[HIGH COURT OF AUSTRALIA.]

PEARSON . . . . . APPELLANT;
DEFENDANT,

AND

SWANNELL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, *Nov.* 9.

Knox C.J., Isaacs and Rich JJ.

Landlord and Tenant—Lease containing option of purchase—Exercise of option—Right of appeal—Determination in matter arising under regulations—War Precautions (Moratorium) Regulations (Statutory Rules 1916, *No.* 284; *Statutory Rules* 1917, *No.* 253), *regs.* 8c, 10.

A decision that reg. 10 of the *War Precautions (Moratorium) Regulations* does not apply to a particular lease is a determination in a matter arising under those Regulations within the meaning of reg. 8c, and therefore no appeal lies to the High Court from such a decision.

Fletcher v. *Skrimshire*, (1920) V.L.R., 29; 41 A.L.T., 172, overruled.

Worrall v. *Commercial Banking Co. of Sydney Ltd.*, 24 C.L.R., 28, followed.

Decision of the Supreme Court (*Owen* A.-J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

Prior to 24th February 1916 Frederick Edward Swannell carried on, at certain premises at Parramatta, the business of veterinary surgeon, and on that date, having enlisted in the Australian Imperial Force for service in the War, entered into an indenture with Frederick Pearson, who was also a veterinary surgeon, whereby he leased to Pearson the premises for a period of twelve months at a certain rent. By the indenture Swannell also covenanted that upon request by Pearson at any time up to and inclusive of 31st January 1918 he would convey and transfer the premises, and the goodwill of the

business of veterinary surgeon carried on there by him, to Pearson for £500, and that if the option of purchase was exercised Swannell would not carry on or be interested in the business of veterinary surgeon within a radius of nine miles of the Post Office, Parramatta, for a period of seven years from the date of the conveyance. Pearson covenanted that should he not exercise his option of purchase he would not carry on or be interested in the business of veterinary surgeon within a radius of nine miles from the Post Office, Parramatta, for a period of seven years from the termination of his occupancy of the premises.

Swannell, in 1919, brought a suit in the Supreme Court against Pearson, alleging, by his statement of claim, that the defendant had entered into possession of the premises but had not exercised the option of purchase on or before 31st January 1918 or at any time thereafter; that the plaintiff granted to the defendant an extension of the term of the lease for a further period of twelve months from 1st February 1918, and an extension of the option of purchase up to 31st January 1919, and that the defendant continued to carry on business there until 12th May 1919; that the plaintiff on 2nd May 1919 served upon the defendant a notice to quit the premises, and that the defendant quitted the premises on 12th May 1919, when the plaintiff resumed his business there; and that the defendant started to carry on business as a veterinary surgeon at other premises in Parramatta on 12th May 1919, and thereafter continued to carry on that business there. The plaintiff claimed (*inter alia*) an injunction to restrain Pearson from carrying on or being interested in the business of veterinary surgeon within a radius of nine miles from the Post Office, Parramatta, for a period of seven years from 1st February 1919.

The material defences were that the defendant had duly exercised his option of purchase by oral notice given to the plaintiff's solicitor and agent in that behalf, Sholto Percival Kemp, prior to 31st January 1918 and also by written notice delivered on 3rd January 1919 to such agent. The defendant also, by counterclaim, asked for a declaration that he had duly exercised his option of purchase, for specific performance and in lieu thereof for damages, and for an

H. C. OF A. 1920.

PEARSON v. SWANNELL.

injunction to restrain the plaintiff from carrying on or being interested in the business of veterinary surgeon within a radius of nine miles of the Post Office, Parramatta, for a period of seven years from the time provided by the lease.

At the hearing the defence was amended by raising a contention that under the *War Precautions* (*Moratorium*) *Regulations* the lease from the plaintiff to the defendant should be dealt with in all respects as if the defendant had exercised his option of purchase within the time limited, and as if the plaintiff were mortgagee and the defendant were mortgagor of the land, the rent reserved by the lease were interest, and the sum of £500 were principal moneys secured, and that by virtue of the Regulations the terms of the lease ought, if necessary, to be extended for the purpose of giving effect to the exercise of the option of purchase.

The action was heard by *Owen* A.-J., who found that the defendant had not properly exercised his option of purchase before 31st January 1919. He also held that reg. 10 of the *War Precautions* (*Moratorium*) *Regulations*, upon which the defendant relied, did not apply to a lease which had expired, and that under the circumstances the lease had been terminated. He therefore gave judgment for the plaintiff, granting an injunction as asked for, an inquiry as to damages and an order for payment of the damages certified to on the inquiry, and he dismissed the defendant's counterclaim.

