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 (Defendants) . . . *Appellants*

AND

PORTER MOTORS LIMITED (Plaintiff) . . *Respondent.*

Case for the Respondent

RECORD.

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Gresson, Hay and Turner, JJ.) dated the 8th December, 1954, dismissing with costs the Appellants' appeal from a judgment of Cooke, J. in the Supreme Court of New Zealand dated the 4th December, 1953, whereby it was ordered that the Respondent should recover from the Appellants possession of certain premises known as 108 Rangitikei Street in the city of Palmerston North, New Zealand. p. 36, l. 1–p. 41, l. 12. p. 25, l. 18–p. 34, l. 13.

2. The question for decision involves the construction and application of the Tenancy Act, 1948, of New Zealand (No. 76 of 1948). That Act restricts recovery of possession from both tenants of dwelling-houses and tenants of "urban property." "Property" is defined by section 2 (1) of the Act by which it means (omitting matters not relevant to this appeal) "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 any dwellinghouse . . .". By a further definition contained in the same section "urban property" means "any property as hereinbefore defined that is not used exclusively or principally for agricultural purposes." The provisions of section 24 of the Act which are directly relevant to this case are :—

> "(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 :—
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> * * * * *

(*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 (1) of this section may have been established."

Section 25 (1) of the Act as amended by the Tenancy Amendment Act of 1950 (No. 28 of 1950) provides :—

" An order to which subsection (1) of the last preceding section relates shall not be made by any Court on the grounds specified in paragraph (*g*) 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 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 (1) 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 thoughout the period of two years immediately preceding the date of the service of the notice . . . but nothing in this proviso shall be construed to limit the operation of subsection (2) of the last preceding section."

3. The point raised by this Appeal is whether a landlord of urban property who intends, upon obtaining possession, to demolish the existing

buildings and erect new ones in their place for the purposes of his own business can be said to require " the premises " for his own occupation within the meaning of section 24 (1) (*h*).

4. By an agreement in writing dated the 29th August 1944 the Respondent let to the Appellants premises known as 108 Rangitikei Street in the city of Palmerston North for a term of one year from the 1st August 1944 at a rent of £3 per week and it was subsequently agreed that the tenancy should continue until the 1st August 1946 and thereafter be terminable by three months' notice. The premises comprise an area of land measuring 63 feet (frontage) by 147 feet (depth) on which stands a wooden building which has at all material times been and still is used and occupied by the Appellants as " the Rangitikei Private Hotel." p. 54, l. 1– p. 56, l. 30. p. 7, l. 4. p. 7, l. 4.

5. On the 2nd February 1948 and on the 20th December 1951 the Respondent gave to the Appellants notices in writing to quit and deliver up possession of No. 108 Rangitikei Street, aforesaid, at the expiration of three months from the receipt by the Appellants of such notice and on the 28th September 1951 the Respondent served on the Appellants the one year's notice specified in the proviso to section 25 (1) of the Act (as amended) hereinbefore referred to. The Appellants remained and still remain in occupation of the premises. p. 7, l. 43. p. 7, l. 43.

6. This action is brought by the Respondent as Plaintiff against the Appellants as Defendants to recover possession of the premises, the requisite notice of intention to commence these proceedings having been given pursuant to section 23 (1) of the Act on the 30th March 1953. The Respondent's Statement of Claim was dated the 15th April 1953 and the Appellants' Statement of Defence was dated the 20th April 1953. The Respondent claimed possession on three grounds— p. 1, l. 1– p. 2, l. 39. p. 3, l. 1– p. 6, l. 17.

(A) that the Appellants had failed to perform and comply with the conditions of the tenancy (section 24 (1) (*a*) of the Act);

(B) that the premises were reasonably required by the Respondent for its own occupation (section 24 (1) (*h*) of the Act);

(C) that possession was required of a part of the premises in excess of the reasonable requirements of the Appellant (section 24 (1) (*e*) of the Act).

On ground (A) Cooke, J., found against the Respondent and as there was no cross-appeal in the Court of Appeal the matter does not arise in this Appeal. On ground (C), Cooke, J., came to no definite decision and it was agreed following argument that in the event of the decision being against the Respondent on grounds (A) and (B) there should be a further hearing, including further evidence if necessary, on ground (C). Since, however, Cooke, J., found in favour of the Respondent on ground (B), ground (C) does not fall to be considered in this Appeal. p. 27, l. 44. p. 33, l. 1. p. 32, l. 8.

