NZLR

3/10

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.1127/82

1177

BETWEEN ALLEN INDUSTRIES LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as paper merchants and JONMER DEVELOPMENTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as developers

Plaintiffs

AND GLOBAL SPA (NEW ZEALAND) LIMITED a duly incorporated company having its registered office in Auckland and carrying on business there and elsewhere as the manufacturers of swimming pools

Defendant

Hearing: 11, 12, 13 June, 1984.

Counsel: A.P. Randerson & S.M. Temm for Plaintiffs
K.C. Manley for Defendant.

Judgment: 13 June, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

The plaintiff companies' claim in this action is for recovery of certain sums alleged to be due and payable by the defendant in terms of an agreement for the leasing of commercial premises in Wairau Road, Takapuna, Auckland. Alternatively, the two plaintiffs base their claim upon a claim for damages for alleged wrongful repudiation by the defendant of the before-mentioned agreement for the leasing of the premises. The sum as finally claimed in terms of the plaintiffs' second amended statement of claim

is on either basis the sum of $14,575.62. There is, in addition, a claim advanced for interest on the amount thus claimed from 1 January, 1982 in accordance with and at the rate prescribed in terms of the Judicature Act down to the date of judgment.

The facts as pleaded and put forward in the evidence of the witnesses for the plaintiffs can be stated fairly briefly although they were the subject of lengthy evidence. The two companies named as plaintiffs were, respectively, the investor in and the developer of certain land upon which a building was subsequently erected. This particular project was one of a number of similar projects which had been carried through by the two companies acting in partnership in this way. In pursuance of this joint venture as regards the land in question, the second-named plaintiff first became the registered proprietor of the land but later transferred to the first-named plaintiff a stratum estate title in freehold within the meaning of the Unit Titles Act 1972 in respect of a building unit, the construction and letting of which was undertaken by the second plaintiff. That company had discussions with Mr Reed, Managing Director of the defendant in which, according to the director of the second-named plaintiff company, Mr Calderwood, all of the essential terms of a leasing arrangement were agreed upon and the defendant was to take a lease of the premises as soon as they were completed, it being anticipated that this would be prior to 1 August, 1980, so that the occupation in terms of the leasing agreement was fixed for that date. The arrangements

thus discussed were recorded in a letter sent by the second-named plaintiff to the defendant. This letter commenced with the statement -

> "Further to our discussions about your company leasing from us the other half of the building occupied by the BNZ at 187, Wairau Road, we are pleased to set out the agreement Heads:"

There followed in this letter reference to all the usual terms of a lease, the period being stated to be 12 years, the commencement date as previously mentioned was included and a rental of $25,000 per annum was stated with provision for rent reviews every three years. The lessee, in addition, was to pay rates, insurance and a cultivation levy and an amount for maintenance and decoration and there were other terms referred to followed by a reference to other terms and conditions not specified which were to be similar to those in leases prepared by Auckland solicitors for buildings of the type in question. The letter also referred to certain matters of special agreement the first relating to an arrangement whereby the second-named plaintiff was to provide an indemnity to the defendant in respect of the residual rental payments on the premises which the defendant was then occupying. There was also a provision regarding certain rebating of rental payments during the initial period of the lease and also a provision regarding expenditure of moneys in the completion of the building and with particular reference to incorporation of features to make the premises suitable for the particular needs of the defendant. In respect of this matter there was a statement with regard to portion of the specific sums referred to that the amount

was "to attract interest at the rate of 15% per annum and to be added to the rent." In other words, this was the commonly encountered provision for capitalisation of the particular expenditure necessary to adapt the premises for the lessee's use so that the capital sum would not need to be provided for but the rental would be increased on the basis of the specified percentage.

The defendant wrote in reply to this letter of 2 July, 1980, on 17 July, and the letter commenced with the following sentence:

> "Thank you for your letter of July 2nd, 1980, outlining the details of the leasing arrangements at 187 Wairau Road."

In the body of the letter there is the statement -

> "The following are comments to the agreements as already discussed."

There follows reference to a number of matters all of which, however, are clearly directed to the furtherance of the objectives contemplated by the letter written to the defendant and there is nothing in the letter calling into question in any way the matters which are set forth in the letter of 2 July. I say this notwithstanding a submission advanced by Mr Manley that there could be read out of this letter of 17 July a question of some new stipulation being introduced by the defendant by its making a reference in the letter to "all outgoings on the above properties". I must say that I simply read this as a reference to the manner in which the indemnity payments would actually be dealt with as a matter

of machinery. There was no evidence to lead me to any contrary view.

The building was not in fact, it seems, ready for occupation on 1 August, 1980 and the sum which was contemplated to be provided by way of capitalisation of the rental in respect of the tenant's improvements evidently exceeded to some degree the amount of $5,000 which was referred to in the letter of 2 July, but these matters are not of importance except to the extent to which I hereafter refer as the evidence of Mr Reed showed ultimately that there is no dispute that the commencement date was deferred to 1 October, 1980 and the rental based on the amended figure which gave an annual rental figure of $26,300 was accepted by the defendant as being the rental payable and payments thereafter were made by it on the basis of a monthly figure computed on that annual sum.

The second-named plaintiff which, the evidence shows, was entrusted by the first-named plaintiff with the task not only of developing the site and the erection of the building but also with all arrangements regarding leasing, continued for a short time after the defendant had taken possession to manage matters with regard to the payment of rental and other questions arising in relation to the final completion of the whole project. In this way there came to be paid to the second-named plaintiff a sum of $2,476 in respect of what is described as building extras but although this sum is included in the sum of $13,243.04

referred to in paragraph 8 of the defendant's final statement of defence, it is agreed by Mr Manley that this amount does not enter into the calculations with regard to the particular claim here under consideration.

