Privy Council Appeal No. 44 *of* 1955

Matthew James McKenna and another - - - - *Appellants*

v.

Porter Motors Limited - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1956

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD TUCKER
LORD COHEN
LORD SOMERVELL OF HARROW

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment of the Court of Appeal, New Zealand, dismissing an appeal from an order of the Supreme Court under which the appellants had to give to the respondents possession of premises known as the Rangitikei Private Hotel in the City of Palmerston North.

The appellants have been lessees of the premises since 1926. In 1941 the respondents bought with other adjoining property the reversion of these premises intending to demolish the hotel and build a garage for the purposes of their own business as soon as they could get possession and obtain the necessary licences.

The appellants' lease expired in 1944. By an agreement dated 29th August, 1944, the respondents granted to the appellants a new lease for one year from 1st August, 1944. The appellants continued in occupation on the terms of that lease. Before summarising the events which led up to the present proceedings it will be convenient to set out the provisions of the Tenancy Act 1948 (No. 76) as amended on which the present appeal depends.

Section 2. Interpretation. In this Act unless the context otherwise requires—

> "" 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 tenant's income or a substantial part thereof is derived from the use of that land for agricultural purposes:
>
> "Licensed premises" has the same meaning as in the Licensing Act 1908:

"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 dwellinghouse; 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."

"Section 24.—Limiting grounds for recovery of possession.—

(1) An order for the recovery of possession of any dwellinghouse 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:

(*g*) In the case of a dwellinghouse, that the premises are reasonably required by the landlord or by one or more of several joint landlords for his or their own occupation as a dwellinghouse:

(*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."

The effect of section 25 on the present proceedings may be summarised as follows. If a year's notice to quit has been given then an order may be made under section 24 (*h*) although the landlord does not offer alternative accommodation. The Court has still to apply section 24 (2) which has been set out. To succeed under sub-section (*m*) there must be an offer of alternative accommodation and there was no such offer in the present case.

In 1949 the respondents sought an order for possession with a view to demolishing the hotel and building the garage. The respondents among other grounds submitted that in the circumstances as stated the premises were required for their own occupation under section 24 (1) (*h*). Hutchison, J., before whom the case came held that a landlord could not require premises for his own occupation within sub-section (*h*) if his intention was to demolish the existing building. In other words a landlord who intended to demolish must proceed under sub-section (*m*) although he intends himself to occupy after demolition and reconstruction. No order for possession was made and the appellants continued in occupation.

A different conclusion had been expressed obiter by Williams, J., in the High Court of Australia in 1948 (*Burling* v. *Chas. Steele and Company Proprietary Ltd.* 76 C.L.R. 485). The case arose under the National

Security (Landlord & Tenant) Regulations which contained provisions similar to sub-sections (*h*) and (*m*), which were as follows:

> (*g*) that the premises . . . (ii) not being a dwellinghouse—are reasonably required for occupation by the lessor or by a person associated or connected with the lessor in his trade, profession, calling or occupation . . . (*l*) that the premises are reasonably required by the lessor for reconstruction or demolition.

Williams, J., said:

> "This ground", (that is (*g*)), "applies whenever the lessor requires the premises, which means the land leased together with the buildings thereon, for his own occupation or for a person associated or connected with him in his trade, profession, calling or occupation. As part of such occupation he is quite entitled to do what he likes with his own land, including reconstructing or demolishing the existing buildings. Ground (*l*) applies where the landlord requires the premises for reconstruction or demolition with a view to letting or selling them or making some use of them other than his own occupation or the occupation of a person associated or connected with him in his trade, profession, calling or occupation."

On the 28th September, 1951, the respondents served on the appellants the year's notice under section 25 referred to above. Apart from that fact, the events prior to the present proceedings which began in 1953 are not relevant. By their statement of claim the respondents claimed possession on three grounds only one of which, namely that based on sub-section (*h*), arises on this appeal.

It was common ground that the decision of Hutchison, J., did not create an estoppel. Cooke, J., before whom the case came in the Supreme Court held that the respondents reasonably required the premises for their own occupation, notwithstanding their intention to demolish the hotel. He then considered the matter under sub-section 24 (2) and made an order for possession. His conclusion on this latter point was challenged unsuccessfully in the Court of Appeal but was not challenged before the Board.

In the Court of Appeal the judgment of the Court was delivered by Turner, J. After referring to *Burlings* case Turner, J., said this:

> "Alternatively, Mr. Hardie Boys argued that a landlord cannot be said to require premises for his occupation when he really intends to demolish the buildings which form a part of those premises. He contended that occupation of the premises meant occupation of each part of the premises, and that this is inconsistent with an intention to demolish any substantial part. We do not think that there is any inconsistency. It may be worth noticing that, while in the case of a dwellinghouse sub-section (*g*) provides that the premises must be reasonably required by the landlord . . . for his occupation as a *dwellinghouse*, in sub-section (*h*) the corresponding provision relating to urban property, there are no words corresponding to those italicised. A landlord may, in our opinion, enter into occupation of premises intending as part of his enjoyment thereof to demolish the buildings, and substitute others therefor which he in turn will occupy; he is occupying the premises if he occupies the land and such buildings as from time to time are situate thereon. In the case of urban property, we do not find any words in the section which conflict with this view."

After considering the points raised under section 24 (2) the Court dismissed the appeal. The appellants submit that the "premises" means the subject matter of the lease and in the present case that included the hotel. There must therefore, it is contended, be an intention to occupy the hotel in order to satisfy sub-section (*h*) and this intention is absent.

Their Lordships agree with the submission that both in sub-section (*h*) and in sub-section (*m*) the word "premises" means the subject matter

of the lease. In this respect they cannot accept the views of Cooke, J., and the Court of Appeal. The demolition contemplated by sub-section (*m*) is demolition "on" and not "of" the premises. It is in the latter part of their submission that the appellants fail. The real question turns on the meaning of "his or their own occupation". Apart from sub-section (*m*) there would be no doubt that a landlord required demised premises for his own occupation although he was intending for the purposes of his occupation to make substantial alterations, or put up a wholly new building. The difficulty arises from the existence of sub-section (*m*). Is that to be construed as covering all demolition or reconstruction cases including those where the landlord will remain in occupation or do the words of sub-section (*h*) limit its operation in the way stated by Williams, J.

Their Lordships are of opinion that its scope is so limited. This gives their natural meaning to the words "for his or their own occupation" while leaving a scope for sub-section (*m*), which accords with the distinction plainly drawn by sub-sections (*g*) and (*h*) between landlords who require to relet or resell and landlords who require to occupy. This construction is supported by section 30 which provides inter alia that a landlord who within two years relets or resells premises of which he has obtained possession under sub-sections (*g*) or (*h*), shall be guilty of an offence. If the appellants' argument is right one might have expected the demolition and reconstruction of a building within two years on premises of which possession had been so obtained also to have been made an offence.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the respondent's costs.

(39797) Wt. 8069—3 90 8/56 D.L.

In the Privy Council

MATTHEW JAMES McKENNA
AND ANOTHER

v.

PORTER MOTORS LIMITED

[DELIVERED BY
LORD SOMERVELL OF HARROW]

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