

19 of 1977

IN THE PRIVY COUNCIL

No. 4 of 1977

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

EWEN NEIL ROSS

Appellant

- and -

JOHN SAMUEL LESTER HENDERSON

Respondent

RECORD OF PROCEEDINGS

MACFARLANES,
Dowgate Hill House,
London, EC4R 2SY.

Agents for :

Kelly, McNeil & Co.,
Hastings,
New Zealand.

WRAY, SMITH & CO.,
1 King's Bench Walk,
Temple,
LONDON, EC4Y 7DD.

Agents for :

O'Dea & O'Dea,
Hawera,
New Zealand.

(i)

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IN THE PRIVY COUNCIL

No. 4 of 1972

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

EWEN NEIL ROSS

Appellant

- and -

JOHN SAMUEL LESTER
HENDERSON

Respondent

10

RECORD OF PROCEEDINGS

No. 1

STATEMENT OF CLAIM

IN THE SUPREME COURT OF NEW ZEALAND
ROTORUA REGISTRY

A. No. 18/75

In the Supreme
Court of New
Zealand

No. 1

BETWEEN JOHN SAMUEL LESTER
HENDERSON of Reporoa,
Farmer

Statement of
Claim

31 January 1975

Plaintiff

A N D EWEN NEIL ROSS of
Hastings, Farmer

Defendant

20

STATEMENT OF CLAIM

Friday the 31st day of January 1975

THE PLAINTIFF by his Solicitor, DANIEL O'DEA
says :

In the Supreme
Court of New
Zealand

—
No. 1

Statement of
Claim -

continued

31 January 1975

1. THE Defendant is the registered proprietor of those pieces of land -

- (a) Containing 159 acres 2 roods 36 perches being all the land in Certificate of Title Volume 1747 Folio 91S
- (b) Containing 185 acres 1 rood 27 perches being Section 608 Reporoa Settlement and being all the land in Certificate of Title Volume 1103 Folio 1188.

2. BY Memorandum of Lease bearing date the 24th day of May 1971 the Defendant did thereby lease to the Plaintiff the land described in the preceding paragraph hereof for five (5) years from the 1st day of June 1971, on the terms, covenants and conditions set out in the Memorandum of Lease. 10

3. THAT Clause (vv) of the Memorandum of Lease provides -

"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 lands herein-before described at the expiry of the said notice at the price of SIXTY FIVE THOUSAND DOLLARS (\$65,000.00) 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 30 40

This clause is hereinafter referred to as "the option".

3.

4. ON the 24th day of June 1971 the Plaintiff deposited with the District Land Registrar at Hamilton a true copy of a declaration within s.24(1)(d) of the Land Settlement Promotion and Land Acquisition Act 1952 in respect of the transactions set out in the Memorandum of Lease.

In the Supreme
Court of New
Zealand

—
No. 1

Statement of
Claim -

continued

31 January 1975

10

5. THE Defendant has alleged that the declaration referred to in the preceding paragraph hereof does not apply to the option and that the option is entered into in contravention of the Land Settlement Promotion and Land Acquisition Act 1952 and is therefore unlawful and of no effect.

WHEREFORE the Plaintiff prays for :

20

- (a) A declaration that the option is valid and enforceable.
- (b) An order that the defendant pay the costs of and incidental to these proceedings.
- (c) Such further or other relief as in the circumstances may be just.

AND AS A FURTHER AND ALTERNATIVE CAUSE OF ACTION the Plaintiff repeats the preceding paragraphs hereof and says :

30

6. THAT if the option be unlawful and of no effect as being in contravention of the Land Settlement Promotion and Land Acquisition Act 1952 the Plaintiff seeks relief pursuant to s.7 of the Illegal Contracts Act 1970.

WHEREFORE the Plaintiff prays for :

- (a) An order that the option be validated in whole.
- (b) An order that the Defendant pay the costs of and incidental to these proceedings.
- (c) Such further or other relief as in the circumstances may be just

In the Supreme
Court of New
Zealand

STATEMENT OF DEFENCE

—

The Defendant says:

No. 2

Statement of
Defence

(Undated)

1. THAT the Defendant admits that he is the registered proprietor of an estate in fee simple in the pieces of land described in paragraph 1 of the statement of claim.

2. THAT the Defendant admits the allegations contained in paragraph 2 of the statement of claim.

3. THAT the Defendant admits the allegations contained in paragraph 3 of the statement of claim. 10

4. THAT the Defendant denies each and every allegation contained in paragraph 4 of the statement of claim.

5. THAT in answer to the allegations contained in paragraph 5 of the statement of claim the Defendant says:

(a) that, if a true copy of a statutory declaration as prescribed by section 26 of the Land Settlement Promotion and Land Acquisition Act 1952 was deposited with the District Land Registrar at Hamilton (which is denied), such declaration did not in terms relate to the transaction for the granting of an option to purchase the freehold of the lands described in paragraph 1 of the statement of claim, as contained in Clause (vv) of the Memorandum of Lease; and 20 30

(b) that since no application has been made within the prescribed time for the consent of the Administrative Division of the Supreme Court to the transaction contained in Clause (vv) of the Memorandum of Lease, as required by section 25(1)(a) of the Land Settlement Promotion and Land Acquisition Act 1952, the transaction is deemed to have been entered into in

5.

contravention of Part II of that Act and by virtue of the provisions of section 25(4) thereof has no effect

In the Supreme
Court of New
Zealand

No. 2

BUT except as may herein be expressly admitted the Defendant denies each and every allegation contained in paragraph 5 of the statement of claim.

Statement of
Defence -

10 6. THAT the Defendant is not required to plead to paragraph 6 of the statement of claim.

continued
(undated)

No. 3

NOTES OF EVIDENCE TAKEN BEFORE
THE HONORABLE MR JUSTICE BEATTIE

No. 3

[By consent Memorandum of Lease 24.5.71 produced as EXHIBIT A and Bundle of Correspondence produced as EXHIBIT B.]

Notes of
Evidence

Plaintiff's
Evidence

MR TOMPKINS OPENS FOR PLAINTIFF AND CALLS:

20 DANIEL O'DEA a Solicitor acting in Hawera. I had acted for plaintiff in other matters. My initial instructions from Mr Henderson - he called in person and he handed to me the letter from Dalgetys of 5.2.71, p.2. of Exhibit B. Following those instructions, I wrote to the solicitors that I understood then acted for defendant, the letter 23.3.71. I received the letter from them of 6.5.71 enclosing a lease and asking for a Declaration under Land Settlement Act. I replied on 18.5.71 enclosing the lease
30 executed in duplicate and a Statutory Declaration under s.24 which is on p.7 of the bundle. That was prepared on my instructions. When I issued instructions for the Declaration's preparation, I was aware that Land Settlement Act applied both to the option to purchase and to the lease itself. The Declaration is headed up "In the Matter of the Land Settlement Promotion and Land Acquisition Act 1952 (hereinafter referred to as "the Act"), and In the Matter of Lease dated the
40 24th day of May 1971" as it was a lease, it

Daniel O'Dea
Examination

In the Supreme
Court of New
Zealand

No. 3

Plaintiff's
Evidence

Daniel O'Dea

Examination -

continued

was an option to purchase and I took that option as being another clause in the lease, being part of the lease and that was the view I have held all the time. I sent the Declaration to vendor's solicitors in Taranaki District usual practice is for vendor's solicitors to be satisfied lease registered and necessary formalities been taken care of and file it in duplicate with District Land Registrar and duplicate copy comes back and when go to register lease, send duplicate up. District Land Registrar excepts the original - Declaration, we understood vendor's solicitors would register the lease and lodge Declaration at the same time, as a rule, yes. In Simpson, Bate & Wane's letter of 15.6.71, Declaration was returned for deletion of paragraph 8 and a bit been written in 'N.B. Alter date of Declaration'. The date was originally 14th but Vendor's solicitors dated lease 18th so obviously the Declaration had to be brought into line so that the lease in existence was signed by the vendor at that time. I initialled alteration when I did it and sent Declaration back to defendant's solicitors with my letter of 17.6.71. I refer to letter of 21.6.71 (p.12) in which they returned Declaration in duplicate for filing. It is my understanding that Declaration in fact went back to them again but in event it was lodged in Land Registry Office and I received back lease with duplicate copy of the Declaration. Letter 21.6.71 (p.12) is to the District Land Registrar. It eventually came back to me from the District Land Registrar. The letter I received 3.7.74 (p.17) from Kelly, McNeil & Co., states defendant does not intend to proceed with option and that was the first knowledge I received that they contested validity of option.

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BENCH: From August 1971 to July 1974? Yes.

COUNSEL: In December 1972 I had an indication from my client, had a ring from him that Ross was going to put him off the farm. He seemed to think they knew the lease hadn't been registered and I said I would fix that and put a caveat on both titles showing that

10 there were leases in existence. It is correct
that the caveat was lodged in December 1972.
Following receipt of Kelly, McNeil's letter
of 3.7.74, I attempted to register the lease
and the result was that I wrote to State
Advances asking for their consent and to BNZ
asking them to produce the title; I found
BNZ Hastings holding first title as they had
mortgage on other title. Leases were present
but before BNZ title on which they had first
mortgage was registered, it was withdrawn.
The land involved in transaction is on two
titles, one subject to mortgage to State
Advances and the other subject to mortgage to
BNZ. The lease, in the end result, was
registered against Certificate of Title
1741/91 (159 a.) but not against Certificate
of Title 1103/18. There was then correspondence
20 between me and defendant's solicitors concerning
validity of the option, them saying they had
an opinion the option was not valid and it was
as a result of that these proceedings were
commenced.

30 XXD: MR BARTON: Is it the function of the
District Land Registrar on receiving a
Statutory Declaration under Land Settlement
Act to lodge it against the day when some
instrument for registration is presented in
accordance with the transaction covered in the
Declaration? ... - no, we file the
Declaration in duplicate; setting out date of
execution and District Land Registrar has a
file which he keeps one copy on and returned
other as evidence that it is lodged in Land
Transfer Office. He does that against the
day when some instrument is presented to him
for registration? Yes. When he receives
Declaration you prepared, he would be holding
it against the day when Memorandum of Lease
presented for registration? Correct. If
40 the option to purchase in Clause (vv) is valid
and exercised, there would subsequently be
Memorandum of Transfer? Yes. It is against
the day when Memorandum of Transfer is
presented that he needs to have some statutory
declaration showing that there was a
transaction relating to a transfer? I think
you will find that an option to purchase is a
lease, which is valid, is not necessary to

In the Supreme
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Zealand

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No. 3

Plaintiff's
Evidence

Daniel O'Dea

Cross-Examination

continued

have another declaration. You make your transfer pursuant to payment of money and to option to purchase in the lease so he only has to refer to his lease.

BENCH: You recite that in preamble to Memorandum of Transfer? Most of the forms have "pursuant to" on it and if you are in doubt you do another Declaration.

COUNSEL: You said you were aware Land Settlement Act applied both to lease and to option to purchase? Correct. Except for purpose of that Act, a lease is separate from option? No, if option to purchase is in the lease, it is part of the lease but I may be wrong. Your general understanding among conveyancers that if option to purchase is in lease, all you need to do is lodge Statutory Declaration relating to lease? Yes, big solicitors in Taranaki lodge Declaration and they sometimes put in the Option to Purchase. You accept that Declaration form nowhere gives, indicates anywhere, that there is option to purchase? No, but it refers to a lease and anybody searching register would look in lease. At time I was dealing with Simpson, Bate & Wane and I thought that it was really up to them to register in our view. They had to get consent of State Advances and Bank and I thought option to purchase is good, therefore, we will waive that condition in the meantime but eventually when validity of it was challenged, then I did my registration. Is it not the position that Simpson, Bate & Wane returned the documents to you to register? No. 23.8.71 (letter 14)? They returned it for Henderson's signature to be witnessed. Did they not contemplate, paragraph 2, that you would wish to register the lease? Yes I can see that now. The lessor's solicitors register, you say that is practice in Taranaki? Yes. Statutory Declaration - you will see description of the land just before Henderson's name appears had "(Taranaki)"? Yes. Was it in order to effect that change that Declaration sent to you? Yes, I would say so. It was sent

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10 back to somebody, may not have been to you?
I think it was sent to me. There was in fact
some communication from District Land Registrar
at New Plymouth saying he had been sent it from
Hamilton? I think he sent it back to Simpson,
Bate and I probably put it in envelope and
sent to South Auckland Registry. It went the
rounds? Yes. Every one dated actual date of
initial deposit as 24.6.71? Yes. Is it the
position that no application has at any time
been made for consent of Administrative Division
of Supreme Court? No, if you look at
correspondence, see they asked us for
Declaration first, strictly speaking it should
have been their application, not ours. No
application made to Administrative Division of
Supreme Court, only application to District
Land Registrar.

20 BENCH: You said strictly speaking lessor's
solicitors will make the application? Yes,
lessors and vendors make that application
with qualified application for lessor or vendor
to Administrative Division together with
declaration from purchaser or lessor - if he
has other land they want to know why he wants
this land. (See last sentence Clause M).

30 COUNSEL: You were not asked to supply a
Declaration which would be necessary if
application to Court made? I understood that
was the declaration Simpson, Bate wanted to
see and that is the one they sent back.

