

**Options and the Land Settlement Promotion
and Land Acquisition Act 1952**

by

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The Land Settlement Promotion and Land Acquisition Act 1952 has since its enactment provided conveyancers with vexing questions as to its application to various aspects of their work. Until recently, one area of contention was whether the declaration procedure available under the Act was applicable to options, and if so, to which options it applied.

An option to purchase land will occur in one of two forms: the option will be contained in a lease, or will be an option *simpliciter*. An option contained in a lease is subject to the Act by virtue of sections 23(1)(b) and 23(1)(e). These provide that the Act applies to any contract or agreement:

- (b) For the leasing of any farm land for a term of not less than three years; and
- (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.

To eliminate the need to obtain the consent of the Land Valuation Tribunal,¹ section 24(1) of the Act provided that if certain conditions were fulfilled (such as being landless) consent would not be required to any contract or agreement where:

- (d) The purchaser or lessee makes a statutory declaration as to the matters provided in paragraphs (a), (b) and (bb) [of section 24(1)], and deposits that declaration with the District Land Registrar or the Registrar of Deeds, as the case may require, within one month after the date of the transaction.

There was some doubt whether, after depositing a declaration in respect of a lease which contained an option to purchase, a further declaration or the consent of the Tribunal was required in respect of the subsequent exercise of that option.

This was resolved in the case of *Ferguson v. Scott*.² In that case the plaintiffs deposited a declaration in respect of a lease containing an option. When they sought to exercise the option, the defendant relied on a term of

¹ The Land Valuation Proceedings Act 1977 substituted Land Valuation Tribunals for the jurisdiction of the Administrative Division of the Supreme Court in respect of the Act. References to "the court" should now be read as referring to "the Tribunal".

² [1976] 1 N.Z.L.R. 611.

the contract requiring the consent of the court, and claimed that this had not been obtained. Although the declaration deposited did not specify that the declarants were both lessee and optionee (grantee of an option), Wilson J. held that the declaration was sufficient:³

The Act does *not* require. . .[a declarant] to declare as to the precise nature of the transaction. It simply requires him if he fulfils the description of a party to the contract referred to in section 23(1) and he wishes to avoid the necessity of getting the consent of the court, to show that he is not disqualified (by holding land either himself or through trustees) from taking the land which he proposes to buy. . .Nowhere are. . .[declarants] required by the Act to specify all the capacities in which they may be required to seek consent of the court. The fact that in the description of the document and the introduction to the declaration it refers to the document as an agreement to lease without adding "option to purchase" and the fact that in the declaration itself. . .[the declarants] say that "we are the lessee. . .of the land" in my opinion does not render the declaration insufficient for the purposes of section 24(1)(d).

Ferguson v. Scott was approved by the Court of Appeal in *Ross v. Henderson*,⁴ a case which also involved a lease containing an option, and a declaration lodged pursuant to section 24(1) in respect of the lease. The Court of Appeal not only approved and followed Wilson J., but felt that had Beattie J. (the first instance judge) known of the decision in *Ferguson v. Scott*, he would have decided similarly.

The Judicial Committee, in the course of its decision in *Ross v. Henderson*,⁵ examined the intent of the Act, finding that the chief purpose was to stop aggregation of land. They then looked at the form provided for declarations by the Regulations⁶ and noted that the only one available was for a "purchaser or lessee"; in other words, no separate form was provided for a declaration by an optionee. The Committee said that even adding the word "option" to the heading of a declaration by a lessee would not advance the main object of the Act, i.e. control of aggregation.

In respect of options *simpliciter* there was even more doubt that the declaration procedure was available. In some quarters it was thought that while a declaration could be deposited in the Land Registry Office, it would be ineffective and that the Tribunal's consent was still required. The reasoning appears to have been as follows: first, section 24(1) was available only to "purchasers or lessees", and an optionee was not a purchaser; second, section 23(3)(q) of the Act provides:

nothing in this Part of this Act shall apply with respect to. . .

- (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 other words, consent was not required to the subsequent transfer when an option was exercised, if consent had already been obtained to the option. By implication "consent" excluded "declaration".

It now appears that this reasoning was incorrect. In *Laybutt v. Amoco*

³ *Ibid.*, 613.

⁴ [1976] 2 N.Z.L.R. 589.

⁵ [1978] 2 W.L.R. 354.

⁶ SR. 1968/246.

*Australia Pty Ltd*⁷ the High Court of Australia dealt with a case which involved an option exercised after the death of the grantor. Gibbs J. in the course of his judgment discussed the nature of an option, and summarised the authorities as indicating that an option was either a conditional contract (the non-promissory condition precedent being the exercise of the option by the optionee), or an offer to sell coupled with a contract not to revoke the offer. He felt that the former was the correct interpretation, and pointed out that the decisions in *Re Mulhollands Will Trusts*⁸ (where an option was validly exercised by a grantee who was appointed executor of the grantor) and *Weeding v. Weeding*⁹ could not have been reached if an option was merely an offer. He also pointed out that it would be difficult to obtain specific performance of a contract not to revoke an offer if it had already been revoked, and concluded that not only is an option a conditional contract, but

it is clear that the option itself creates an equitable interest in the land to which it relates. . . . An equitable interest cannot be created by a mere offer; it is necessary to find a contract which gives the grantee a right to call for a conveyance of the land. Of course, on either view of the nature of an option, there is a contract, but it seems very artificial to treat a contract which does no more than provide that an offer shall not be revoked as giving the party to whom the offer is made a right to call for a conveyance of the land and an equitable interest in it. On the other hand, a conditional contract to sell the land would clearly create a contingent equitable interest in the land.¹⁰

Consistent with the approach of Gibbs J. has been the approach of New Zealand courts. In *re Rutherford*¹¹ Roper J. looked at options, and distinguished between options and rights of pre-emption, and found that an option not only had contractual operation but also created an equitable interest in land capable of supporting a caveat under section 137 of the Land Transfer Act 1952 (something a mere offer would not do).

It is submitted that an option therefore is a conditional contract which falls within the term "contract or agreement" in section 24(1) of the Act. Support for this view is to be found in the Privy Council decision in *Ross v. Henderson*¹² where their Lordships agreed with Beattie J. (the first instance judge) that because section 24(1) refers to *any* contract or agreement, and section 23(1) lists the various contracts or agreements to which the Act applies, including options, section 24(1) must include a contract or agreement to grant an option.

It is also submitted that the word "purchaser" in section 24(1) includes optionee. In *Ross v. Henderson* the Court of Appeal held that "purchaser" was a proleptic expression which the legislature intended to include "optionee".¹³

⁷ (1974) 4 A.L.R. 482; discussed in (1974) 49 A.L.J. 192.

⁸ [1949] 1 All E.R. 460.

⁹ (1861) 2 J. & H. 424; 70 E.R. 812.

¹⁰ *Laybutt v. Amoco Australia Pty Ltd*, supra, 497.

¹¹ [1977] 1 N.Z.L.R. 505.

¹² Supra.

¹³ [1976] 2 N.Z.L.R. 589, 592. Cooke J.

Section 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, the person who will become the purchaser if an option is exercised.

That "purchaser" was a proleptic expression was agreed by the Privy Council.¹⁴

As to the argument that "consent" means consent of the Tribunal only, it is submitted that this too is a proleptic expression, intended to mean "complied with the provisions of the Act" and includes "depositing a declaration" with "consent".

It seems therefore that the declaration procedure under section 24 is available in respect of options *simpliciter* as well as options contained in leases, and no further declarations or consent will be required to the subsequent exercise of the option.

¹⁴ *Ross v. Henderson* [1978] 2 W.L.R. 354.