

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

EWEN NEIL ROSS

Appellant

- and -

JOHN SAMUEL LESTER HENDERSON

Respondent

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CASE FOR THE RESPONDENT

RECORD    REPORT

HISTORY OF ACTION

1. This is an appeal from the judgment of the Court of Appeal of New Zealand (Richmond, P., Woodhouse and Cooke, J.J.) given on the 22 July 1976 dismissing an appeal and allowing a cross-appeal from the judgement of the Supreme Court of New Zealand (Beattie, J.) given on 21 January 1976.

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2. In January 1971 negotiations between the appellant and the respondent commenced concerning a dairy farm of some 345 acres at Reporoa owned by the appellant. The outcome of these negotiations was that a memorandum of lease dated 24 May 1971 was signed between the appellant as lessor and the respondent as lessee. The relevant terms were:-

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- p. 17            (a) The land was leased by the appellant to the respondent for five years from the 1st June 1971.
- p. 17            (b) The annual rental was \$3,000.
- p. 20            (c) There was no right of compensation for improvements (clause (c)).
- (d) There was no right of renewal.
- p. 22            (e) (Clause (vv) contained an option to purchase in the following terms:- 10
- "(vv) 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) 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 Division of the Supreme Court for the consent thereto." 20
3. A declaration made pursuant to s 24 of the Land Settlement Promotion and Land Acquisition Act 1952 ("the Land Settlement Act") was deposited with the District Land Registrar at Hamilton on the 24th June 1971. 30
4. The respondent moved into possession on the 2nd June 1971 and had remained in possession farming the land as a dairy unit until the
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- l. 18

date of hearing.

5. By letter of the 3rd July 1974 the appellant's solicitors wrote to the respondent's solicitors advising that the appellant is not prepared to proceed with the option which the lease purports to give pursuant to Clause (vv). p. 34

THE PROCEEDINGS

- 10 6. By writ of summons and statement of claim dated the 31st January 1975 the respondent commenced proceedings in the Supreme Court of New Zealand at Rotorua seeking a declaration that the option contained in Clause (vv) is valid and enforceable. p. 1  
p. 3  
l. 16
- 20 7. Alternatively, if the option be unlawful and of no effect as being in contravention of the Land Settlement Act, the plaintiff sought relief pursuant to s. 7 of the Illegal Contracts Act 1970 ("the Illegal Contracts Act") by way of an order that the option be validated in whole. p. 3  
l. 33
- 30 8. The appellant's statement of defence (undated) pleaded that if a declaration pursuant to s 24 of the Land Settlement Promotions Act was deposited, such declaration did not in terms relate to the transaction for the granting of an option to purchase the freehold of the land and that since no application had been made within the prescribed time for consent to the transaction, contained in Clause (vv) of the memorandum of lease, the transaction was of no effect. p. 4

IN THE SUPREME COURT

9. The action was heard in the Supreme Court at Rotorua on the 18th and 19th November 1975.
- 40 10. For the respondent evidence was called from Mr. Daniel O'Dea, the respondent's solicitor, relating the history of the transaction, producing the relevant correspondence and describing the events leading up to the completion of the memorandum of lease and the completion and deposit of the 24 declaration. p. 5  
He described the lodging of a caveat,

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- the attempt to register the lease referred to and the correspondence concerning the validity of the option that led up to the commencement of the proceedings. He also gave evidence of the practice amongst conveyancers concerning the use of the declaration procedure in the case of an option to purchase contained in a lease and concerning some allegations of breaches of the terms of the lease made by the appellant against the respondent. 10
11. The respondent gave evidence concerning the events leading up to the signing of the lease and confirming his intention to exercise the option. He gave further evidence relating to his expenditure on the farm during his period of occupancy. Since this evidence is no longer relevant to the issues on this appeal, it has been omitted by agreement from the record. 20
- p. 13  
l. 22
12. For the appellant the only evidence called was that of the appellant himself. His evidence concerned the negotiation leading up to the signing of the lease then his instructions to his solicitors to take up the question of the legality of the option to purchase. He referred to some difficulty concerning payment of the rent in the early days of the lease. Part of his evidence related to what would have been relevant to the validation issue and has been omitted from the record by agreement. 30
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13. As a result of this evidence and in the submissions by counsel, there emerged four issues, the first three of which remain the issues on this appeal. 40
- (a) Whether the declaration procedure prescribed in s 24 of the Land Settlement Act is available when a contract or agreement is for the granting of an option to purchase.
- (b) Whether the statutory declaration made and deposited by the respondent complied with s 24 (1) (d) of the Land Settlement Act in respect of the option

to purchase.