40 In answer to His Honour's question, when
you were dealing with the way in which a
Memorandum of Transfer would be drawn up
pursuant to option to purchase, p.3., line 4,
you indicated that there would be a recital in
the Transfer and His Honour said 'You recite
that in preamble to Memorandum of Transfer'
- you said 'Most of the forms have 'pursuant
to' on it and if you are in doubt you do
another Declaration.'? You do another
Agreement I think I said. What is the
Agreement you do on this one? Agreement
pursuant to option given in the Lease.
You exercise the option and treat that as
Agreement? I understood that is why
'pursuant to' was printed into the Transfer

In the Supreme
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Zealand

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No. 3

Plaintiff's
Evidence

Daniel O'Dea

Cross-Examination

continued

forms. You mean it is when you exercise the option you have another Agreement? No, I didn't quite say that, the position is that some firms insist on having another Agreement and reciting the Agreement, that Agreement made pursuant to option to purchase in the lease. What is second Agreement? Agreement for sale and lease. Because you are exercising option? Some firms do that. Before exercise of option? I understood 'pursuant to' was put in for express purpose of reciting a memorandum of lease. Also, that you were exercising the option? Yes, I suppose so, yes. If you were to have such a further agreement on the exercise of the option, is it the practice to have yet another statutory declaration? If you do an Agreement, do another Declaration as you have done an Agreement and because you are in doubt about your first option in lease? If do Agreement, have to file a declaration within a month from date within Agreement. Why should there be doubts about first option? Some firms do that, but I say personally it is not necessary but not really come across it until recently. Was it the position that you first learned new firm of solicitors, Kelly, McNeil, were acting for Ross when you received letter 3.7.74? That is correct. Why was it that you decided to lodge a caveat against the titles to Ross's land? My client rang me up and said he had been told the lease wasn't registered and I said I'd fix that by lodging caveat so nobody can deal with the matter without letting me know. Why not register lease? With hindsight I should have done it. What was the interest on which you relied for lodging caveat? That we had an unregistered Memorandum of Lease. Correct to say you relying on leasehold interest? Yes, I would say so, but as far as I was concerned option to purchase was in the leasehold, it was part of the lease. Do you accept that a person who has an option to purchase land has a different kind of interest from lessee under unregistered Lease? NOT REQUIRED TO ANSWER.

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In the Supreme
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Plaintiff's
Evidence

Daniel O'Dea

Cross-
Examination -

continued

In any event, caveat which you did lodge specified that estate or interest was "under an unregistered Memorandum of Lease 24.5.71"? Yes. That caveat was lodged against two Titles? Correct. Subsequently withdrawn? Yes, so that I could register the lease against but I couldn't register lease while caveat was there. Title against which you wished to register transaction of lease was one with State Advances mortgage on it? Yes, I wanted to do it against both Titles. The Title from which caveat was withdrawn had State Advances mortgage registered against it? Correct. You still act for Henderson? Yes. Is it true that over last several months a difference has arisen between you which it is proposed to submit to arbitration? Yes. Does it relate to allegations by Mr Ross that there have been breaches of covenant in the lease? Yes.

BENCH: Those allegations contemporaneous with or ex post facto exercising of option? We have not exercised option yet.

COUNSEL: Has Mr Henderson handed or shown you a formal notice in writing under s.118 of the Property Law Act calling on him to remedy alleged certain breaches of covenant? Yes, I had copy of that. I referred it to Mr Tompkins. Each of the parties, Ross and Henderson, nominated his arbitrator? Yes. Know whether they nominated referee? No, I referred it back to Kelly McNeil under advice of Mr Tompkins to put allegations into more like a statement of claim but they never returned it.

BENCH: To what period of time those allegations first relate? Some time earlier this year.

COUNSEL: The parties are on the brink of going to arbitration on matters alleged to be in dispute between them? Correct, depending on outcome of this case it may not be necessary.

TO BENCH: If this Court's decision should be in your favour? We will exercise the option.

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Plaintiff's
Evidence

Daniel O'Dea

Cross-Examination

continued.

COUNSEL: There will still be a lease with covenants under lease and alleged breaches with loss to lessor? No, my client will be owner if he exercises the option, if he doesn't do the work, that is his loss. At present time whether you exercise option or not, is the allegation that lessor has sustained that because you been in breach of covenant? Which we deny, of course. Is not the position also that from almost the inception of the lease, there were 10 difficulties over payment of rent? Don't know present position but were times he behind with rent. You get letters from Simpson, Bate urging you to put pressure on him to pay rent? Yes, he was always very late with his payment but eventually he paid. Was a clear breach, in respect of covenant to pay rent? Yes, I suppose there would have been in the early part. If the true view is that Henderson needs to apply to Supreme Court, Administrative Division, for 20 its consent to the option, have you given any thought to making that application and asking for extension of time? I haven't given any thought to it but I suppose we would have to, and quote the lease.

Re-Examination

REXM: On question of arbitration, has Henderson been advised not to complete it to arbitration until results of this done? I haven't done it, took that for his benefit.

John Samuel
Lester Henderson

Examination

MR HALFORD CALLS: JOHN SAMUEL LESTER 30
HENDERSON Reporoa, farmer, been farmer about 10 years. I recall January 1971, I was in Manaiia sharemilking. My contract finished that particular season and I saw an advertisement referring to a particular farm and looking at documents, Exhibit B No. 1 is a copy of that advertisement. As a result of that I got in touch with the land agents concerned and they wrote me a letter, No. 2, is a copy of that. When I received that we rang Mr Bray 40 and told him we would like to see over the property and we came up and viewed the property with Mr Bray. It had a lot of work to be done to it but it was a big farm and lay nice to the sun and being a young farmer it suited me and I told Mr Bray if he would fix it up I would take it under a lease with a right of purchase.

In the Supreme
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Zealand

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No. 3

Plaintiff's
Evidence

John Samuel
Lester
Henderson

Examination -
continued

Started off negotiating round about \$60,000
and it was sort of - it wasn't the price Mr
Ross wanted but I wasn't prepared to meet it
so we left it at that for time being and I went
to Havelock North to Mr Ross at orchard and
we finally came to price \$60,000. It was to
be leased with right of purchase, price fixed,
and term was 5 years. Annual rental \$3,000
per annum. I went and saw Mr O'Dea and told
10 him I had fixed a price and eventually Mr
Ross's solicitors would forward him a copy of
the lease. The lease eventually arrived and
we signed it. I later recall signing another
document. Looking at No. 7, Exhibit B, I
think I did sign original of that document.
At that time, I had no interest at all in any
other land whatsoever. I recall moving into
property 2.6.71 and I have lived there ever
since. At some stage I heard something about
20 Mr Ross wanting his land back, I heard something
along those lines but don't know what source
it came from. As to the option, I have always
had the intention to exercise that option,
it was subject to finance at the time. I am
quite confident that I can get the necessary
finance.

[..... . Omitted by Agreement]

CONCLUSION OF EVIDENCE FOR PLAINTIFF.

MR BARTON CALLS:

Defendant's
Evidence

Ewen Neil Ross

Examination

30 EWEN NEIL ROSS, Defendant. The firm of
Simpson, Bate and Wane, Hastings, acted as
my solicitors in connection with transaction
with Mr Henderson. After the initial
negotiations were concluded, I left all the
legal work to them. I did not know anything
at all about Statutory Declaration, I had no
knowledge whatsoever. I changed my solicitors
to Kelly, McNeil & Co. sometime in 1973 when
my ex-wife took me to the Court for a property
40 settlement. Mr Martin Brown of that firm
then began to act for me. It was necessary
for him to discuss with me what property I
owned so he could advise me in connection with
my wife's application and I handed to him my
copy of the Memorandum of Lease, that would be

In the Supreme
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—
No. 3

Defendant's
Evidence

Ewen Neil Ross

Examination -

continued

some time in 1973. After he had looked at that document and considered it, he gave me certain advice about it. His advice related to the option to purchase, among other things. He thereafter took up with Mr O'Dea the question of the legality of the option to purchase. There was some difficulty in the early days of the lease about getting rent paid promptly, was considerable difficulty at that stage, the first rent payment should have been met as at 1.6.71 and this was not met until some time in September 1971. The payment due next under the lease, not able to recall when that was paid. I have unfortunately lost all my legal correspondence relating to these matters when I left the orchard home in 1973 I only walked out with what I stood up in. I first visited the farm at Reporoa, after Mr Henderson had gone in possession, I think it was October or early November 1972. 10

BENCH: About 18 months after he had gone in? Yes, even though I had driven up and down the road on various occasions, I had not gone into the property. 20

COUNSEL: Since then, I didn't visit the property again until December 1974. I have visited the property virtually always with someone else but last time, 3 weeks ago, was the first time I had been by myself

[..... Omitted by Agreement]

Before the lease began, I was not farming property at Reporoa, I let it in July 1970 and had my eldest adopted boy run the farm for one season on wages for me, I paid him in excess of \$8,000 to run that farm property and nothing was done for that year so I could not afford to pay that boy that sort of money again to have that farm, absolutely nothing done for a year. I was living in Hawke's Bay during the year and 1970/71. 40

Cross-Examination

XXD: MR TOMPKINS: When you decided to sell this property early 1971, you place it in hands of Dalgetys? Yes. That was when? Might have been October/November 1970.

That was after you left the property yourself in July? Yes. Had you bought another property in Hawke's Bay? Yes, I had gone into an orchard business. When your son was operating farm, nothing was done on it? I paid the boy and he milked the cows only, it was a contract arrangement and I paid considerably more - within a contract arrangement. He just milked the cows and did no maintenance? Absolutely nothing. Was it after your experience of that that you realised that system not going to work? Right.

In the Supreme
Court of New
Zealand

No. 3

Defendant's
Evidence

Ewen Neil Ross

Cross-
Examination -

continued

Look at letter received from Dalgetys, Exhibit B, No. 2, asking price \$70,000 L.& B? Yes, we had tried year before to sell farm property at \$75,000 but in 1970/71 season, farming values came down a little bit. Dalgetys say - "This property is at present not very well farmed and you will appreciate that there is a fair amount of expense involved to bring it up to a high producing unit, and in our opinion this farm is worth between \$55,000 and \$60,000.", agree? No. What parts you not agree with? In 1971 when I had this boy on the property, actually when I left it in July 1970, it was worth more than than what it was worth in 1971. With what part do you not agree? I don't agree farm property only worth \$55-60,000. No, I don't agree a lot of expense required to bring the farm up to high producing property after all, basic ingredients were there. "The Owner who lives in Hawkes Bay, is very anxious to be relieved of the responsibility of running the farm and is prepared to have a good look at any workable proposition." That a good statement? That is the land agent's own words, I never gave that to the land agent. You were anxious to be relieved of running farm? Yes. Were prepared to look at workable proposition? I had marriage trouble with wife which was causing me trouble. Were prepared to look at workable proposition? Yes.

BENCH: That sentence is right then? Yes, it would be accurate.

In the Supreme
Court of New
Zealand

No. 3

Defendant's
Evidence

Ewen Neil Ross

Cross-
Examination -

continued

COUNSEL: You recall visit from Mr Henderson to your place in Hawkes Bay? Yes, he caught me on an extremely busy day, at times in year with farming am extremely busy. Was it at that meeting that outline of deal was arrived at, i.e., lease for 5 years, option to purchase at \$65,000? I can't recall the option to purchase that day at all. In 1971 you wanted to sell the place? Yes, at market value. In fact you entered into the lease with an option to purchase at end of 5 years? Yes. Why in July 1974 did you decide to seek to avoid the option?

10

BENCH: Why did you wish to avoid giving lessee a chance to get the property? For one reason, I had my ex-wife out vote me as Managing Director of orchard business; another reason, greatly escalating land values and I think that is quite enough reasons.

COUNSEL: If you were successful in getting farm back, you put it up for sale again? No, I would farm it myself again. Still own property in Hawkes Bay? No, I do not. That been sold? It has been used to settle a property settlement claim. My ex-wife owns it now.

20

[..... Omitted by Agreement]

Re-Examination

REXM: When you said your ex-wife had out-voted you as a director, explain what the company was of which you had been a director, what did it do? When I left Reporoa 1970 I formed company and gifted ex-wife 48% of share capital in the company and also gifted my children, including 3 adopted children, one share each and when my wife used shares of 3 adopted children to out-vote me as director. What owned orchard? I have no financial interest in the orchard whatsoever and am still unable - in Supreme Court ruling, April 1974, I was to have property settlement from orchard and am still unable to receive this. Does the company still own the orchard? Yes.

30

40

SUPREME COURT, ROTORUA

Approved by the Registrar-General of Land Wellington. No. 62/541432

NEW ZEALAND

MEMORANDUM OF LEASEEWEN NEIL ROSS of Reporoa, Farmer

1. Here state nature of the estate or interest.

being registered as the proprietor of an estate¹ in fee simple subject however to such encumbrances liens and interests as are notified by memoranda

FIRST

2. District, county, or township.

underwritten or endorsed hereon in all that piece of land situated in the² Paeroa Survey District S

3. Here state area, exclusive of roads intersecting the same, if any.

containing³ ONE HUNDRED AND FIFTY NINE ACRES TWO ROODS THIRTY SIX PERCHES (159ac. 2rd. 36pr.)

be the same a little more or less Sections 34 Block XV and being all the land in Certificate of Title Volume 1747 Folio 91S

SUBJECT TO: Section 59 of the Land Act, 1948, Mortgage S 187790

4. Here state rights of way, privileges, or easements, if any, intended to be conveyed: If the land to be dealt with contains all that is included in an existing grant, or certificate of title, or lease, refer thereto for description of parcels and boundaries in chains, links or feet, and refer to the plan delineated on the margin, or annexed to the Instrument or deposited in the Land Registry Office.

and Mortgage S 240074.