7. Evidence was given by Kenneth Allen Henderson, a Director of the Respondent Company, that his company had bought 108 Rangitikei Street aforesaid in 1941 with the intention of building a garage thereat as soon as circumstances permitted. At the time the Respondent purchased p. 6, l. 27. p. 9, l. 36.

p. 7, l. 9. the premises the Appellants were in occupation under a lease due to expire the 1st August 1944 and conducting thereat the aforementioned
p. 7, l. 4. Rangitikei Private Hotel. The Respondent told the Appellants at that
p. 7, l. 7. time of its intention to build a garage as soon as possible. Prevailing
p. 7, l. 8. conditions made it impossible however to build and the Respondent
p. 7, l. 10. entered into negotiations with the Appellants resulting in the said agreement of the 29th August 1944. Shortly before the expiry of that
p. 7, l. 14. agreement there was a fire in the premises and in December 1945 the Respondent agreed to extend the Appellants' tenancy until the 1st August 1946 and that thereafter it should be terminable by three months' notice.
p. 7, l. 22. On the 16th April 1946 the Respondent and the Appellants entered into a written undertaking with the Corporation of the City of Palmerston North whereby in consideration of the grant of permission for temporary repairs to the Rangitikei Private Hotel the Respondent and the Appellants agreed to demolish or permit to be demolished the said Private Hotel upon the expiration of a three months' notice from the said Corporation.
p. 7, l. 31. In 1948 the Respondent brought proceedings against the Appellants for possession of the premises which were dismissed by Hutchinson, J., on the 12th August 1949 (reported in (1950), N.Z.L.R. 8). In the course
p. 58, ll. 18 & 22. of the hearing in that case both the Appellants gave an assurance to the Judge that once the Respondent obtained its building permit they would
p. 7, l. 38. go out. On the 15th November 1951 the Respondent obtained a building permit for the erection of new premises at 108 Rangitikei Street at an estimated cost of £30,000 and thereafter served on the Appellants the
p. 7, l. 45. notice dated the 20th December 1951 referred to in paragraph 5 hereof.
p. 7, l. 47. On the 7th April 1952 the City Council of Palmerston North served notice on the Respondent requiring it to demolish the buildings standing at
p. 8, l. 13. No. 108 Rangitikei Street pursuant to the said undertaking of the 16th April
p. 8, l. 44. 1946. The Respondent has arranged the necessary finance for its new
p. 9, l. 4. building. The Respondent has a General Motors franchise for certain makes of motor car and was being pressed by General Motors to construct
p. 9, l. 8. a new garage. If the Respondent were unable to build, its position would be very serious because General Motors would look for another agent
p. 9, l. 9. with more up-to-date premises. The Respondent's franchise was in jeopardy. The Respondent had repeatedly informed the Appellants of
p. 9, l. 28. the position and immediately they had received permission to build they pressed the Appellants to give up possession of the premises.

p. 16, l. 28. 8. Evidence for the Appellants was given by Vincent Leo Gifford, the second Appellant, who described the nature of his business and said
p. 17, l. 15. that he had had no success in finding other premises and had not the
p. 17, l. 18. means to build a new private hotel but admitted that he had owned two
p. 19, l. 42. houses in Palmerston North and that his partner the first Appellant owned
p. 17, l. 20. eight properties in the same town of a value of approximately £12,000. He stated that he had carried on the occupation of a private hotel
p. 17, l. 24. proprietor for 26 or 27 years in the premises. He had known since the Respondent bought the premises or about then the purpose for which the Respondent had bought them and that it intended to build thereon as
p. 17, l. 26. soon as possible. Until 1951 he had led the Respondent to believe that when it obtained a permit to build he would be willing to vacate the
p. 17, l. 27. premises. His sole reason for declining to observe previous undertakings to give up the premises was on account of money he had spent on the

premises since 1945 and legal advice that he had received. It would depend upon the amount of compensation whether he would be prepared to vacate the premises. He had discussed with Mr. Porter of the Respondent Company accepting compensation for the money that he had spent on the premises if he would vacate them. Even if satisfactory compensation were arranged he would not now be prepared to give the same assurance that he would go out as he gave to Hutchison, J. He admitted that permission from the City Council to carry out repairs after the fire in 1945 was only obtained upon his agreement to sign the undertaking to demolish the premises after notice. p. 17, l. 30. p. 17, l. 34. p. 18, l. 40. p. 19, l. 28.

9. It was admitted by the Statement of Defence that the Palmerston North City Council had given notice to the Appellants on the 7th April 1952 requiring them to permit the said premises to be demolished. p. 5, l. 28.

10. Further evidence for the Appellants was given by a number of other witnesses as to the hardship which they alleged would be caused to the Appellants and to other persons if an order for possession were made. p. 22, l. 1– p. 25, l. 15.

11. On the 4th December 1953 Cooke, J., gave Judgment for the Respondent and made an order for possession, execution of which was suspended until the 30th June 1954, and reserved the question of costs. Cooke, J., gave the following among other reasons for his Judgment. He held that on the evidence the Respondent had established that it reasonably required the land for its own occupation and that it reasonably required the buildings for demolition. He said that he thought that the word " premises " in paragraph (*h*) includes both land and buildings but that as used in paragraph (*m*) the word refers only to buildings. He thought that there was sufficient reason for construing the word in the former sense in paragraph (*h*) and in the latter sense in paragraph (*m*). He added : p. 25, l. 18. p. 34, l. 12. p. 28, l. 38. p. 28, l. 41. p. 28, l. 45.