- (c) Whether the court has jurisdiction under s 7 of the Illegal Contracts Act to validate a contract that has been rendered unlawful and of no effect by s 25 (4) of the Land Settlement Act.
- 10 (d) If so, whether, in the circumstances of the present case, the court should exercise its discretion and validate the option.
14. In his reasons for judgment delivered on the 21st January 1976 Beattie, J. - p. 36
- (a) Found the facts relating to the negotiations leading up to the lease, the conduct of the parties since and the reasons why the appellant sought to avoid the option. p. 36  
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- (b) Concerning the issue in para. 13 (a) above, he concluded that where there is a lease which includes an option to purchase, in his opinion the purchaser or lessee can complete a declaration saying he has no farm land. p. 39  
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p. 42  
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- (c) Concerning the issue in para. 13 (b) above, he came to the conclusion that the declaration was inadequate to cover the option as well as the lease. p. 44  
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- (d) Concerning the issue in paragraph 13 (c) above, he adopted the contention by counsel for the respondent that the meaning of "subject to the express provisions of any other enactment" must be regarded against the whole of s 7 and that thus read, the court may grant relief subject to an express provision to the contrary against the granting of relief. Consequently he held that the Illegal Contracts Act applied. p. 53  
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- 40 (e) Concerning the issue in para. 13 (d) above, he held that the merits of granting relief were overwhelm- p. 53  
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ing in favour of the respondent.

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- (f) In the result he made an order that the option to purchase contained in clause (vv) of the Memorandum of Lease is to be valid for all purposes and awarded costs to the respondent.

IN THE COURT OF APPEAL

15. The appellant appealed to the Court of Appeal of New Zealand from so much of the judgment of Beattie, J. as related to:- 10
- p. 56  
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- (a) The decision that the holder of an option to purchase contained in a lease can satisfy the requirements of the Land Settlement Act by filing a s 24 declaration.
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- (b) The decision that s 11 of the Illegal Contracts Act can validate a contract deemed illegal by s. 25 (4) of the Land Settlement Act. 20
- p. 57  
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- (c) The order that the option to purchase be valid for all purposes.
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l. 25
16. The respondent cross-appealed contending that Beattie, J's judgment should be varied by holding that the declaration resulted in compliance with s 24 of the Land Settlement Act in respect of the option to purchase and that therefore the option to purchase was valid and enforceable. 30
17. The appellant has not challenged in the Court of Appeal nor will he challenge before the Judicial Committee of the Privy Council that, if the court had jurisdiction to validate the option, the discretion was properly exercised in favour of the respondent.
18. This appeal together with the appeals of 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 were heard on the 13 and 14 April 1976. The judgment of the court delivered by Cooke, J. on the 22nd July 1976 dismissed the appeal and allowed the cross-appeal with the effect that the reasons for the result in favour of the respondent were varied. 40
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p. 67  
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19. In its reasons for judgment, after reciting the clause containing the option, the facts leading up to the action and the relevant provisions of the Land Settlement Act, the court held -
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|  | p. 58 | p. 590 |
|  | l. 19 | l. 5   |
|  | to    | to     |
|  | p. 63 | p. 592 |
|  | l. 12 | l. 16  |
- (a) The word "purchaser" in s 24 (1) naturally includes a person who will become the purchaser if an option is exercised. After reviewing the objects and purpose of the Act in general, and the declaration procedure in particular, it found that the interpretation that s 24 may be used when an option is granted, seems rather more likely to achieve the object of the Act than an interpretation which would insist on a stipulation that the option be subject to the consent of the court. It pointed to the use of the term "purchaser" in s 35 B (e) as clearly including an option holder. It concluded by agreeing with Beattie, J. that the declaration procedure under s 24 is available where a contract or agreement to which Part II applies is for the granting of an option within s 23 (1) (e).
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|    | l. 37 | l. 30  |
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|    | l. 41 | l. 3   |
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|    | l. 48 | l. 8   |
| 30 | p. 65 | p. 593 |
|    | l. 20 | l. 18  |
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|    | l. 25 | l. 21  |
|    | p. 66 | p. 593 |
|    | l. 17 | l. 44  |
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|    | l. 27 | l. 50  |
- in farm land other than the land in which the declarant is acquiring for himself an interest or more than one

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p. 66    p. 593  
l. 33    l. 53

interest, It adopted the reasoning of Wilson, J. in Ferguson v. Scott [1967] 1 N.Z.L.R. 611.