~~be the same a little more or less~~⁴

SECONDLY: All that piece of land containing ONE HUNDRED AND EIGHT FIVE ACRES ONE ROOD THIRTY SEVEN PERCHES (185ac. 1rd. 27pr.) be the same a little more or less Section 60 S Repora

Settlement and being all the land in Certificate of Title Volume 1103 Folio 188 S

SUBJECT TO: Mortgage No. S 196074, S 196075, S 240074 and

Section 206 of the Land Act, 1924.

DO HEREBY LEASE to JOHN SAMUEL LESTER HENDERSON of Manaia, Sharemilker (hereinafter referred to as "the lessee") all the said land to be held by him, the said John Samuel Lester Henderson as tenant for the space of five years from the 1st day of June, 1971 at the annual rental of THREE THOUSAND DOLLARS (\$3,000.00) such rent being payable half yearly in advance on the 1st days of June and December in each and every year throughout the said term SUBJECT HOWEVER to the following covenants conditions and agreements AND the lessee doth hereby covenant with the lessor in manner following that is to say:-

(f) THE lessee will not at any time during the term hereby created overstock the said land and will not during the last twelve months of the said term depasture upon the said land a greater number of stock than the average number they shall have had depasturing thereon during the preceding four years of the said term.

10 (g) THE lessee shall in all respects comply with the provisions of "The Dairy Industry Act, 1952" and its amendments and every Act that may thereafter be passed in amendment thereof or in substitution therefor and all the rules and regulations made or which shall be made thereunder so far as the same relate to the demised premises and under no circumstances shall the lessor be liable to pay or to contribute to expenditure by the lessee on buildings or other improvements upon the demised premises.

20 (h) THE lessee shall not without the precedent consent or leave in writing of the lessor's mortgage, charge or encumber, assign, transfer, sublease or sublet or otherwise part with the possession of the demised premises PROVIDED ALWAYS that the lessor's consent shall not be unreasonably withheld in the case of a respectable solvent responsible and experienced person PROVIDED FURTHER that if the lessee with the consent of the lessor assign, transfers demises, sublets, or otherwise disposes of or parts with the possession of the demised premises or any part thereof, the lessee shall in each and every case at his own expense procure the execution and delivery to the lessor by such assignee, transferee, sublessee, or subtenant of a Deed of Covenant whereby such assignee, transferee, sublessee or subtenant shall directly covenant with the lessor that he shall and will during the currency of the sublease or subtenancy in the case of a sublease or subtenancy and during the balance of the said term in the case of assignment or transfer duly and punctually pay the rent reserved by these presents and observe and perform all the covenants, agreements, and conditions contained or implied herein so far as the same are to be observed or performed by the lessee AND whereby such assignee, transferee, sublessee or subtenant shall also covenant that in the event of his assigning transferring, demising or subletting the said land or any part thereof, he will at his own expense procure, the execution and delivery to the lessor by the subsequent assignee, transferee, sublessee or subtenant of a Deed of Covenant in the same terms (including this part of this clause mutatis mutandis) such Deed or Deeds of Covenant to be prepared by the lessor's Solicitors PROVIDED FURTHER and it is hereby agreed and declared that the taking of any such Deed or Deeds of Covenant shall not in any way operate so as to release the lessee or any assignee, transferee, sublessee or subtenant from any liability imposed by these presents or any such Deed or Deeds of Covenant not prejudice any right or remedy whatsoever of the lessor against the lessee or any assignee, transferee, sublessee or subtenant.

50 (i) THE lessee shall not without the precedent written consent of the lessor fell, cut or destroy or permit or suffer to be cut, felled or destroyed and any shrubs or trees upon the said land or remove any timber or firewood therefrom.

(j) THE lessee shall not without the written consent of the lessor first had and obtained do cause or permit to be done any act deed matter or thing whereby any charge under Section 119 of "The Electric Power Boards Act, 1925" or under any amendment of the said Act or any Act substituted therefor shall or may be created upon or over the demised premises in respect of the same.

(k) ALL millable timber coal lignite stone clay flax gold mineral oil and other metals or minerals of whatsoever kind or nature in under or upon the said land are hereby reserved from expressly the said lease.

(1) THE lessee will permit the lessor either personally or by their agents or servants at all reasonable times to enter upon the said land and view and inspect the same and the condition thereof and the messuages, buildings, fences, hedges, ditches, drains and other improvements for the time being standing in upon or around the same and will immediately on receipt of written notice thereof from the lessor or his Solicitor or agent and make good to the satisfaction of the lessor or his Solicitor or agent any defects therein or in any part thereof.

10 (m) THE lessee shall and will immediately upon the execution of these presents by the lessor pay all costs and disbursements of and incidental to the lease of the said lands and will within seven days of the execution hereof 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 thereof hereto. Such
20 application shall be made and applied for by the lessor, or their Solicitors at the expense of the lessee.

(n) THE lessee will on demand pay to the lessor all moneys expended or expenses or costs incurred or sustained by the lessor in or about or incidental to the doing, effecting or carrying out of any of the acts, matters and things herein expressed or implied by the lessee to be done, effecting or carried out and as to which the lessee shall be in default or in or about or incidental to the lawful exercise of any power, right, remedy, liberty or privilege in these presents expressed or implied in favour of the lessors or incurred or sustained by the
30 lessor by reason of any default of the lessee in the observance or performance by him of any of the covenants and provisions herein expressed and implied and to be observed or performed by the lessee.

(o) AND it is hereby expressly agreed and declared by and between the parties hereto that no compensation whatsoever shall be payable or paid to the lessee in respect of any improvements that may be effected by the lessee on the demised land during the term hereof.

(p) THE lessee shall not make any structural alterations to any building without the previous written consent of the lessor not do anything that may vitiate any fire policy thereover or increase any
40 premium thereunder.

(q) THE lessor shall not be liable to erect or maintain or to contribute to the cost of the erection or maintenance of any fence on any of the boundaries of the said land and any unfenced boundaries thereof shall forthwith upon the lessee taking possession of this land have erected thereon by and at the cost of the lessee of the land having such unfenced boundaries a post and wire fence in accordance with the provisions of the Fencing Act 1908. The Lessee shall further have the right to use any fencing materials owned by the lessor presently on the said land for the purposes of complying with this
50 clause.

(r) IN addition to the rental covenants conditions and agreements hereinbefore provided the lessee shall expend not less than \$500.00 per annum in effecting permanent improvements on the said land in manner from time to time agreed between the parties.

(s) THE lessor shall not be obliged or compellable by the lessee to survey the said land for any purpose whatsoever nor shall they be compelled to give a registerable lease thereof or compellable.

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED:-

(t) THAT if the rent hereby reserved or any part shall thereof be in arrear or unpaid for the space of twentyeight days after any of the days hereinbefore appointed for the payment thereof, whether the same shall have been legally demanded or not, if there shall be any breach non-observance or non-performance by the lessee of any of the covenants, conditions or stipulations herein contained or implied and on the part of the lessee to be observed or performed or if the lessee shall become bankrupt or insolvent or enter into any composition with his creditors, then and in any such case it shall be lawful for the lessor forthwith or at any time thereafter without giving notice to the lessee of their intention so to do into and upon the demised land or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely cease and determine BUT WITHOUT PREJUDICE to the recovery of any rent secured to the date of such re-entry and then remaining unpaid and to the right of action of the lessor in respect of any breach of the lessee's covenants or any of them herein expressed or implied.

(u) ANY notice required to be given by the lessor to the lessee under the provisions hereof is to be deemed to be sufficiently given if the same is in writing and executed by the lessor or signed on behalf of the lessor and served on the lessee or any servant, Solicitor or agent of the lessee either personally or by posting the same through the Post Office by registered letter addressed to the lessee at his usual or last known place of business or abode AND any notice required to be given by the lessee to the lessor shall be deemed to be sufficient given if the same is in writing signed by the lessee or his Solicitor or duly authorised agent and served upon the lessor either personally or by posting the same through the Post Office by registered letter addressed to the lessor at his usual or last known place of business or abode in New Zealand and any letter so posted shall be deemed to have been delivered on the day on which it would in the ordinary course of post have reached the addressee.

(v) IN case any question difference or dispute shall hereafter arise between the parties hereto touching these presents or the subject matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise such question, difference or dispute shall be referred to the award of a single arbitrator in case the parties can agree upon one and otherwise to two arbitrators one to be appointed by each party, and in case of their disagreement then to an umpire to be appointed by the two arbitrators prior to their entering upon the consideration of the matters referred to them and all such proceedings shall be taken in accordance with the provisions of the Arbitration Act 1908 or any amendment thereof shall or any Act passed in substitution therefor and this clause be deemed to be a submission to arbitration under the provisions of that Act or amendment thereof or any substituted Act.

(vv) see annexed

(vi) THAT in the event of the lessor or other the trustees or owners for the time being of the said land desiring to lease the same at the expiration of the present term calling for tenders or otherwise negotiation to lease the same the lessee shall and will permit any person who desires to tender or ~~to~~ negotiate therefor to enter upon the said at reasonable times in the day time and inspect the same.

5. Here insert description.

of⁵
I, JOHN SAMUEL LESTER HENDERSON of Manaia, Sharemilker do hereby accept this lease of the above-described lands, to be held by as tenant and subject to the conditions, restrictions and covenants above set forth.

Dated this 24th day of May one thousand nine hundred and seventy one.

Signed by the above-named EWEN NEIL)
ROSS) 'E.N. Ross'

as Lessor in the presence of

Solicitor
Hastings

Signed by the above-named JOHN SAMUEL)
LESTER HENDERSON) 'J.S.L. Henderson'

as Lessee in the presence of

10 Solicitor
Hawera

SIGNED on behalf of the State Advances)
Corporation of New Zealand by)
authority of the Corporation under its) for and on behalf of
Common Seal pursuant to Section 13 of) STATE ADVANCES
the State Advances Corporation Act,) CORPORATION OF
1935 by) NEW ZEALAND

20 DAVID ROBERT WEMYSS) 'D.R. Wemyss'
an officer of the Corporation in)
the presence of)

Legal Administration Officer
State Advances Corporation
Rotorua

30 (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 (\$65,000.00) 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.

STATUTORY DECLARATION TO BE MADE WHERE PURCHASER IS AN INDIVIDUAL

Heurman
24 JUN 1971

IN THE MATTER of the Land Settlement Promotion and Land Acquisition Act 1952 (hereinafter referred to as "the Act"), and

SOUTH AUCKLAND HAMILTON

IN THE MATTER

(a) Set out nature of transaction.

of (a) Lease dated the 24th day of May 1971

(b) Full name.

from (b) EWEN NEIL ROSS as Vendor

(c) Full name.

(or Lessor) to (c) JOHN SAMUEL LESTER HENDERSON

(d) Official description of land.

as Purchaser (or Lessee) affecting all that parcel of land (a) 759acs. 2rds. 36pchs. to Secn. 59 of the Land Act 1948 and (b) 185acs. 1rd. 27pchs., Section 60S Repora Settlement

being all/part of the land comprised and described in certificate of title, Volume 1747 folio 91S (South Auckland Land Registry).

(e) Full name, address, and occupation.

I, (c) JOHN SAMUEL LESTER HENDERSON of Maniaia, Sharemilker solemnly and sincerely declare:

1. That I am the ~~purchaser~~ (or lessee) above-named of the land above described.
2. I have entered into the transaction solely on my own behalf as the person beneficially entitled thereunder.
3. I do not own, lease, hold, or occupy in fee simple or under any tenure of more than one year's duration, either severally, jointly, or in common with any other person, any farm land, as defined in the Act, outside a city or borough or town district, and I have no estate or interest whether legal or equitable and whether vested or contingent, under any trust, will, or intestacy, in any such farm land.
4. (~~I am unmarried.~~ Or my wife (~~is not~~) does not own, lease, hold, or occupy in fee simple or under any tenure of more than 1 year's duration, either severally, jointly, or in common with any other person, any farm land, as so defined, outside a city or borough or town district, and she (or he) has no estate or interest, whether legal or equitable and whether vested or contingent, under any trust, will, or intestacy, in any such farm land.)
5. No company of which I or my wife (~~or husband~~) is a member, the members of which are less than 10 in number, owns, leases, holds, or occupies in fee simple or under any tenure of more than 1 year's duration, either severally, jointly, or in common with any other person, any farm land, as so defined, outside a city or borough or town district, or has any estate or interest whether legal or equitable and whether vested or contingent, under any trust or will, in any such farm land.
6. (~~I~~) I have attained the age of 17 years. (~~Or neither my father nor my mother owns, leases, holds, or occupies in fee simple or under any tenure of more than 1 year's duration, either severally, jointly, or in common with any other person, any farm land, as so defined, outside a city or borough or town district, or has any estate or interest, whether legal or equitable and whether vested or contingent, under any trust, will, or intestacy, in any such farm land.~~)
7. I have not since the passing of the Act (namely, the 16th day of October 1952) transferred, granted, leased, or otherwise disposed of any estate or interest in farm land, as so defined, to any person as a trustee for any person or created any trust in respect of any estate or interest in any such farm land.

(f) Delete clause not applicable.

(g) Delete clause not applicable.

Where the declaration is made pursuant to section 35z of the Act.