From that decision the defendant appealed to the High Court.

T. P. Power, for the appellant. It was the plaintiff's duty under the contract to have someone here to whom notice of exercise of the option of purchase could be given. The defendant did all that he was bound to do to entitle him to say that he had exercised that option. [Counsel referred to *Leake on Contracts*, 6th ed., p. 601; *Hughes* v. *Metropolitan Railway Co.* (1); *Friary Holroyd and Healey's Breweries Ltd.* v. *Singleton* (2).] Under reg. 10 of the *War Precautions* (*Moratorium*) *Regulations* the option should be taken to have been exercised. A lease of land which contains an option to purchase the land and something else is within the regulation (see *Harman* v. *Reeve* (3); *Morris* v. *Baron & Co.* (4)). Reg. 8c is

(1) 2 App. Cas., 439, at p. 448.
(2) (1899) 1 Ch., 86; (1899) 2 Ch., 261.
(3) 18 C.B., 587, at p. 595.
(4) (1918) A.C., 1.

not a bar to this appeal; for the decision is that the Regulations do not apply to this lease, and that is not a determination in a matter arising under the Regulations (*Fletcher* v. *Skrimshire* (1)). [Reference was also made to *Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (2); *Southee* v. *Finnis* (3).]

S. A Thompson, for the respondent, was not called upon.

KNOX C.J. In this case the appeal rests on two points. The first arises out of the first question decided by the learned Judge apart from the Moratorium Regulations, namely, whether Kemp was authorized to receive from the defendant notice of the exercise of his option to purchase. The learned Judge decided that there was not sufficient evidence of authority, and I entirely agree with his decision. It appears that some conversation took place as to the defendant going to see Kemp if he intended to exercise his option of purchase, but it is quite clear that when the lease was executed a power of attorney was drawn up in favour of Herbert Pottie, appointing him the plaintiff's agent for the express purpose of carrying out the sale of the property and business to the defendant. Herbert Pottie having died in February 1918, the defendant went to see Kemp in October 1918 in reference to exercising his option, and Kemp pointed out that it would be necessary to get another power of attorney from the plaintiff. It is quite clear that at that time neither Kemp nor the defendant regarded Kemp as having been authorized to receive notice of the exercise by the defendant of his option. After the plaintiff returned in April 1919 the conversation between the plaintiff and the defendant, as deposed to by both of them, is quite inconsistent with any idea that the defendant at that time thought that he had finally exercised his option to purchase. That being so, I agree with the finding of the learned Judge on that part of the case.

Then we come to the *War Precautions* (*Moratorium*) *Regulations*. At the trial Mr. *Power* obtained leave to amend the defence by setting up reg. 10 as extending to the defendant a further opportunity of

(1) (1920) V.L.R., 29; 41 A.L.T., 172.
(2) 24 C.L.R., 28.
(3) (1917) N.Z.L.R., 341.

H. C. OF A 1920.

PEARSON v. SWANNELL.

KNOX C.J.

exercising his option and as affording a reason why the relief claimed by the plaintiff should not be granted. I do not think it is necessary in the present case to express a considered opinion whether a lease such as that in question here, that is, a lease of land containing an option to purchase the land and the goodwill of a business, comes within reg. 10. It is quite clear that the learned Judge decided one of two things, either that this was not a case to which the Moratorium Regulations applied or, if it was, that he would give the plaintiff leave to go on and sue upon the agreement. Whichever way he decided it was a determination on the very issue raised by the amendment of the defence setting up reg. 10. That being so, it is clear that under reg. 8c no appeal lies from the decision of the learned Judge. That is in line with the decision of this Court in *Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (1), and that case was not cited to the Victorian Supreme Court in *Fletcher* v. *Skrimshire* (2).

I think, therefore, that as far as the appeal turns on the question of the exercise of the option the decision appealed from was right, and that as far as it turns on the question of the Moratorium Regulations we have no right to entertain the appeal.

ISAACS J. I agree.

RICH J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *S. P. Kemp*, Taree, by *F. C. Petrie & Son.*

Solicitor for the respondent, *H. E. McIntosh.*

B. L.

(1) 24 C.L.R., 28.

(2) (1920) V.L.R., 29 ; 41 A.L.T., 172.