this proviso shall be construed to limit the operation of subsection two of the last preceding section.

(2) An order to which subsection one of the last preceding section relates shall not be made by any Court on the grounds specified in paragraph (*k*), or in paragraph (*l*), or in paragraph (*m*) of that subsection unless the Court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order takes effect.

. . . . . .

3. The Appellants have been carrying on business as proprietors of the Rangitikei Private Hotel since about 1926. In 1941 the Respondents bought the premises occupied by the Appellants. It was the intention of the Respondents to demolish the hotel and build a garage on the land as soon as circumstances allowed. The Appellants' lease expired in 1944, and by an agreement dated the 29th August, 1944, the Respondents granted the Appellants a new lease for one year from the 1st August, 1944. It was a term of this agreement that, if the Appellants remained in occupation with the consent of the Respondents after the expiry of the year of the lease, the tenancy should be terminable by three months' notice on either side, with the proviso that the Respondents should not give notice terminating the tenancy before the 1st August, 1946, unless they required the premises for rebuilding. In July, 1945, the premises were damaged by fire, and on the 2nd August, 1945, the Respondents gave the Appellants three months' notice to quit. On the 21st December, 1945, however, the Appellants and the Respondents entered into an agreement that the tenancy should continue until the 1st August, 1946, and be terminable by three months' notice thereafter, on condition that the Appellants released their claim to have the insurance money spent on reinstatement of the premises. The City Council refused at first to give the Appellants a permit to repair the premises; but the council eventually gave a permit in return for an undertaking, signed by the Appellants and two directors of the Respondents on the 16th April, 1946, to demolish the hotel, or permit it to be demolished, immediately on the expiration of three months' notice by the council requiring the hotel to be demolished. The Appellants then repaired the premises at their own expense. On the 2nd February, 1948, the Respondents gave the Appellants three months' notice to quit, and after that notice had expired the Respondents started an action in the Supreme Court against the Appellants for possession. In this action the Respondents claimed possession under s. 24 (1) (*a*) of the Tenancy Act, alleging that the Appellants, by failing to comply with requirements of the local authority for repairs, had failed to perform the conditions of the tenancy, under s. 24 (1) (*h*), alleging

p. 17, ll. 19-20.
p. 6, ll. 24-25; p. 7, ll. 3-4.
p. 6, ll. 30-31; p. 7, ll. 5-7.
p. 7, ll. 9-12.
pp. 54-55.
p. 55, ll. 15-29.
p. 7, ll. 14-15.
p. 3, ll. 26-27.
p. 7, ll. 27-30.
p. 3, ll. 32-42.
p. 19, ll. 24-27.
p. 19, ll. 27-29.
p. 4, ll. 7-24.
p. 57, l. 31.
p. 2, ll. 10-14.
p. 7, l. 31.

that they reasonably required the premises for their own occupation, and under s. 24 (1) (*m*), alleging that they reasonably required the premises for demolition or reconstruction. The action was tried by Hutchison, J., who gave judgment on the 12th August, 1949, refusing to make an order for possession (*Porter Motors, Ltd.* v. *McKenna and anor.* (1950), N.Z.L.R. 8). As regards the claims under s. 24 (1) (*h*) and (*m*), the learned Judge held that, as the Respondents wanted to demolish the premises, they could not require them for their own occupation; the ground set out in paragraphs (*h*) and (*m*) were alternative and, in this case at least, not cumulative; no suitable alternative accommodation was available for the Appellants, so no order could be made under paragraph (*m*). On the 28th September, 1951, the Respondents served on the Appellants one year's notice to quit, stating in the notice that they required the premises for their own occupation. On the 15th October, 1951, the Respondents obtained from the building controller authorisation to erect new premises on the land (i.e., the land on part of which the hotel stands). On the 20th December, 1951, the Respondents served on the Appellants yet another notice to quit. It was this time a three months' notice, so that it both was served and expired during the currency of the notice served on the 28th September, 1951. On the 4th March, 1952, the Respondents' solicitors wrote to the town clerk of Palmerston North, asking that the City Council should act under the undertaking of the 16th April, 1946, by serving on the Appellants three months' notice requiring demolition of the hotel. Accordingly, on the 7th April, 1952, the City Council served on the Respondents and the Appellants notices requiring them respectively to demolish the hotel and to permit it to be demolished.

p. 4, ll. 32-37.
p. 7, ll. 43-45.
p. 6, ll. 6-26.
p. 7, ll. 38-40.
p. 7, ll. 43-45.
p. 8, ll. 3-7; pp. 59-60.
p. 2, ll. 22-24.
p. 5, ll. 27-30.