~~8. The transaction is subject to Part IIa of the Act, and~~

- (a) I am a British subject, but not a New Zealand citizen, (or, I am a British protected person within the meaning of the British Nationality and New Zealand Citizenship Act 1948); and
- (b) I have resided in New Zealand for not less than 2 1/2 years during the period of 3 years immediately preceding the date of the transaction, and intend to continue to reside permanently in New Zealand.

9. The transaction is not subject to Part IIA of the Act because--

The transaction does not relate to any land of any of the classes described in paragraph (f) subsection (1) of section 35B of the said Act (as substituted by section 2 of the Land Settlement Promotion and Land Acquisition Amendment Act 1969).

Or, where the purchaser or lessee is not a trustee.

(h) Delete paragraphs not applicable.

(h) I am a New Zealand citizen, and so declare because--

~~(a) Immediately before the date of commencement of the British Nationality and New Zealand Citizenship Act 1948 I was a British subject, and I was born within the territories comprised at the commencement of that Act in New Zealand and would have been a New Zealand citizen if section 6 of that Act had been in force at the time of my birth (or I was ordinarily resident in New Zealand at the commencement of that Act and had been so resident throughout the period of 12 months immediately preceding the commencement of that Act.)~~

(b) I am a person naturalised in New Zealand.

~~(c) I am registered as a New Zealand citizen.~~

(d) I am a New Zealand citizen by birth.

~~(e) I am a New Zealand citizen by descent.~~

~~(f) I am the wife of (i)~~

(i) Full name, address, and occupation.

~~who is qualified as a New Zealand citizen~~

(ii) Specify.

~~as set out in paragraph (ii) above.~~

(iii) Any other qualification.

~~(g) (iii)~~

Or, where the purchaser or lessee is a trustee.

(iv) Specify the trust.

~~I am the purchaser (lessee) as trustee under the following trust (iv) and every beneficiary under the trust is a New Zealand citizen (or every beneficiary under the trust who is an individual is a New Zealand citizen and no beneficiary under the trust that is a body corporate is an overseas corporation as defined in section 35A of the Act)~~

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Act 1957.

DECLARED at Hawera
this 20th day of May 19 71

before me—

J. S. L. Henderson

[Signature]
Justice of the Peace
Solicitor of the Supreme Court.
~~(to be the person authorized to take and receive Statutory Declarations)~~

Note--1. Where both Parts II and IIA of the Act apply to the transaction, the purchaser or lessee is required to declare as to the matters prescribed in paragraphs 1 to 8 of this form.

2. Where only Part II of the Act applies to the transaction, the purchaser or lessee is required to declare as to the matters prescribed in paragraphs 1 to 7 and paragraph 9 of this form.

3. Where only Part IIA of the Act applies to the transaction, the purchaser or lessee is required to declare as to the matters prescribed in paragraphs 1 and 8 of this form.

4. Where the declaration is made for the purposes of section 35B of the Act, the purchaser or lessee is required to declare as to the matters prescribed in paragraphs 1 and 9 of this form.

5. Where Part II only or both Parts II and IIA of the Act apply to the transaction, and the purchaser or lessee is a trustee, then, under section 24 (1) (a) of the Act the consent of the Court is required and this form is not applicable.

6. Section 2 (1) of the Act contains the following definitions:

"Farm land" means land that, in the opinion of the Land Valuation Committee, or, as the case may be, of the Land Valuation Court, is or should be used exclusively or principally for agricultural purposes:

Provided that, where land that is being used exclusively or principally for agricultural purposes could, in the opinion of the Committee or, as the case may be, of the Court, be used with greater advantage to the community generally for non-agricultural purposes, it shall for the purposes of this Act be deemed not to be farm land.

"Agricultural purposes" has a meaning corresponding to the term "agriculture", which for the purposes of this definition means the cultivation of the soil for the production of food products and other useful products of the soil, and includes the use of land for horticultural or pastoral purposes, or for the keeping of pigs, bees, or poultry.

7. The classes of land described in paragraph (f) of section 35B (1) of the Act are as follows:

(a) Any land of 1 acre or over in area which under any operative regional planning scheme or proposed or operative district scheme under the Town and Country Planning Act 1953, is designated or zoned as a reserve, or as a public park, or for recreation purposes, or as private open space, or for preservation as a place of or containing an object of historical or scientific interest or natural beauty, or any proposed such purpose.

(b) Any land of 5 acres or over in area which under any such proposed or operative district scheme is zoned for rural purposes or is so zoned that farming of any kind is a predominant or conditional use in that zone.

(c) Any land of 1 acre or over in area which is not included in any proposed or operative district scheme provided and maintained by any Council or other local authority under that Act.

(d) Any land being or forming part of any island (except the North Island and the South Island) which is less than 100 miles from the nearest part of the coast of the North Island or of the South Island.
v land being or forming part of any island of the Chatham Islands.

EXHIBIT "B"No. 6.In the Supreme
Court of New
ZealandBUNDLE OF CORRESPONDENCE CONTAINING:-----
No. 6

NEWSPAPER ADVERTISEMENT -

Exhibit "B"

FARMS FOR SALE

Newspaper
AdvertisementDALGETY REAL ESTATERotorua (P.O. Box 94)

10 345 ACRES F.H. two titles, carrying 200 dairy cows (45,000 fat) 70 other cattle with approx 340 acres in grass. 4 bedroom brick home, 3 bedroom cottage, 12 aside H.B. shed also 8 aside H.B. shed, 3 haybarns. 3 miles schools, 29 miles Rotorua. Little untidy and fencing requires attention. Shed requires renovating. Land is fertile and capable of much higher production. Suitable for a family prepared to work. Absentee owner will sell, lease with R.O.P. or have a look at any sound proposition. Price \$70,000 L & B. Ph. Office: 86-099. After Hrs. E.A.Braae 81-321.

20 DALGETY NEW ZEALAND LIMITED

Exhibit "B"

5 February 1971

continued

Mr J. Henderson,
28 R.D.
Manaia,
TARANAKI.

5 February 1971

Dear Sir,

Thank you for your enquiry regarding the property at Reporoa, and the details you require are as follows:

30 Area: 345 acres
Capital Value: \$58,000
Price: L & B \$70,000

In the Supreme
Court of New
Zealand

No. 6

Exhibit "B"

continued

5 February 1971

Contour: Flat to easy rolling, approx. 340 ac grass, 5 ac undeveloped.

Weeds: Ragwort, also a little barley grass,

Buildings: 4 B.R. Brick home (requires interior decorating) 3 B.R. Workers cottage, 12 aside H.B. Shed, Large brick implement shed, 3 haybarns. We feel that the Dairy Inspector will require extensive improvement to bring the shed up to standard and a new shed may be necessary. The property is on tanker supply to the Reporoa Factory. 10

Water: Troughs in most paddocks, supply comes from a stream. This is not satisfactory and a new source of supply is necessary. County water is available approximately ¼ mile from farm and it would cost approx. \$1500 to get on the pipeline. 20

Fencing: 50 paddocks by 6 & 7 wire fences. Some work needed, mainly gates.

Rates: \$220.

Livestock: At present milking 200 cows (45,000 fat) should carry 200 cows with replacements, plus 2 - 300 sheep. 30

Nearest Towns: Rotorua, 30 miles; Reporoa 4½ miles; Schools 4½ miles bus at gate.

This property is at present not very well farmed and you will appreciate that there is a fair amount of expense involved to bring it up to a high producing unit, and in our opinion this farm is worth between \$55,000 and \$60,000.

27.

The owner who lives in Hawkes Bay, is very anxious to be relieved of the responsibility of running the farm and is prepared to have a good look at any workable proposition.

If you wish to make an inspection, we shall be pleased to assist in any way possible. My after hours telephone number is 81 321 Rotorua.

Yours faithfully,

'E.A. Braae'
REAL ESTATE DEPARTMENT
MANAGER

In the Supreme
Court of New
Zealand

No. 6

Exhibit "B" -
continued

5 February 1971

10

\$58,000

Rental 6% 2% of from purchase price

Hay to be left

Rent - 3 m nthly in advance.

6% on \$58,000 (Go to \$60,000 if necessary)

Right to connect on to County Water if necessary and reduce cost from rent. (Not in first year.)

20

Option to buy at end of 5 years at \$48,000 or \$60,000 less 2% of rest paid plus the cost of County Water if taken on.

If option exercised owner to leave \$25,000 in 2nd mortgage at 7% for 10 years.

Lease in your joint names.

Exhibit "B" -
continued

Undated Note

In the Supreme
Court of New
Zealand

O'DEA & O'DEA
Barristers & Solicitors

23rd March, 1971

No. 6

Exhibit "B"

Messrs Simpson & Bate,
Solicitors,
HASTINGS.

continued

Dear Sirs,

23 March 1971

re Ewen Ross & J.S.L. Henderson

We act for Mr J.S.L. Henderson, who has
been offered a lease by your client Mr Ross.
We would be pleased if you would let us have
the lease for perusal.

10

Yours faithfully,
O'DEA & O'DEA

per: 'D. O'Dea'

Exhibit "B"

SIMPSON, BATE & WANE
Barristers & Solicitors

continued

6th May, 1971

6 May 1971

Messrs O'Dea & O'Dea
Barristers & Solicitors,
P.O. Box 226,
HAWERA

20

Dear Sirs,

re: Ross & Henderson

Memorandum of Lease is enclosed in
triplicate for execution.

We understand your client is landless and
would appreciate a copy of his declaration
under the Land Settlement Promotion and Land
Acquisition Act 1952 together with the
signed Leases at an early stage.

30

29.

Formal details of your client's background and experience for obtaining mortgagee's approval would now be appreciated.

Yours faithfully,
SIMPSON, BATE & WANE

Per: 'H.L. Crawford'

In the Supreme
Court of New
Zealand

No. 6

Exhibit "B"

continued

6 May 1971

O'DEA & O'DEA
Barristers & Solicitors

18th May, 1971

Exhibit "B"

continued

18 May 1971

10 Messrs Simpson, Bate & Wayne,
Solicitors,
HASTINGS.

Dear Sirs,

re: J.S.L. Henderson & Ewen Ross

We now enclose Memorandum of Lease in triplicate, duly executed by our client and Statutory Declaration under Section 24 in duplicate.

20 We have not completed the date of execution of the Lease and will leave you to insert this in the Statutory declaration.

With regard to the Lease, our client would like the rent to be payable three monthly and not half-yearly. Would you please advise if your client is agreeable to this.

With reference to the right of purchase, our client has requested us to ascertain if your client would be prepared to leave \$25,000 on second mortgage at 7½% for ten years.

30 Would you please refer these matters to him and advise us the result in due course.

Yours faithfully,
O'DEA & O'DEA

Per: 'D. O'Dea'

In the Supreme
Court of New
Zealand

SIMPSON, BATE & WANE
Barristers & Solicitors

15th June, 1971.

Exhibit "B"

continued

15 June 1971

Messrs O'Dea & O'Dea
Solicitors,
P.O. Box 226,
HAWERA.

Dear Sir,

re: E.N. Ross Leasing to J.S.L.Henderson

The declaration forwarded with your letter 10
of the 18th May is returned in duplicate for
deletion of paragraph 8, dating as shown in
pencil and filing. N.B. alteration to date
of declaration.

A copy of the lease is enclosed as requested,
also a note of our charges for the leases
preparation. The lease will be stamped and
forwarded in due course following payment of
our costs.

The lease provides for rental payable half 20
yearly but the parties have informally agreed it
shall for convenience be payable quarterly.

Mr Ross advises us he would negotiate the
terms of a second mortgage for \$25,000 but only
behind a first mortgage for not greater amount.

Yours faithfully,
SIMPSON, BATE & WANE

per: 'H.L. Crawford'

O'DEA & O'DEA
Barristers & Solicitors

In the Supreme
Court of New
Zealand

17th June, 1971

Messrs Simpson, Bate & Wane,
HASTINGS.

No. 6

Exhibit "B"

Dear Sirs,

continued

re: Henderson and Ross

17 June 1971

10 We now return the declaration under the
Land Settlement Promotion and Land Acquisition
Act in duplicate duly amended.

Yours faithfully,
O'DEA & O'DEA

per: 'D. O'Dea'

SIMPSON, BATE & WANE
Barristers & Solicitors

Exhibit "B"

21st June, 1971

continued

20 Messrs O'Dea & O'Dea,
Solicitors,
P.O. Box 226,
HAWERA.

21 June 1971

Dear Sirs,

re: Henderson and Ross

Thank you for your letter of 17.6.71.
Kindly ask your client to forward his rent
cheque for the first quarter to this firm as
our clients are pressing for payment and he is
in occupation. The lease, executed, is
currently being stamped.

Yours faithfully,
SIMPSON, BATE & WANE

30

per: 'H.L. Crawford'

In the Supreme
Court of New
Zealand

SIMPSON, BATE & WANE
Barristers & Solicitors

21st June, 1971.

No. 6
Exhibit "B"

The District Land Registrar,
Lands and Survey Department,
P.O. Box 460.

continued
21 June 1971

Dear Sir,

re: Land Settlement Promotion and
Land Acquisition Act, 1952,
E.N. Ross and J.S.L. Henderson

10

The lessee's Declaration is enclosed in
duplicate for filing. Kindly return our
certified copy in due course.

Yours faithfully,
SIMPSON, BATE & WANE

per: 'H.L. Crawford'

Exhibit "B"
Continued
29 June 1971

SIMPSON, BATE & WANE
Barristers & Solicitors

29th June, 1971

Messrs O'Dea & O'Dea,
HAWERA

20

Dear Sirs,

re: E.N. Ross and J.S.L.Henderson

We would advise that the Leases have now
been returned following stamping and can be
released hereon receipt of payment for our
costs.