> " It seems to me, too, that circumstances may exist in which a landlord would not speak inconsistently if he made assertions that brought his case within each of the two paragraphs. Thus, in the present case, the landlord has in one breath said in effect that ' the premises ' are required for its own occupation and that ' the premises ' are required for demolition ; and I think that in the circumstances the first of these assertions means that ' the premises ' that are required for occupation are the land and that the second of those assertions ' the premises ' means the buildings that are themselves to be demolished. The plaintiff, having, as I think, established both the ground contained in paragraph (*h*) and the ground contained in paragraph (*m*) is entitled to have its case dealt with as it asks that it should be dealt with, on the footing that it rests on the former ground alone." p. 29, l. 1– p. 29, l. 12.

He then considered the exercise of his discretion under section 24 (2) of the Act. He found that the refusal of an order for possession would cause hardship to the Respondent and that the making of an order would cause considerable loss and therefore considerable hardship to the Appellants. He felt that the giving by the Appellants of the assurance before Hutchison, J., and the refusal to renew it before him if satisfactory compensation were arranged for the intervening expenditure was " a p. 29, l. 13. p. 29, l. 24. p. 29, l. 29. p. 30, l. 29.

matter that must go pretty heavily into the scale " in favour of the
p. 31, l. 19. Respondent in this case. Having considered the evidence he came to the conclusion that looking at the matter only as between the Plaintiff and the Defendants the just and proper course would be to exercise the discretion under section 24 (2) in favour of the Respondent and to make
p. 33, l. 5. an order for possession. He then addressed his mind to the meaning of the expression " any other person " in relation to section 24 (2) of the Act
p. 33, l. 42. and, having considered the evidence, he did not think that any hardship " to any other person " would be great enough to turn the scales against the Respondent. 10

p. 36, l. 1. 12. The Appellants appealed to the Court of Appeal of New Zealand (Gresson, Hay and Turner, JJ.). On the 8th December, 1954, the Court of Appeal gave judgment dismissing the Appellants' Appeal with costs. The judgment of the Court was delivered by Turner, J., who said that in
p. 38, l. 8. subsection (*m*) " premises " could mean only the buildings on the land since it is clear that only buildings could be demolished or reconstructed.
p. 38, l. 12. In subsection (*h*), however, " premises " must mean the land with any buildings thereon since (*h*) could undoubtedly have reference to urban land upon which no buildings are erected of which possession is sought. He
p. 39, l. 4. agreed with the judgment of Cooke, J., as to the meaning of the word 20 " premises " and said :—

p. 39, l. 5. > " We are therefore led to prefer the view of Cooke, J., to that of Hutchison, J. on this point, and to conclude that ' premises '— i.e., land and the buildings upon it—may be required by the landlord for his own occupation when it is the intention of that landlord, upon obtaining possession, to demolish or reconstruct the ' premises '—i.e., the buildings situate upon the land. This conclusion disposes of the appeal in so far as it is based on the construction of section 24 (1) (*h*) and (*m*)."

p. 39, l. 11. Turner, J., then considered the further ground of appeal of the Appellants 30 that Cooke, J., had misdirected himself in the exercise of the discretion given to him under section 24 (2) and stated that it was the conclusion of
p. 40, l. 9. the Court of Appeal that it had not been shown that Cooke, J., had acted on a wrong principle and therefore the Court of Appeal would not interfere.

p. 48, l. 1–
p. 53, l. 20. 13. On the 3rd June, 1955, the Court of Appeal of New Zealand granted as of right leave to appeal to Her Majesty in Council.

14. The Respondent submits that this Appeal should be dismissed with costs for the following amongst other

REASONS 40

(1) BECAUSE, as the Courts below have rightly held, upon a true construction of section 24 (1) (*h*) of the Act the word " premises " means the land with any buildings thereon.

(2) BECAUSE on a true construction of section 24 (1) of the Act premises comprising land with buildings upon

it are required by the landlord "for his . . . own occupation" within the meaning of paragraph (*h*) if his intention is upon obtaining possession to demolish the existing buildings on the land and erect new buildings in their place for the purposes of his own occupation.

(3) BECAUSE the evidence showed that the premises are reasonably required by the Respondent for its own occupation.

(4) BECAUSE the learned trial judge rightly addressed his mind to the matters which he was required to consider in relation to the exercise of his discretion under section 24 (2) of the Act and there is no ground for interfering with the exercise by him of his discretion in favour of the Respondent.

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(5) BECAUSE the Judgments of both the learned trial judge and of the Court of Appeal were right.

LIONEL A. BLUNDELL.

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Case for the Respondent

WRAY, SMITH, PATERSON & CO.,
3–4 Adelaide Street,
Strand,
London, W.C.2,
Solicitors for the Respondent.

The Solicitors' Law Stationery Society, Limited, Law and Company Printers
22 Chancery Lane, W.C.2. N5311–22579