4. Subsequently the Respondents started the present action, claiming possession of the premises on the grounds (so far as material to this appeal) (*i*) that the Appellants had failed to perform the conditions of the tenancy, and (*ii*) that the Respondents reasonably required the premises for their own occupation. The Appellants denied that they had failed to perform the conditions of the tenancy, denied that the Respondents required the premises for their own occupation, and alleged that the Respondents required possession of the premises only to demolish them and not to occupy them, and there was no suitable alternative accommodation available to them (the Appellants). The Statement of Claim and the Defence, dated respectively the 15th April and the 20th April, 1953, set out the material facts stated in paragraph 3 of this Case.

p. 2, ll. 27-36.
p. 5, ll. 31-44.
p. 6, ll. 1-2.
p. 6, ll. 7-11.
pp. 1-6.

5. The action came on before Cooke, J. on the 26th May and the 27th October, 1953. For the purposes of this appeal it is not necessary to set out the evidence, except that given on behalf of the Respondents by one Henderson, a director of the company, about the use which the
p. 8, ll. 7-16. Respondents wished to make of the land. He said it was necessary for the Respondents' building operations that they should get possession of that part of their land occupied by the Appellants. It was
p. 10, ll. 12-14. fundamental that the new building should occupy the whole frontage. The Respondents wanted the hotel demolished in order to build a new garage. Henderson made some suggestion that the Respondents might
p. 9, l. 38–p. 10, l. 28. move the building to another part of their land and turn it into flats for their employees. He said, however, that he doubted whether the City Council would allow this to be done; and it appeared that it was a suggestion which had not really been considered by the Respondents.

pp. 25-34. 6. Cooke, J. gave judgment on the 4th December, 1953. He first
p. 25, l. 18–p. 26, l. 33. described the nature of the claim and set out certain of the facts. Turning to the allegation that there had been breaches of the conditions
p. 26, l. 34–p. 27, l. 46. of the tenancy, the learned Judge said that even if the alleged breaches had been committed (which he did not decide), he would not in the exercise of his discretion, be prepared on that ground to make an order
p. 28, l. 1–p. 29, l. 12. for possession. It was necessary next to consider the allegation that the Respondents required the premises for their own occupation. The Appellants contended that the Respondents required the premises not for their own occupation but for demolition, and relied upon Hutchison, J.'s decision that a landlord who wished to demolish "premises" could not claim that he required to occupy those "premises". The Respondents contended that this decision was wrong. They said that the word "premises" in s. 24 meant, though not always, the whole of the property let; in paragraph (*h*) it included land, but in paragraph (*m*) its meaning was doubtful. The learned Judge held that the Respondents had established that they reasonably required the land for their own occupation and reasonably required the buildings for demolition. He thought the word "premises" in paragraph (*h*) included both land and buildings, but in paragraph (*m*) referred only to buildings. The Respondents, he thought, had established both the ground of paragraph (*h*) and the ground of paragraph (*m*), and were entitled to have the case decided on the former
pp. 29-34. ground alone. Having considered the question of hardship to the parties and other persons, and certain other matters which do not now arise, the learned Judge made an order for possession suspended until the 30th June, 1954.

RECORD.

7. By a notice of appeal dated the 12th May, 1954, the Appellants appealed to the Court of Appeal of New Zealand. The appeal came on before Gresson, Hay and Turner, JJ. on the 2nd July, 1954. p. 35.