We do not yet appear to have received
advice that the rent has been paid and would
ask that you give your client another reminder
on this matter

30

Yours faithfully,
SIMPSON, BATE & WANE

per: 'H.L. Crawford'

33.

SIMPSON, BATE & WANE
Barristers & Solicitors

In the Supreme
Court of New
Zealand

23rd August, 1971

—
No. 6

Messrs O'Dea & O'Dea,
HAWERA.

Exhibit "B"

Dear Sirs,

continued

re: Henderson and Ross

23 August 1971

10 Thank you for your letter of the 18th August. The Lease is enclosed in triplicate and you will note that on two copies Mr Henderson's signature requires to be witnessed.

If you wish to register the Lease please advise us because the formal Consents of the Mortgagees will have to be endorsed on the Lease prior to registration.

Otherwise we would appreciate the return of our copy of the Lease following witnessing.

Yours faithfully,
SIMPSON, BATE & WANE

20 per: 'H.L. Crawford'

LAND REGISTRY OFFICE

Exhibit "B"

No. 50846

continued

Received the undermentioned instrument(s) produced by Messrs Simpson Bate & Wane to enable registration.

24 June 1971

Box 749

Hastings L S P dec - H.S.L.Henderson

[Signature illegible]
For District Land Registrar

30

24/6/1971

In the Supreme
Court of New
Zealand

O'DEA & O'DEA
Barristers & Solicitors

25th August, 1971

No. 6

Exhibit "B"

Simpson, Bate & Wayne,
HASTINGS.

Continued

Dear Sirs,

25 August 1971

re: J.S.L.Henderson

We now return Counterpart of lease duly
witnessed by the writer.

It does not appear necessary to us to
register, in view of the option to purchase
given by your client.

10

Yours faithfully
O'DEA & O'DEA

per: 'D. O'Dea'

Exhibit "B"

KELLY, McNEIL & CO.
Barristers & Solicitors

Continued

3rd July, 1974

3 July 1974

Copy for your Information

Messrs O'Dea & O'Dea
HAWERA.

Mr E.N. Ross,
107 Renata St
Hastings.

20

Dear Sirs,

J.S.L. Henderson and E.N. Ross

We have been instructed to act for Mr
Ross in respect of the Lease which he gave your
client Mr Henderson, in 1971.

We are instructed by Mr Ross to advise
you that he is not prepared to proceed with
the Option which the Lease purports to give
pursuant to clause (vv).

30

It would appear this Option is not binding upon our client for the reason that Section 23 of the Land Settlement Promotion and Land Acquisition Act has not been complied with. The Section provides that Part II of the Act applies to the granting of an Option to Purchase. The Statutory Declaration filed relates solely to the Lease and not to the Option to Purchase and indeed, we note that the Lease has not been registered with the District Land Registrar and therefore the proposed Option cannot have come to his notice.

10

As the Land Settlement Promotion Act has not been complied with the Option is therefore illegal and not binding upon our client and he is therefore now entitled to make arrangements to sell the property either subject to the Lease or subsequent to the expiry of the Lease.

20

Yours faithfully,
KELLY, McNEIL & CO.

per: 'M.D. Brown'

KELLY, McNEIL & CO.
Barristers & Solicitors

16th September 1974

Messrs O'Dea & O'Dea
HAWERA.

Dear Sirs,

E.N. Ross and J.S.L. Henderson

30

We understand from the Bank of New Zealand that you have requested them to produce a Title to enable the Lease to be registered. We can advise that our client will not upset your client in the quiet enjoyment of his lease until the time for possession arises at the end of May next year, but for that reason we cannot see any point in having the Lease registered and shall be pleased if you will advise why you wish it to be so.

40

Yours faithfully,
KELLY, McNEIL & CO.
per: 'M.D. Brown'

In the Supreme
Court of New
Zealand

—
No. 6

Exhibit "B"

continued

3 July 1974

Exhibit "B"

continued

16 September 1974

In the Supreme
Court of New
Zealand

No. 7

REASONS FOR JUDGMENT OF BEATTIE J.

Hearing: 18, 19 November 1975
Counsel: D.L. Tompkins Q.C. and G.R.
Halford for plaintiff
G.P. Barton for defendant.
Judgment: 21 January 1976.

—
No. 7

Reasons for
Judgment of
Beattie J.

21 January 1976

The plaintiff seeks a declaration that an option to purchase contained in a Memorandum of Lease dated the 24th May 1971 is valid and enforceable. Alternatively, if it be held that the option is unlawful and of no effect as being in contravention of the Land Settlement Promotion and Land Acquisition Act 1952 (which I shall call the Land Settlement Act) the plaintiff seeks relief pursuant to s.7 of the Illegal Contracts Act 1970. The defendant says that if the plaintiff did lodge a statutory declaration with the District Land Registrar as prescribed by s.26 of the Land Settlement Act, such declaration did not in terms refer to the transaction for the granting of an option but in any event it is contended that s.24 of the Land Settlement Act does not apply to options to purchase, the proper procedure being an application for the consent of the Administrative Division of the Supreme Court. Furthermore the defendant submits that notwithstanding strong dicta in recent judgments and a considered decision on the point, the Illegal Contracts Act can not, for want of jurisdiction, be brought in aid to assist the plaintiff. I now find the facts.

In January 1971 the plaintiff came across an advertisement which reads as follows:

"345 ACRES F.H. two titles, carrying 200 dairy cows (45,000 fat) 70 other cattle with approx. 340 acres in grass.

10 4 bedroom brick home, 3 bedroom cottage,
12 aside H.B. shed also 8 aside H.B. shed,
3 haybarns, 3 miles schools, 29 miles
Rotorua. Little untidy and fencing
requires attention. Shed requires
renovating. Land is fertile and capable
of much higher production. Suitable for
a family prepared to work. Absentee owner
will sell, lease with R.O.P. or have a
look at any sound proposition. Price
\$70,000 L.& B.

In the Supreme
Court of New
Zealand

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No. 7

Reasons for
Judgment of
Beattie J. -

continued

Ph. Office: 86-099. After Hrs. E.A. Braae
81-321. "

21 January 1976

After making an enquiry from the vendor's agent,
Dalgety New Zealand Limited, the plaintiff was
informed in a letter of further details including
these comments:

20 "This property is at present not very well farmed
and you will appreciate that there is a fair
amount of expense involved to bring it up to a
high producing unit, and in our opinion the farm
is worth between \$55,000 and \$60,000. The
owner who lives in Hawkes Bay is very anxious
to be relieved of the responsibility of running
the farm and is prepared to have a good look at
any workable proposition".

30 Negotiations between the plaintiff and
defendant's agent and later the defendant himself
resulted in the completion of the Lease which
has a term of five years and an annual rental of
\$3,000.00. There is no provision for
compensation for improvements. The option
to purchase is contained in clause (vv). It
reads:

40 "(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
(\$65,000.00) which sum shall thereupon be
payable as to the sum of SIX THOUSAND FIVE

In the Supreme
Court of New
Zealand

No. 7

Reasons for
Judgment of
Beattie J. -

continued

21 January 1976

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 Administrative Division of the Supreme Court for the consent thereto." 10

Plaintiff entered into possession on the 2nd June 1971. The statutory declaration under the Land Settlement Act was deposited with the District Land Registrar at Hamilton on the 24th June 1971. It can be observed that on the printed form alongside the marginal title "Set out nature of transaction" the word "Lease" only has been inserted. The defendant is described as vendor or lessor while the plaintiff is recorded as purchaser or lessee. However, in the section of the document where the plaintiff makes his declaration he is referred to as lessee. I find that the plaintiff duly farmed the property and expended substantial sums for improvements relating primarily to a water supply for the property together with new milking equipment, the erection of a hay barn and an effluent disposal unit. In addition he spent \$1,174 on seed purchase over a three year period. In all these improvements cost him \$6,228.14. Besides this, he spent a further \$1,279 on repairs to fences and farm buildings. Although the defendant claims the plaintiff was in arrears over rent in the early stages (but the plaintiff says he was unaware of this) and that the plaintiff is in breach of covenants over repairing fences, drainage work, house repairs and other matters, I understand that a submission to arbitration thereon depends on my decision. I must observe however that the right to exercise the option is not subject to due compliance with the covenants of the lease. No objection was 20 30 40

taken by the defendant's original solicitors to the form of the statutory declaration but on the 3rd July 1974 new solicitors wrote to the plaintiff's solicitors advising that the defendant was not prepared to proceed with the option as the statutory declaration solely related to the Lease and not to the option to purchase. It was contended therefore the option was illegal as contravening the Land Settlement Act.

10 Before me, the reasons for this attitude soon became clear. The defendant stated that his ex-wife had outvoted him as managing director of an orchard business because he gifted the share capital to her and their children. Apparently through a settlement he is to get some redress. If he gets the property back from the plaintiff he would farm it himself. But his main reason for seeking to avoid the bargain, was as is now quite commonly the

20 case, "greatly escalating land values".

For my part I do not happily lend the Court's assistance to those who choose to avoid contracts on these grounds, but as there was a strong argument on both illegality and lack of jurisdiction I reserved my decision.

Mr O'Dea, the plaintiff's solicitor, gave evidence. He regarded the option to purchase as another clause in the lease though he was well aware that the Land Settlement Act

30 applied to both the lease and the option vide s.23(1)(b) and (1)(s). He stated it was the practice in Taranaki that if the option to purchase is in the lease, all that was necessary was the lodging of the declaration. Sometimes, he said, a reference to the option is included on the form. It is also clear from Mr Barton's questions that no application has been made for the consent of the Administrative Division of the Supreme Court.

40 I turn to consider the various legal arguments.

As Mr Barton, rightly, in my opinion, stressed, there are two features of the transaction incorporated in the lease. First, the plaintiff acquired an estate or interest

In the Supreme
Court of New
Zealand

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Reasons for
Judgment of
Beattie J. -

continued

21 January 1976

In the Supreme
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Reasons for
Judgment of
Beattie J. -

continued

21 January 1976

as an equitable lessee prior to registration. Under the principle in Walsh v. Lonsdale (1882) 21 Ch.D. 9 that leasehold interest in equity was as good as a legal lease, provided that specific performance was available to the plaintiff. The second estate created under clause (vv) (supra) was an equitable interest in the fee simple but contingent on the lessee validly exercising the option. That this is clear is apparent from the judgments of the Court of Appeal in Morland v. Hales & Ors. and Somerville (1910) 30 N.Z.L.R. 201; the High Court of Australia, in Goldsbrough Mort & Co.Ltd. v. Quinn (1910) 10 C.L.R. 674; and Brightman J. in George Wimpey & Co.Ltd. v. Inland Revenue Commissioners [1974] 1 W.L.R. 975 at 980-1. So these two estates are different interests though created in the one document. It follows that since the land was farm land and the transactions fall within s.23(1)(b) and (e) of the Land Settlement Act, the consent of the Court was required and the consequences in Part II of the Act applied. Leasing is treated distinctly from an option to purchase. Thus the consequences of s.25 which prohibits transactions without the consent of the Court, came into play unless s.24 applies. That section where material, reads:

"24. Consent of Court not required in certain cases - (1) Notwithstanding anything in this Part of this Act, the consent of the Court shall not be required to any contract or agreement to which this part of this Act applies where -

- (a) the purchaser or lessee enters into the transaction solely on his own behalf as the person beneficially entitled thereunder and does not own, lease, hold, or occupy in fee simple or under any tenure of more than 1 year's duration, either severally, jointly, or in common with any other person, any farm land outside a city or borough or town district; and

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(b) The purchaser or lessee has not after the passing of this Act transferred, granted, leased, or otherwise disposed of any estate or interest in farm land to any person as a trustee for any person or created any trust in respect of any estate or interest in farm land; and

In the Supreme
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10 (c) The purchaser or lessee makes a statutory declaration as to the matters provided in paragraphs (a), (b) and (bb) of this subsection, and deposited that declaration with the District Land Registrar or the Registrar of Deeds, as the case may require, within 1 month after the date of the transaction."

continued

21 January 1976

20 Although Mr Barton accepted that s.25(1)(b) has been satisfied because s.24 applies to the lease, he submitted that s.24 could not apply to the option to purchase as the section only embraces a purchaser or lessee. An option holder is not a leasee. Is he a purchaser?

30 In the well known case of Helby v. Matthews [1895] A.C. 471 the House of Lords says he is not. Counsel drew attention to s.23(4) of the Land Settlement Act where the term 'transfer' in subsection (3) includes a lease but there is no definition where a purchaser includes a person who has a right of option. Therefore, Mr Barton argued that the declaration procedure is not available to an option holder who could make a declaration for the District Land Registrar for the lease but would need the consent of the Court for the separate transaction over the option. Counsel claimed further support from the wording of s.23(3)(q) which reads:

40 "(q) Any contract or agreement for the sale or transfer or lease of any estate or interest pursuant to an option to which the consent of the Court has been granted under this Act:"

In the Supreme
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Reasons for
Judgment of
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continued

21 January 1976

I was also reminded that as matters stood before the Land Settlement Act it was necessary to apply twice for the Court's consent; first, when the option was granted and secondly, when it was exercised: In re a proposed lease, Hood to Woolworths (New Zealand Limited [1949] N.Z.L.R. 297. This interesting argument which if correct, means the end of the plaintiff's case, founders I consider when resort is had to a careful reading of the sections. The opening words of s.24(1) refer to "any contract or agreement" to which Part II of the Act applies. Then, s.23(1) reads "Subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement" ... (b) for leasing, (e) for the granting of an option to purchase. In my view the words in s.24(1) must therefore include a contract or agreement for an option. Furthermore, where the words "purchaser or lessee" are used in s.24(1)(a), (b), (bb) and (d), I consider Mr Tompkins is correct in his submission that the words are sufficient to identify the person who is a party to the contract for agreement and who can make the declaration. An example where the strict legal meaning is not always applied is the Privy Council judgment in Frazer v. Walker [1967] 1 A.C. 569 where, at 586 Their Lordships were in agreement with our Court of Appeal in holding that a particular section should not be narrowly read. Therefore, where there is a lease which includes an option to purchase in my opinion the purchaser or lessee can complete a declaration saying he has no farm land.