(c) For reasons set out in the judgment of the Court in Harding v. Coburn [1967] 2 N.Z.L.R. 577, the court held that, if there had been a need for validation, jurisdiction would have existed under the Illegal Contracts Act and could properly have been exercised in this case. 10

HARDING v. COBURN

20. Since, for the appellant to succeed in the present appeal, the Board would have to decide that the decision of the Court of Appeal in Harding v. Coburn is wrong, it is necessary to review that decision also.

p. 577

21. This was an appeal from a decision of the Chief Justice Sir Richard Wild, declaring that an agreement for sale and purchase dated the 21st February 1973 between the defendant (appellant) as vendor and the plaintiff (respondent) as purchaser, to be valid for all purposes. The appeal was heard on the 13th and 14th April 1976. The judgment of the Court of Appeal of New Zealand was delivered by Cooke, J. on the 22nd July 1976. 20

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22. The agreement was a transaction to which Part II of the Land Settlement Act applied. Through a mistake in the office of the purchaser's solicitor, the wrong form of agreement was used, the agreement was not expressed to be subject to the consent of the court, the purchaser's solicitor omitted to lodge an s 24 declaration which the purchaser could have completed, and consequently, by virtue of s 25 (4) the transaction was deemed to be unlawful and of no effect. 40

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23. The purchaser (respondent) commenced an action praying for an order under s 27 of the Illegal Contracts Act validating the agreement. The issue before the court, therefore, was exactly the same as the issue set out in paragraph 13 (c), namely whether the court has jurisdiction under s 7 of the

p. 579  
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Illegal Contracts Act to validate a contract that has been rendered unlawful and of no effect by s 25 (4) of the Land Settlement Act.

- 24 The court concluded that it agreed with the judgment of the Chief Justice and the appeal was dismissed. The reasons that led to that conclusion may be summarized as follows:-
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- (a) After setting out the relevant provisions of the Illegal Contracts Act the court referred to the complications, difficulty and hardship that arose from the rule that existed before the enactment of the Illegal Contracts Act that the courts would not enforce a contract prohibited by Statute. p. 581  
l. 23
- 20 (b) The present contract became an illegal contract within the meaning of s 3 of the Illegal Contracts Act and the court set out the two ways in which this reason could be reached. p. 582  
l. 4
- (c) It considered the relationship between s 7 and s 6 finding that the crucial question is what provisions of other enactments are properly to be regarded as express provisions in conflict with s 7. p. 582  
l. 52
- 30 (d) It considers the part played by s 7 in the scheme of the Illegal Contracts Act. It points out that it is only when the ordinary consequences of illegality have been ascertained does s 7 come into play. S. 7 is concerned throughout with relief from these consequences. The subject matter of the section is discretionary jurisdiction to grant various kinds of relief. After describing the range of permissible relief it comments that there would be nothing in this inconsistent with the Land Settlement Act which is in no way directed against the discretionary judicial power to direct variation. p. 583  
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- 40 (e) There is no patent inconsistency p. 584  
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- between the provisions in the Land Settlement Act that a contract shall be of no effect, and the fourth specific kind of relief authorized by the Illegal Contracts Act - validation of the contract in whole or in part or for any particular purpose. Reading the two Acts in their natural and ordinary meanings prima facie there are strong reasons for holding that no part of the beneficial jurisdiction given by s 7 of the Illegal Contracts Act is excluded by s 25 (4) of the Land Settlement Act.
- (f) Looking for anything telling for or against that interpretation the court found no cogent consideration against it but several supporting it.
- (g) First it emphasized the use of the word "express" which it found significant suggesting that parliament meant to rule out arguments based on implication or inference.
- (h) Secondly, it finds support in s 7 (7) of the Illegal Contracts Act.
- (i) Thirdly, it refers to a number of other enactments which expressly make provision concerning relief to parties to illegal contracts. It comments:-
- "The words that have given rise to the whole argument in this case are a qualification on remedial powers conferred on the courts by way of much needed law reform. Being in the nature of an exception clause they should not be extended by interpretation further than reasonably necessary. It is not necessary to treat them as referring to such provisions as s 25 (4) of the Land Settlement and Land Acquisition Act."
- (j) Fourthly, the court examines the relief which the Illegal Contracts Act sets out to remedy, and points out that the Land Settlement Act was prominent among the measures giving rise to the mischief to be remedied.

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(k) Fifthly, the court points out that there is nothing in the subject matter of Part II of the Land Settlement Act which might have led parliament to any view that the power of validation should be withheld for a contract in breach of that Act no matter how technical or innocuous the transgression yet granted for contracts made unlawful by sundry statutes which do not happen to contain the words "of no effect" or "void".

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26. On the 29th November 1976 the Court of Appeal granted the appellants final leave to appeal to Her Majesty in Council from the judgement of the Court of Appeal.

THE RESPONDENT'S SUBMISSIONS

27. The respondent submits:-

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(1) The declaration procedure prescribed in s 24 of the Land Settlement Act is available when a contract or agreement is for the granting of an option to purchase.

(2) The statutory declaration made and deposited by the respondent complied with s 24 (1) (d) of the Land Settlement Act in respect of the option to purchase.

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(3) The court has jurisdiction under s 7 of the Illegal Contracts Act to validate a contract that has been rendered unlawful and of no effect by s 25 (4) of the Land Settlement Act.