8. The judgment of the Court of Appeal was delivered by Turner, J. on the 8th December, 1954. The learned Judges first summarised the course of the proceedings, and referred to the earlier action tried by Hutchison, J.. They said it was not necessary to consider whether the Appellants had failed to comply with the conditions of the tenancy, because Cooke, J. had decided this point in favour of the Appellants and there was no cross-appeal. The meaning of the word " premises " could not be the same in paragraphs (*h*) and (*m*); in paragraph (*m*) it could mean only the buildings on the land, whereas in paragraph (*h*) it must mean the land with any buildings thereon. Counsel for the Appellants had submitted that on Cooke, J.'s view there would be no need for paragraph (*m*). The learned Judges thought this argument must fail, because paragraph (*m*) would apply when a landlord wished to demolish or reconstruct, but did not wish to occupy at all. Alternatively, counsel had argued that occupation of the premises was inconsistent with an intention to demolish any substantial part of them. The learned Judges thought there was no inconsistency; they said a landlord might enter into occupation of premises intending to demolish the buildings and substitute others, which in turn he would occupy. They preferred Cooke, J.'s view to that of Hutchison, J., and held that " premises ", i.e., land and buildings upon it, might be required by a landlord for his own occupation when it was his intention to demolish or reconstruct the " premises ", i.e., the buildings. The learned Judges then disposed of certain arguments about Cooke, J.'s exercise of his discretion, and dismissed the appeal.

pp. 36-41. pp. 36-37. p. 36, ll. 20-23. p. 38, ll. 1-16. p. 38, ll. 24-34. p. 38, l. 35 - p. 39, l. 10. pp. 39-41.

9. The Appellants respectfully submit that both the Courts in New Zealand erred in holding that the Respondents brought themselves within the terms of s. 24 (1) (*h*). Cooke, J. held that " premises " in paragraph (*h*) includes both land and buildings, but went on to say that, when the Respondents said " the premises " were required for their own occupation, they meant that what was required was the land. In order to apply the interpretation which he had himself put upon paragraph (*h*), the learned Judge should have said that, when the Respondents said " the premises " were required for their own occupation, they mean that what was required was the land and the buildings. It would then have been clear that the Respondents, since they wanted to demolish the buildings, did not require " the premises "

for their own occupation. In the Court of Appeal, the learned Judges held that occupation of premises is not inconsistent with an intention to demolish a substantial part of the premises, because a landlord occupies the premises " if he occupies the land and such buildings as from time to time are situate thereon ". This, in the Appellants' respectful submission, overlooks the fact that " the premises " in paragraph (*h*) must mean the premises occupied by the tenant; so that, if a tenant is occupying land with buildings on it, the landlord does not require the premises for his own occupation if he wants to occupy the land with new and different buildings substituted for those occupied by the tenant.

10. The Appellants respectfully submit that the word " premises " in s. 24 (1) (*h*) bears its ordinary meaning of that which is covered by the habendum of a lease. In the present case, the habendum covers " premises known as the Rangitikei Private Hotel as at present occupied by the tenants situated at No. 108, Rangitikei Street ". The habendum thus covering both land and buildings thereon, the landlord does not require " the premises " for his own occupation unless he requires to occupy both that land and those buildings; i.e., in the present case, unless the Respondents require for their own occupation the Rangitikei Private Hotel. Consequently, Hutchison, J., in the Appellants' respectful submission, was right in holding that paragraphs (*h*) and (*m*) are alternative and not cumulative. A man cannot occupy that which he demolishes, and cannot require for his own occupation that which he requires for the purpose of demolition.

11. The Appellants respectfully submit that the judgment of the Court of Appeal of New Zealand was wrong and ought to be reversed, and this appeal ought to be allowed, for the following (amongst other)

REASONS

1. BECAUSE the word " premises " in the Tenancy Act, 1948, s. 24 (1) (*h*) covers both the land and the buildings let.
2. BECAUSE the Respondents let to the Appellants a piece of land with the buildings standing thereon.
3. BECAUSE the Respondents do not require the buildings for their own occupation.
4. BECAUSE the Respondents did not establish any of the grounds on which an order for possession may be made under the Tenancy Act.

J. G. LE QUESNE.

No. 44 of 1955.

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

MATTHEW JAMES McKENNA and
VINCENT LEO GIFFORD

– v –

PORTER MOTORS, LIMITED.

Case for the Appellants.

COWARD, CHANCE & CO.,
ST. SWITHIN'S HOUSE,
WALBROOK,
E.C.4.

Waterlow & Sons Limited, London and Dunstable.