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Mr Barton then mounted a further attack on the assumption that the declaration procedure does apply to options. It is claimed that in this case there was no compliance with s.24 in relation to the option as no document has been filed from which to glean any information or alert the District Land Registrar that the option was available. Mr Tompkins made seven submissions to overcome the omission of any reference to the option in the declaration. It was first

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claimed that the plaintiff had made a declaration covering the matters in s.24 and had completed the form prescribed pursuant to the Land Settlement Promotion and Land Acquisition Regulations 1968. But in my opinion he only made his declaration as lessee and not as an option holder.

In the Supreme
Court of New
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Reasons for
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continued

21 January 1976

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However, he can alert the District Land Registrar at a later stage when, after exercising the option the plaintiff files another declaration or applies for Court consent. Secondly, it was urged that the declaration made related to the transactions in the lease which is a contract or agreement as referred to in s.23. Again, however in my view the declaration is deficient as it refers purely to the lease and does not highlight the option in any way. Thirdly, it was submitted that there is nothing in the Act

20

or Regulations that requires the declaration to enumerate the different characteristics of the contract. I consider that the intention of the Act is to deal with particular transactions in s.23(1). The fourth point was that there is no requirement that the characteristics be named in specific terms: while that is true, it is my view that the Act contemplates there will be compliance with Part II in respect of each of the contracts or agreements. Mr Tompkins' fifth matter was an examination of the declaration itself.

30

I cannot accept the submission that it is consistent with both a declaration for a lease and an option to purchase. He next contended that clause (vv) is not by itself a contract or agreement to which the Act applies because it is purely a clause in a lease and dependent upon it. I reject that submission. It is possible, as the decision in Davis v. Capel & Anor. [1959] N.Z.L.R. 825 establishes, for a lease to be outside the Act and the option to purchase, within it.

40

Quilliam J. in the unreported decision of Morgan v. Beck & Pope (judgment 2nd September 1974) commented that an option is a contract which is distinct from a lease. I respectfully agree. As his seventh point, Counsel submitted that Regulation 2 of the Land Settlement Regulations 1968 is directory and not imperative so that

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continued

21 January 1976

even if the form had not been exactly complied with by stating "lease" instead of "lease and option to purchase", there was substantial compliance more particularly where the regulation ended with the words "or as near thereto as the circumstances of the case permit". I think Mr Barton is right when he suggested that regard must be had to the imperative nature of s.25, and that the concluding words of Regulation 2 would help minor errors but not cure a basic deficiency. All in all, therefore, I have come to the conclusion that the declaration was inadequate to cover the option as well as the lease. The transaction which incorporates an option to purchase is, therefore, deemed by s.25(4) to be unlawful and of no effect. But for a strong submission from Mr Barton that the Court has no jurisdiction under s.7 of the Illegal Contracts Act 1970 to cure (in its discretion) an illegality under the Land Settlement Act, I would, at this stage of this judgment, have granted relief. The argument is this. In the opening words of s.7(1) appears the expression "but subject to the express provisions of any other enactment;" Subsections (4) and (5) of s.25 of the Land Settlement Act are provisions. They read:

"(4) Where any transaction is entered into in contravention of this Part of this Act, or where any condition upon or subject to which this Court grants its consent to any transaction is not complied with, the transaction shall be deemed to be unlawful and shall have not effect.

(5) Where any transaction to which this Act applies is entered into subject to the consent of the Court, the transaction shall not have any effect unless the Court consents to it and the conditions upon or subject to which the consent is granted are complied with."

Are they express provisions? Counsel submitted they were, because first, an express provision is one whose effect is not left to inference: Nalla Karumburu Kayambu Shanmugan v. Commissioner for Registration of Indian and

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Pakistani Residents [1962] A.C. 515 per Lord Radcliffe at 526-7. It is said that s.25(4) (supra) does not rely on inference - it speaks directly. Next, Mr Barton submitted the words "express provision" in s.7(1) must have the same meaning that is given to them in both ss. 5 and 7(7).

In the Supreme
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Zealand

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Reasons for
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Beattie J. -

continued

21 January 1976

10 Then it is claimed that the words "and shall not have any effect" in s.25(4) (supra) have been treated in several New Zealand cases as specifically declaring the consequences of illegality. Reliance was placed on the decision of F.B. Adams J. in Hayes v. Sutherland [1959] N.Z.L.R. 1377. At p.1386 the judge said:

20 " Returning to the question of construction, it seems clear to construe the words in any of the differing senses suggested in Watson v. Miles must not surely be a confessed departure from their natural meaning, but must also have the effect of rendering them otiose. From the Legislature's declaration that the transaction is to be deemed unlawful, it would follow automatically that the transaction could have no effect in creating rights, obligations or liabilities. If this were all that the words "shall have no effect" were intended to mean, they might as well not have been enacted. In 30 the same way, it would follow automatically, in the absence of further words, that the transaction would have the effects of an unlawful transaction, and would have no other effects, and there was no need for further words in order to bring this about. The presumption is that the words are not mere surplusage, but were intended to add to what has already been said; and I am unable to see what meaning, by way of 40 addition, can fairly be attributed to them except the one indicated by their natural meaning. In my opinion, they were deliberately inserted for the very purpose of ensuring that, instead of having the normal effects of an unlawful transaction, which would necessarily have been the case if nothing more had been said, the transaction should not have those effects.

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Reasons for
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continued

21 January 1976

It could have had no others once it was declared unlawful. The statute enacts two things; first, that the transaction shall be deemed unlawful, and secondly, that it shall have no effect; and, in my respectful opinion, to attribute to it the effects of an unlawful transaction is a contradiction of the statute.

It is worthy of note - and I doubt whether this has been previously adverted to in this connection - that similar phraseology ("shall not have any effect") occurs in s.25(5), the next succeeding subsection. There is there no mention of unlawfulness, and the qualifications which it has been suggested should be put on the corresponding words in s.25(4) could not be applied. In s.25(5) the words must necessarily mean what I suggest they mean in s.25(4). Can it be supposed that the Legislature used such similar formulas with different meanings in these two subsections? They are, in fact, overlapping provisions, both of which may apply to a single transaction, and may even do so simultaneously. Both are, indeed, applicable now in the present case, the conclusion that the transaction is to be treated as having no effect being derivable indifferently from either." 10

The deliberate language in this passage was fully approved by the Court of Appeal in Joe v. Young [1964] N.Z.L.R. 24, and by Sir Richard Wild C.J. in Wainuiomata Golf Club (Inc.) v. Anker Developments Ltd. [1971] N.Z.L.R. 278 affirmed by the Court of Appeal, [1972] N.Z.L.R. 801. So, it is central to Mr Barton's argument that s.24 of the Land Settlement Act is an express provision of another enactment and s.7 of the Illegal Contracts Act cannot be called in aid. Furthermore, it is said that the language of s.25(4) is of a kind that is generally regarded as an express provision. Two instances are afforded in Halsbury's Laws of England 4th Ed. Vol. 9, para 426. 40

10 "426. Express statutory provisions affecting contract. Sometimes a contract will make express provision as to the civil rights of the parties and in that event the provisions of the statute must, of course, be applied. Thus, the sale of a motor vehicle which does not comply with statutory regulations as to construction, weight and equipment is prohibited by statute and such a sale is a criminal offence, but it is provided that the contract is not thereby affected; similarly, a contract for the supply of goods is not rendered void or unenforceable simply by a contravention of the legislation relating to trade descriptions. By contrast, certain bargains contravening the legislation against the sale of offices are expressly declared by statute to be void as well as constituting offences."

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30 My attention was then directed to the words "subject to" in s.7(1). The submission is, that when considering their effect as between s.7(1) and s.25(4), the latter is the dominant one. Magarry J. in C. & J. Clark Ltd. v. Inland Revenue Commissioners [1973] 1 W.L.R. 905, 910-1; [1973] 2 All E.R. 513, 520 held that where a statutory provision was expressed to be "subject to" another statutory provision, that merely made the latter prevail over the former if there was any conflict; it did not require the master provision to be construed in such a way as to make the whole of the master provision conflict with the subject provision. However, the Chief Justice in Coburn v. Harding (unreported decision 23rd October 1974, Auckland Registry) said :

40 "One other point raised by Mr Grove requires to be mentioned. He submits that even if the Court makes the order sought that will not avail the plaintiff who would still require to comply with the Land Settlement Act. I do not agree. What the plaintiff seeks is an order validating the contract. He needs that only because the transaction is, in the words of s.25(4) of the Land Settlement Act, "unlawful" and of "no

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effect". If the Court, taking the view mentioned of its power under the Illegal Contracts Act 1970, validates the contract notwithstanding s.25(4), that overcomes the effect of that provision."

It is claimed that by using the word 'notwithstanding' the Chief Justice has lost sight of the effect of the actual words "subject to" in the section. A similar criticism is made of the judgment of McMullin J. in Dreadon v. Fletcher Development Co.Ltd. [1974] 2 N.Z.L.R. 11. McMullin J. found, as did Wild C.J. in Coburn's case, and Chilwell J. in a fully considered judgment in R.D. Bull Ltd. v. Broadlands Rental Ltd. [1975] 1 N.Z.L.R. 304 that there is nothing in s.25(4) of the Land Settlement Act which precludes the Court from applying s.7(1) of the Illegal Contracts Act to a transaction made unlawful and of no effect by s.25(4). What McMullin J. said at p.19 was :

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"Nor do I think that the words "and of no effect" preclude the operation of the Illegal Contracts Act 1970. While these words are not surplusage and effect must be given to them - Joe v. Young (supra) - I cannot see any reason why they should prevent the defendant from praying in aid s.7 of the Illegal Contracts Act. Indeed, the Illegal Contracts Act specifically contemplates the granting of relief to contracts which but for that enactment would be "of no effect". Section 6 provides that every illegal contract shall be "of no effect" and s.7 provides that, notwithstanding the express provisions of s.6, the Court may grant relief in the case of an illegal contract, inter alia, by its validation in whole or in part. In my respectful opinion, the words "subject to the express provisions of any other enactment" in s.7 of the Illegal Contracts Act do no more than recognise the right of the Legislature in the enactment of a particular statute to treat the contravention of that statute as being

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without remedy so as to preclude the invocation of the benevolence of s.7, but they do not otherwise prevent its application, unless there is a specific direction to the contrary."

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In Evans v. Credit Services Ltd. [1975] 2
N.Z.L.R. 560 McMullin J. at 561 said:

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"Before considering what, if any, relief should be granted under s.7 of the Illegal Contracts Act 1970, the position in which the parties would have found themselves had the Illegal Contracts Act not been passed should be considered, because it is "relief" from that position with which the statute is concerned. The considerations applicable to contracts which are unlawful, either because they are declared so by the common law or because they transgress some statutory provision, are set out in the statement of Lord Mansfield in Holman v. Johnson (1775) 1 Cowp. 341; 98 E.R. 112D:"

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Consequently, Mr Barton submitted that where we are concerned with a special act relating to farm land which has a specific provision for illegality, it is modifying the consequences which follow at Common Law. His argument in summary therefore is that it is no part of the Illegal Contracts Act to modify some express provisions of some other Act where the consequences are illegal under that other Act. Secondly, he says, the use of 'subject to' in the statute supports this contention. I now intend to examine Mr Barton's submissions against judicial opinions and a decision to the contrary. The first decision is that of the Chief Justice in Combined Taxis Co-operative Society Ltd. v. Slobbe [1972] N.Z.L.R. 354. At p.360 he said:

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"The second point is that the power given by s.7(1) is "subject to the express provisions of any other enactment". The enactment relevant here is, of course, the

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Moneylenders Act 1908 and its amendments. If that Act expressly declared a contract of the kind here in issue to be illegal or void the words just quoted would, in my opinion, preclude the Court from exercising the power given by s.7(1) to grant relief by way of validating it. But the Moneylenders Act 1908 contains no express provision that a contract made by an unregistered moneylender is illegal or void. That consequence is Judge-made law. Accordingly, in my judgment the Court may validate this contract."

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On appeal, [1973] 2 N.Z.L.R. 651 Richmond J. at 652 referred to the passage I have cited, but he did not express any concluded view as to the point I am considering.

Then followed Dreadon's case (supra). It directly concerned an option to purchase and the Land Settlement Act. Although the comments of McMullin J. are obiter, because he held the action to be premature, in my respectful view they provide a detailed study of the question. I observe particularly the passage at p.19 where McMullin J. said:

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"With respect, it seems to me, however, that, if the words "subject to the express provisions of any other enactment" where used in s.7 of the Illegal Contracts Act are given the meaning for which Mr Dugdale contends as excluding, in the present case, the application of s.7 of the Illegal Contracts Act, that statute could never have any application to a statute which has declared a transaction to be unlawful and of no effect. If this were so the remedial effects of the Illegal Contracts Act would be largely lost and, indeed, s.7 would have application only to those contracts which are illegal at common law. Most cases before the Courts on illegality of contract are cases

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in which the illegality is the result of statute or regulation. It was the need "to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare state seems to require" (Carey v. Hastie [1968] N.Z.L.R. 276, 282, per McCarthy J.) and not so much to deal with the consequences of common law illegality that the Illegal Contracts Act was enacted."