28. THE RESPONDENT'S FIRST SUBMISSION:

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(a) The words "purchaser or lessee" in s 24 (1) (a) include a person who will become a purchaser or a lessee on the execution of an option and therefore include a person who has entered into a contract or agreement for the granting of an option to purchase.

(b) The words "purchaser or lessee" in s 24 (1) are intended to identify the person who may make a declaration under that sub-section.

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- (c) The opening words of s 24 (1) make clear the intention that s 24 should apply to any contract or agreement to which Part II applied. A contract or agreement for the granting of an option to purchase is a contract or agreement to which Part II applies.
- (d) To interpret s 24 so as to allow the use of the declaration procedure in respect of an option to purchase is an interpretation that will best ensure the attainment of the object of the Act and contribute to the smooth working of the scheme established by the Act. 10
- (e) To interpret s 24 so as to require an application to the court for an option to purchase is contrary to the object and scheme of the Act. It produces a result that is inconvenient or unreasonable and should be avoided when, as here, there is another construction available. 20

28. THE RESPONDENT'S SECOND SUBMISSION.

- (a) The object of Part II of the Land Settlement Act is the control of sales and leases of farm land to prevent undue aggregation, and ensure personal residence. The declaration procedure is one of the ways by which this object is achieved. 30
- (b) The purpose of the declaration procedure is to prove the matter stated in s 24 (1) (a), (b) and (bb). It is not necessary to achieve this purpose nor does the Act require that the declaration state specifically each transaction to which the Act applies.
- (c) The declaration dealt specifically with each of the requirements in s 24 (1).
- (d) The option was contained in a clause of the lease. The description in the declaration of the nature of the transaction as a lease dated the 24th day of May is a sufficient description of the document containing the two transactions to which the Act applied, namely the lease and the option. 40

(e) The word "transaction" in s 24 (1) (a) is a comprehensive word that includes all those particular kinds of transactions listed in s 23 (1). Here the transaction is the agreement or agreements contained in the document described as a memorandum of lease and dated the 24th day of May 1971.

10 (f) The expression "any farm land" in s 24 (1) (a) means any farm land other than the land the subject matter of the transaction.

29. THE RESPONDENT'S THIRD SUBMISSION.

(a) In determining the jurisdiction conferred by the Illegal Contracts Act the court should have regard to the mischief the Act was designed to remedy, namely the over-harsh consequences of a contract being found illegal as a consequence of s 6, the provisions of an enactment, the common law, or equitable principles.

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(b) "subject to the express provisions of any other enactment" in s (7) of the Illegal Contracts Act should be interpreted as meaning "subject to the express provisions of any other enactment concerning the granting of relief".

(c) Such an interpretation -

- 30 (i) Remedies the mischief.
- (ii) Is consistent with the words and purpose of s. 7.
- (iii) Is consistent with the provisions of the whole of the Act.
- (iv) Is consistent with the purpose and content of the Land Settlement Act.
- (v) Is consistent with the statutory provisions relating to illegality and the granting of relief contained
- 40 in other acts and regulations.

(d) S. 25 (4) of the Land Settlement Act does not contain provision concerning the granting of relief. Neither the words "shall have no effect" in that section nor the subject

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matter of all of Part II of the Land Settlement Act indicate an intention to restrict the granting of relief.

- (e) "Shall have no effect" is not an express provision against the granting of relief.
- (f) There is no conflict between s 25 (4) of the Land Settlement Act and s 7 of the Illegal Contracts Act.
- (g) The respondent respectfully adopts the reasons adopted in the judgements of the Supreme Court in -

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Dreadon v. Fletcher Development Co. Ltd.  
[1974] 2 N.Z.L.R. 11.

Coburn v. Harding (unreported 23/10/74).

R.D. Bull Ltd. v. Broadlands Rental Ltd.  
[1975] 1 N.Z.L.R. 304.

Ferguson v. Scott [1976] 1 N.Z.L.R. 611.

The case under appeal.

And by the Court of Appeal in Harding v. Coburn [1976] 2 N.Z.L.R. 577.

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30. The respondent contends that this appeal should be dismissed with costs for the following, among other,

REASONS

- (i) BECAUSE the Court of Appeal was correct in holding that the declaration procedure is available where the contract or agreement is for the granting of an option.
- (ii) BECAUSE the Court of Appeal was correct in holding that as regards the option the statutory declaration complied with s 24 (1) (d) of the Land Settlement Act.
- (iii) BECAUSE the Court of Appeal was correct in holding (in Harding v. Coburn) that the court has jurisdiction under s 7 of the

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Illegal Contracts Act to validate  
a contract that has been rendered  
unlawful and of no effect by s 25  
(4) of the Land Settlement Act.

D.L. TOMPKINS, Q.C.  
R.T. FENTON

No. 4 of 1977

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CASE FOR THE RESPONDENT

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