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Mr Barton takes no issue with the first sentence in this excerpt but contends as I have already stated, that the words "shall have no effect" take the Land Settlement Act outside the Illegal Contracts Act. He argues that it is because s.6 declares illegal contracts to be of no effect that it was necessary for the draftsman in s.7 to say "notwithstanding" and he claims that leaves unaffected all enactments, such as s.24 of the other statute, which declare prohibited transactions to have no effect. Again, counsel submits that McMullin J. has not considered the importance of the term "shall be of no effect" at p.20 of his judgment. I repeat the passage on p.20:

"In my respectful opinion, the words "subject to the express provisions of any other enactment" in s.7 of the Illegal Contracts Act do no more than recognise the right of the Legislature in the enactment of a particular statute to treat the contravention of that statute as being without remedy so as to preclude the invocation of the benevolence of s.7, but they do not otherwise prevent its application, unless there is a specific direction to the contrary."

Counsel submits that the words "unless there is a specific direction to the contrary" are imprecise. For myself, I think the Judge was saying an Act could provide that a certain matter could be illegal and void and also provide that s.7 should have no application.

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I mention next Coburn v. Harding (cit sup). It is directly in point. At p.3, the Chief Justice adopts the views of McMullin J. but described them as obiter dicta. A few days before this judgment was delivered Chilwell J. in Bull v. Broadlands Rental decided that the use of the word "void" in regulation 10 of the Hire Purchase and Credit Sales Stabilization Regulations 1957 did not preclude the Court from applying s.7. At p.307 in a fully considered judgment, Chilwell J. says McMullin J. is clearly right on the jurisdictional question. I observe that this judgment is under appeal. Speight J. entered the lists with an oral judgment in December 1974, in Teh v. Frazer (also under appeal); This was a Land Settlement Act case where the Judge at p.6 of his judgment had reservations about jurisdiction and the Illegal Contracts Act. However he assumed jurisdiction but exercised his discretion against granting relief. Though these were tentatively expressed doubts from Speight J. it may be that the example he gives at pp.6-7 of his judgment is, with respect, questionable. He mentions what would happen when the Illegal Contracts Act is used to reverse a finding of a Land Valuation Committee or the Administrative Division of the Supreme Court - a finding by judicial decision that a contract was deemed illegal. But might this example not overlook the provisions of s.25(1)(a) of the Land Settlement Act in that the transaction that comes before the Court must be subject to the consent of that Court? If consent is refused, the contract comes to an end but it is not illegal. Furthermore, it appears that s.25(5) which provides that a transaction subject to the consent of the Court shall not have any effect unless the Court consents, states in statutory form the common law position for a condition that has not been fulfilled, but it is not an illegal transaction. I agree with Mr Tompkins that the refusal of consent could not give rise to invoking the Illegal Contracts Act.

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Apart from relying on the weight of judicial authority to support his submissions, Mr Tompkins urged that the meaning of "subject to the express provisions of any other enactment" must be regarded against the whole of s.7. Thus read, it is submitted that the Court may grant relief subject to an express provision to the contrary against the granting of relief. It does seem that looked at in this way, the parts fall into place, and there is no collision between s.7(1) and s.25(4) because the latter section places no restriction on the granting of relief. The words "shall have no effect" in s.25(4) fall short of limiting the grant of relief. This interpretation in my opinion fits precisely within the comments of McMullin J. in Dreadon's case at p.20 when he said: "unless there is a specific direction to the contrary". I respectfully adopt his reasoning and the approach of Chilwell J. in Bull's case where he was prepared to grant relief unless there was an express provision precluding him from doing so.

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Holding as I do that the Illegal Contracts Act applies, I turn at once to the merits of granting relief. In my opinion they are overwhelming in favour of the plaintiff. The error of leaving out a reference to the option in the heading of the declaration was a technical one. The plaintiff had no part in it himself. There was no attempt to circumvent the law. On the other hand, the defendant seeks to avoid the option because of escalating land values. The option is for \$65,000. The defendant's asking price was \$70,000 but his agents thought the farm was worth \$55,000 to \$60,000. In 1971 when he was anxious to sell, the defendant had a good bargain. I do not find any act or default on the part of the plaintiff that offends against the policy of the Act. Had the declaration complied, then no consent under the Act was required. Furthermore, the plaintiff, being completely oblivious to the facts or law giving rise to the illegality, the Court is not required to take knowledge into account.

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There are other matters that come down on the plaintiff's side. I refer first, to the failure of the defendant to take the point of illegality until three years after the commencement of the lease. Next, to refuse relief would work an undue hardship because of quite considerable capital expenditure on improvements but no right of compensation. The claim by the defendant of breaches of covenant has not been established. In any event, as I have validated the option, such a claim would fail if this option is exercised as there would be no loss. Then again, any alleged breaches are irrelevant because the right to an option is not dependent on performance of the covenants.

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Finally, as to the gravity of the penalty expressly provided for the breach, in my opinion to keep the transaction an unlawful one is too severe a punishment for a technical error.

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I make an order that the option to purchase contained in clause (vv) of the Memorandum of Lease is to be valid for all purposes.

Costs to plaintiff \$400 plus disbursements and witnesses' expenses to be fixed by the Registrar.

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No. 8

No. 8

FORMAL JUDGMENT VALIDATING OPTION

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Formal Judgment
Validating Option

WEDNESDAY THE 21st DAY OF JANUARY, 1976
BEFORE THE HONOURABLE MR. JUSTICE BEATTIE

21 January 1976

THIS ACTION coming on for trial on the 18th and 19th days of November 1975 before the Honourable Mr Justice Beattie at Rotorua UPON HEARING Mr D.L. Tompkins Q.C. and Mr G.R. Halford of Counsel on behalf of the abovenamed Plaintiff and Mr G.P. Barton of Counsel on behalf of the abovenamed Defendant and the evidence then adduced it is ADJUDGED

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DECLARED ORDERED AND DECREED THAT

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Formal Judgment
Validating
Option -

continued

21 January 1976

10 1. THE declaration lodged with the District Land Registrar at Hamilton by or on behalf of the Plaintiff on 24 June 1971 in purported compliance with section 24 of the Land Settlement Promotion and Land Acquisition Act 1952 in respect of the transactions evidenced by the Memorandum of Lease dated 24 May 1971 between the Defendant (as Lessor) and the Plaintiff (as Lessee) applied only to the contract or agreement for the leasing of the demised farm land and was inadequate to cover the granting of the option to purchase that land contained in Clause (vv) of the said Memorandum of Lease;

20 2. THE option to purchase contained in Clause (vv) of the said Memorandum of Lease was deemed by section 25(4) of the Land Settlement Promotion and Land Acquisition Act 1952 to be unlawful and of no effect;

3. THE general dispensing power conferred on the Court by section 7 of the Illegal Contracts Act 1970 may be exercised in respect of contracts deemed by section 25(4) of the Land Settlement Promotion and Land Acquisition Act 1952 to be illegal and of no effect; and

30 4. THE option to purchase contained in Clause (vv) of the Memorandum of Lease made on the 24th May 1971 between the Plaintiff and the Defendant be valid for all purposes

AND IT IS FURTHER ORDERED that the Defendant do pay to the Plaintiff the sum of FOUR HUNDRED DOLLARS (\$400) for costs.

By the Court

L.S.

'R. Lochhead'

REGISTRAR

In the Court
of Appeal of
New Zealand

NOTICE OF MOTION ON APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND

No. 9

No. C.A. 27/76

Notice of Motion
on Appeal

BETWEEN EWEN NEIL ROSS of
Hastings, Farmer

8 March 1976

Appellant

A N D JOHN SAMUEL LESTER
HENDERSON of Reporoa,
Farmer

Respondent

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TAKE NOTICE that on Monday the 5th day of
April 1976 at 10 o'clock in the forenoon or
so soon thereafter as Counsel can be heard
Counsel on behalf of the abovenamed EWEN
NEIL ROSS will move this Honourable Court by
way of appeal from so much of the judgment of
the Supreme Court at Rotorua delivered by
His Honour Mr Justice Beattie on 21 January
1976 in an action (A.18/75, Rotorua
Registry), in which the Appellant was
Defendant and the Respondent was Plaintiff, as
relates to:

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- (a) The decision of the Supreme Court that the holder of an option to purchase the demised land contained in a lease of farm land may satisfy the requirements of Part II of the Land Settlement Promotion and Land Acquisition Act 1952 by filing a declaration in accordance with the provisions of section 24(1)(a)-(d) of that Act;
- (b) The decision of the Supreme Court that the general dispensing power conferred on the Court by section 7 of the Illegal Contracts Act 1970 may be exercised in respect of contracts deemed to be illegal by section 25(4) of the

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Land Settlement Promotion and Land Acquisition Act 1952, and in respect of which that subsection enacts that they "shall have no effect"; and

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- (c) The order of the Supreme Court that the option to purchase contained in clause (vv) of the memorandum of lease made on 24 May 1971 between the Appellant (as Lessor) and the Respondent (as Lessee) be valid for all purposes

Notice of
Motion on
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continued

UPON THE GROUNDS that the parts of the said judgment specified above are erroneous in fact and in law.

8 March 1976

DATED at Hastings this 8th day of March 1976.

'M.D. Brown'

Solicitor for the abovenamed Appellant

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No. 10

No. 10

NOTICE OF MOTION OF CROSS APPEAL

- 20 TAKE NOTICE that the respondent intends, on the hearing of this appeal, to contend that the judgment of the Supreme Court given at Rotorua by His Honour Mr Justice Beattie on the 21st January 1976 should be varied as follows:

Notice of
Motion of
Cross Appeal

22 March 1976

- 30 1. THE judgment should hold that the declaration, lodged with the District Land Registrar at Hamilton on the 24th June 1971, resulted in compliance with S.24 of the Land Settlement Promotion and Land Acquisition Act 1952 in respect of the option to purchase contained in Clause (vv) of the memorandum of lease dated the 24th May 1971.

2. THE judgment should hold that the option

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to purchase contained in Clause (vv) of the
said memorandum of lease was valid and
enforceable.

No.10

DATED at Hawera this 22nd day of March 1976.

Notice of Motion
of Cross Appeal -

'D. O'Dea'

continued

Solicitor for Respondent

22 March 1976

No. 11

No. 11

REASONS FOR JUDGMENT OF COURT OF APPEAL
(DELIVERED BY COOKE J.)

Reasons for
Judgment of
Court of Appeal

Coram: Richmond J.
Woodhouse J.
Cooke J.

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22 July 1976

Hearing: 13, 14 April 1976

Counsel: G.P. Barton and A.W. Grove for
Appellant.
D.L. Tompkins Q.C. and G.R.
Halford for Respondent

Judgment: 22 July 1976.

This case was argued at the same time as
Harding v. Coburn and Broadlands Rentals
Limited v. R.D. Bull Limited, because on one
view it involves, like those cases, a
question as to the scope of s.7 of the Illegal
Contracts Act 1970. The parties, whom it is
convenient to call respectively the vendor and
the purchaser, entered into a memorandum of
of lease dated 24 May 1971 in respect of
areas of land which are admittedly farm
land within the meaning of the Land
Settlement Promotion and Land Acquisition
Act 1952. The lease was for five years
from 1 June 1971. It included the following
option :

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(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 (\$65,000.00) 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.

On 24 June 1971 a statutory declaration by the purchaser covering the matters specified in s.24 of the Land Settlement Promotion Act was deposited with the appropriate District Land Registrar. It came to be contended for the vendor, however, that this declaration was made by the purchaser in his capacity as lessee and does not suffice to validate the option. From the judgment of Beattie J. in the Supreme Court it is apparent that the Judge regarded the vendor's attitude towards his bargain as one of repentance influenced by the inflation of land prices - a kind of case that has come before the New Zealand Courts with increasing frequency in recent years.

In January 1975 the purchaser began an action praying for a declaration that the option is valid and enforceable or for relief under the Illegal Contracts Act. In the

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Reasons for
Judgment of
Court of
Appeal -

continued

22 July 1976

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of Appeal of
New Zealand.

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Reasons for
Judgment of
Court of
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continued

22 July 1976

Supreme Court it was held that the declaration procedure under s.24 is available to an option-holder but that the declaration in this case was inadequate to cover the option as well as the lease. It was further held that there is jurisdiction under s.7 of the Illegal Contracts Act to validate a contract rendered unlawful and of no effect by s.25(4) of the Land Settlement Promotion Act. Exercising that jurisdiction, Beattie J. 10 ordered that the option was to be valid for all purposes. The vendor appeals. The purchaser, while supporting the grant of relief if necessary, contends by way of cross-appeal that the declaration was sufficient to cover the option.

The provisions of the Land Settlement Promotion Act immediately relevant are as follows :

23(1) Subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement - 20

(a) For the sale or transfer of any freehold estate or interest in farm land, whether legal or equitable :

(b) For the leasing of any farm land for a term of not less than 3 years :

(c) For the sale or transfer of any leasehold estate or interest in farm land, whether legal or equitable, of which a period of not less than 3 years is unexpired : 30

(d) For the sale or transfer of a lease of Crown Land (being farm land) where, by virtue of section 208 of the Land Act 1924 or the corresponding provisions of any former Land Act, the consent of the Land Settlement Board is not required to the sale or transfer :

(e) For the granting of an option to purchase or otherwise acquire any freehold or leasehold estate or interest in farm land as aforesaid or to take any lease as aforesaid. 40

. . .

24. (1) Notwithstanding anything in this Part of this Act, the consent of the Court shall not be required to any contract or agreement to which this Part of this Act applies where - (a) The Purchaser or lessee entered into the transaction solely on his own behalf as the person beneficially entitled thereunder and does not own, lease, hold, or occupy in fee simple or under any tenure of more than 1 year's duration, either severally, jointly, or in common with any other person, any farm land outside a city or borough or town district; and

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(b) The purchaser or lessee has not after the passing of this Act transferred, granted, leased, or otherwise disposed of any estate or interest in farm land to any person as a trustee for any person or created any trust in respect of any estate or interest in farm land;

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and

(bb) The transaction is not subject to Part IIA of this Act or the transaction is subject to that Part and the purchaser or lessee makes and files a declaration under section 35E of this Act within the time specified in that section; and

. . .

(d) The purchaser or lessee makes a statutory declaration as to the matters provided in Paragraphs (a), (b), and (bb) of this subsection, and deposits that declaration with the District Land Registrar or the Registrar of Deeds, as the case may require, within 1 month after the date of the transaction or, in the case of a transaction relating to land situated in the Chatham Islands, within 3 months after the date of the transaction.

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25. (1) Where any transaction to which this Part of this Act applies is entered into, the transaction shall be deemed to be entered into in contravention of this Part of this Act, unless -

(a) The transaction is entered into subject to the consent of the Court and an application for the consent of the Court to the transaction is made within 1 month after the date of the transaction or, in the case of a transaction relating to land situated in the Chatham Islands, within 3 months after the date of the transaction or in either case within such further time as may be allowed by the Court or a Land Valuation Committee; or 10

(b) In any case to which section 24 of this Act applies, the statutory declaration referred to in that section is deposited with the District Land Registrar or the Registrar of Deeds within the time specified in that section. 20

: : :
: : :

(4) Where any transaction is entered into in contravention of this Part of this Act, or where any condition upon or subject to which the Court grants its consent to any transaction is not complied with, the transaction shall be deemed to be unlawful and shall have no effect. 30

(5) Where any transaction to which this Part of this Act applies is entered into subject to the consent of the Court, the transaction shall not have any effect unless the Court consents to it and the conditions upon or subject to which the consent is granted are complied with.

(6) The Court or a Land Valuation Committee shall not grant an extension of time within which to make application 40

for the consent of the Court to a transaction, unless the Court or the Land Valuation Committee, as the case may be, is satisfied that the delay in making the application was due to mistake (whether of fact or of law) of the parties or any of them or of any other person or to circumstances beyond the control of the parties or of any of them, and that the delay has not been used for the purpose of contravening the provisions of this Act.

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The first question is whether s.24(1) applies to a contract or agreement for the granting of an option falling within s.23(1)(e). The argument to the contrary is that the grantee of an option is not a 'purchaser' within the meaning of s.24(1). Obviously such a person has not yet agreed to buy and so has not yet become a purchaser in the ordinary sense. If authority is needed for the proposition that an option-holder has not agreed to buy, it may be found in, for instance, Helby v. Matthews [1895] A.C. 471. But s.23(1), without using the word 'purchaser', is expressed to apply to contracts or agreements of various kinds relating to farm land. They are contracts or agreements for sales or transfers or leasing or for the granting of options to purchase. Section 24 goes on to eliminate the need for the consent of the Court to any contract or agreement to which Part II of the Act applies where 'the purchaser or lessee' satisfies the stated conditions and makes and duly deposits the prescribed declaration. In that context the word 'purchaser' naturally includes, in our opinion, a person who will become the purchaser if an option is exercised. Proleptic expressions are common enough in the ordinary use of language - as when persons attending an auction are addressed as 'buyers'. This interpretation is fortified by the subject-matter. If on the granting of an option a declaration may be filed, the exercise of the option will lead to a contract

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for sale or transfer to which Part II of the Act will apply by virtue of s.23(1)(a), (b), (c) or (d). So at that later stage either a further declaration under s.24 will have to be filed or, if the contract has been entered into subject to the consent of the Court, application will have to be made for that consent. As one or other of those courses will be essential, the procedure will lend itself to enforcing 10 the statutory policy against undue aggregation - a policy indicated in the heading to Part II of the Act and elaborated in s.31. On the other hand, if the consent of the Court has to be sought at the stage when the option is granted, and consent is then obtained, any contract or agreement for a sale or transfer pursuant to the option to which consent has thus been granted will not be subject to the consent or declaration 20 procedure (unless, perhaps, some special requirement to that effect has been imposed as a condition of the original consent : but we doubt whether the Act contemplates any such condition). That is the effect of s.23(3)(q), which was evidently inserted in the 1952 Act because in In re a Proposed Lease, Hood to Woolworths (New Zealand) Limited [1949] N.Z.L.R. 297 Judge Archer held that under the corresponding provisions in the Servicemen's Settlement and Land Sales Act 1943 consents were required on both the granting and the exercise of an option. If anything, therefore, 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. 40 Further, in s.35B(e), in Part IIA of the same Act, the term 'purchaser' is clearly used as including an option-holder. Although that provision is not directly relevant here and was not enacted until 1968, it does illustrate that this use of the term is one that might well have come naturally to Parliament in the 1952 Act. So we agree 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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No.11

Reasons for
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10 The next question is whether, as regards the option, the statutory declaration made and deposited in this case complied with s.24(1)(d). Beattie J. upheld the argument that the declaration was deficient in that it referred purely to the lease and did not 'highlight' the option in any way. The declaration was in form No. 1 scheduled to the Land Settlement Promotion and Land Acquisition Regulations 1968. In the heading the respondent was described as 'Purchaser (or Lessee)' but in paragraph 1 of the declaration itself the word 'purchaser' was struck out, leaving the words '(or lessee)'.
20 The Regulations do not prescribe a separate form for option-holders. Strictly speaking, the prescribed general form should have been slightly adapted to make it clear that the declarant was acquiring both an option and a lease, albeit in respect of the same land. But the matters essential in a declaration under s.24(1)(d) were all covered. For instance the respondent declared that he entered into the transaction - a term which naturally embraces all aspects of the contract in the
30 lease document - solely on his own behalf as the person beneficially entitled thereunder; and that he did not own, lease, hold, or occupy in fee simple or under any tenure of more than one year's duration, either severally, jointly, or in common with any other person, any farm land, as defined in the Act, outside a city or borough or town district; and had no estate or interest, whether legal or equitable and whether vested or contingent, under any trust,
40 will, or intestacy, in any such farm land.

Among his arguments in this Court Mr Barton submitted for the vendor that, if an option to purchase the fee simple of farm land is contained in a lease, the declarant must specifically state that he is acquiring interests in the land both as lessee and as option-holder.

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Reasons for
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continued

22 July 1976

In the alternative counsel went as far as to submit that, if he is acquiring an interest as lessee in the same farm land by the same instrument, a grantee of an option cannot be in a position to make a declaration that he has no interest in farm land. The first of these suggestions, and indeed the entire argument for the vendor in connection with the actual wording of the declaration, seem to us to run counter to s.5(i) and (j) of the Acts Interpretation Act 1924. Paragraph (j) is too well known to require quotation. Paragraph (i) provides that wherever forms are prescribed, slight deviations therefrom, but to the same effect and not calculated to mislead, shall not vitiate them. The second suggestion would place an irrational limitation on s.24. No such result is compelled by the language of the section. As the Legislature is content to allow a person to acquire the full fee simple without necessarily having to apply for the consent of the Court, it is most improbable that an application for consent is meant to be obligatory when a person is acquiring something less - namely a lease and an option to purchase. In normal circumstances the declaration required by s.24 must be directed to interests in farm land other than the land in which the declarant is acquiring for himself an interest or more than one interest.

In the somewhat similar case of Ferguson v. Scott, decided in the Supreme Court in Auckland on 5 December 1975, Wilson J. took the same view about the sufficiency of the declaration, holding that the Act did not require the declarants to specify all the capacities in which they were required to comply with it. Beattie J. did not know of Wilson J.'s judgment before he gave the judgment now under appeal. Later he learnt of it and drew it to counsel's attention. With respect, we think that Wilson J. was right and that Beattie J. might well have reached the same conclusion if he had had the advantage of considering Wilson J.'s reasoning.

On that view it follows that there was no contravention in this case of Part II of the Land Settlement Promotion Act. Accordingly there was no need for the option to be validated under the Illegal Contracts Act. If there had been a need for validation, we would agree with Beattie J. that jurisdiction would have existed under the Illegal Contracts Act and could properly have been exercised in this case. Such questions have been discussed in Harding v. Coburn and do not call for further consideration here.

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For those reasons the present appeal must be dismissed and the cross-appeal allowed, the effect being that the reasons for the result in favour of the purchaser are varied. The respondent is allowed costs in the sum of \$500 and disbursements.

In the Court of Appeal of New Zealand

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No.11

Reasons for Judgment of Court of Appeal -

continued

22 July 1976

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No. 12

No.12

JUDGMENT OF THE COURT OF APPEAL

Judgment of Court of Appeal

BEFORE: THE RIGHT HONOURABLE MR JUSTICE RICHMOND
PRESIDENT
THE RIGHT HONOURABLE MR JUSTICE WOODHOUSE
THE HONOURABLE MR JUSTICE COOKE

22 July 1976

THURSDAY the 22nd day of July 1976

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THIS appeal and cross-appeal coming on for hearing on the 13th and 14th days of April 1976 AND UPON HEARING Mr G.P. Barton and Mr A.W. Grove of counsel for the appellant and Mr D.L. Tompkins, Q.C. and Mr G.R. Halford of counsel for the respondent THIS COURT HEREBY ORDERS :

1. THAT the appeal be dismissed.

2. THAT the cross-appeal be allowed with the result that the judgement of the Supreme Court delivered by the Honourable Mr Justice Beattie on the 21st January 1976 be and the same is varied to hold as follows :

In the Court
of Appeal of
New Zealand

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No.12

Judgment of
Court of
Appeal -

continued

22 July 1976

- (i) The declaration lodged with the District Land Registrar in Hamilton on the 24th day of June 1971 on behalf of the respondent resulted in compliance with s.24 of the Land Settlement Promotion and Land Acquisition Act 1952 in respect of the option to purchase contained in clause (vv) of the memorandum to lease dated the 24th May 1971. 10
- (ii) The option to purchase contained in clause (vv) of the said memorandum to lease was valid and enforceable.
- (iii) If the option to purchase contained in clause (vv) of the said memorandum of lease were unlawful and of no effect by virtue of s.24(4) of the Land Settlement Promotion and Land Acquisition Act 1952, jurisdiction to validate the option would have existed under the Illegal Contracts Act 1970 and could properly have been exercised in this case. 20

3. THE appellant pay to the respondent the sum of \$550.20 for costs and disbursements in respect of the appeal and cross-appeal in accordance with the schedule annexed hereto.

By the Court

L.S.

'D.V. Jenkin'

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REGISTRAR

No. 13

ORDER GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL.

In the Court
of Appeal of
New Zealand

No.13

BEFORE:

THE RIGHT HONOURABLE MR JUSTICE RICHMOND
(PRESIDING)
THE RIGHT HONOURABLE MR JUSTICE WOODHOUSE

Order granting
Final Leave to
Appeal to Her
Majesty in
Council

MONDAY THE 29TH DAY OF NOVEMBER 1976

29 November
1976

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UPON READING the notice of motion filed
herein and the affidavit of JOHN MACWILLIAM
MORRISON sworn and filed in support thereof
AND UPON HEARING Mr Barton of Counsel for
the Appellant and Mr Withers of Counsel for
the Respondent THIS COURT DOTH ORDER that
the Appellant do have final leave to appeal
to Her Majesty in Council from the judgment
of this Honourable Court delivered on 22nd
July 1976

By the Court

'D.V. Jenkin'

L.S.

REGISTRAR

IN the Court
of Appeal of
New Zealand

CERTIFICATE OF THE REGISTRAR OF
COURT OF APPEAL

No. 14

Registrar's
Certificate

16 February
1977.

I, DOUGLAS VICTOR JENKIN, Registrar of the
Court of Appeal of New Zealand DO HEREBY
CERTIFY that the foregoing 69 pages of
printed matter contain true and correct copies
of all the proceedings, evidence, judgments,
decrees and orders had or made in the above
matter, so far as the same have relation to
the matters of appeal, and also correct copies
of the reasons given by the Judges of the
Court of Appeal of New Zealand in delivering
judgment therein, such reasons having been
given in writing:

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AND I DO FURTHER CERTIFY that the Appellant
has taken all the necessary steps for the
purpose of procuring the preparation of the
record, and the despatch thereof to England,
and has done all other acts, matters and
things entitling the said Appellant to
prosecute this Appeal.

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AS WITNESS my hand and Seal of the Court
of Appeal of New Zealand this 16th day of
February 1977.

L.S.

'D.V. Jenkin'

REGISTRAR

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

EWEN NEIL ROSS

Appellant

- and -

JOHN SAMUEL LESTER HENDERSON

Respondent

RECORD OF PROCEEDINGS

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