On 26 November, 1980 the solicitors acting for the second-named plaintiff sent a deed of lease for perusal by the defendant's solicitor. This deed of lease incorporated all the terms referred to in the letter earlier mentioned but with the alterations to which I have referred.

On 18 December, 1980 the first-named plaintiff directed a letter to the defendant referring to the fact that it was the owner of the building and to the fact that the development arrangements with the second plaintiff were nearing a completion and accordingly required the rentals to be paid to it by the defendant from 1 January, 1981. The evidence showed that what was contemplated was that, as had been previously done, the lease initially taken in the name of the second plaintiff would be assigned to the first plaintiff as soon as everything was going smoothly and the development arrangements were treated as concluded.

In terms of the arrangements as I have described them rental payments in the ordinary way were made by the defendant to the second-named plaintiff for the months of November, December, 1980 and January and February of 1981 and the second-named plaintiff accounted to the first-named plaintiff for these sums and contras in accordance with the

overall dealings taking place between them.

In March of 1981, however, two cheques were received by the first-named plaintiff from the defendant totalling the ordinary monthly rental sum but one of these was a cheque drawn by the defendant in favour of a company designated on the cheque as Mayfair Pools Limited and endorsed over to the first-named plaintiff and the second was a cheque drawn by a company called Pacific Marketing Limited. Thereafter, two more cheques for the monthly rental were sent by this company named Pacific Marketing to the first-named plaintiff being for the months of April and May, 1981. Following, as the evidence of the first plaintiff's General Manager showed, there were cheques for the amount of $560 paid to it by a company called Europarts Limited. There were four of such latter cheques in all.

The matters which arise in this action for the Court's decision are concerned with the occupancy of the premises or parts of the premises which had been leased to the defendant by the companies or parties to which I have made reference.

In relation to these issues, it is necessary to note that although the first plaintiff, as I have already mentioned, had arranged for the rental payments to be made directly to it, the second-named plaintiff, by its Managing Director, Mr Calderwood, continued to exercise authority

as the agent of the first-named plaintiff in relation to the letting of the premises and to attend to the various matters which arose during the year 1981. This was, of course, done in pursuance of the arrangements already referred to whereunder all the arrangements with regard to tenancy were attended to by the second plaintiff in pursuance of the joint venture arrangements. In fact, this however, clearly led to some of the uncertainties which arose in this case because the rental payments were not passing through the hands of the second plaintiff as had been done in the earlier stages.

In essence, the evidence of Mr Calderwood and of Mr Burrett, a director of the company referred to, Pacific Marketing Limited, and of Mr Leppard, the director of the second-named company, Europarts Limited, was to this effect: As regards the first-mentioned company, Mr Calderwood was made aware early in the year 1981 that the defendant company was facing difficulties in its business. There were matters relating to import licences which were affecting it very adversely and it was anxious to make some arrangements which would enable its difficulties to be overcome. Among its desires was to endeavour to extend its operations or undertake operations in Australia. To this end, according to Mr Calderwood, the defendant, according to its managing director Mr Reed, wished to divest itself of the retail side of its spa pool business and for this purpose to introduce into the premises a firm or company which would undertake this side of the business. For this reason, according to Mr Calderwood, there was

introduced to him a Mr and Mrs Burrett whom he later learned operated the company called Pacific Marketing Limited. A conference was held at the request of Mr Reed at which Mr and Mrs Burrett were present, also Mr and Mrs Reed for the defendant company and Mr Calderwood himself. The version of what occurred as given by Mr Calderwood is simply that he was asked to approve of a sub-tenancy arrangement whereby the front portion of the premises hitherto occupied by the defendant would be taken over by Mr and Mrs Burrett or their company and thereafter they would be looking after all the retail side of the defendant's business. It was also, according to Mr Calderwood, put to him in the course of this meeting that the building owner should agree to a separate lease being entered into by Mr and Mrs Burrett for the part of the premises which they were to occupy and for the small part to be retained by the defendant to be subject to a separate lease, these leases to be in lieu of the lease which it had been anticipated would be signed on behalf of the defendant. Mr Calderwood was quite adamant in his evidence, however, that he would not agree to any fragmentation as he put it of the building as regards the leases nor was he agreeable to any release of the defendant from its liabilities under the leasing arrangements of the whole of the premises which had been entered into with the defendant. This aspect of the matter was the subject of completely conflicting evidence as I will hereafter mention but it should here be noted that the Mr Burrett referred to was called to give evidence for the plaintiffs and his version of matters was completely in accord with that related by Mr Calderwood. He indeed said that his company was in the

situation where it was wishing simply to try out the prospects of success in dealing with the retail side of the sale of swimming pools and he would certainly have not been agreeable to entering into any long term lease at all. Mr Calderwood confirmed that he signified agreement on behalf of the building owner to the Burretts entering into possession of portion of the demised premises in accordance with this discussion.

It should also here be mentioned that, according to Mr Calderwood, it was not at any stage made clear to him at this discussion just in what capacity Mr and Mrs Burrett were to become sub-tenants of the defendant. The uncertainty in his mind arose because of the mention of various names, i.e. Pacific Marketing Limited and Mayfair Pools and also he noted some reference to someone called Atkins being involved in the arrangement which the defendant, Mr Reed, was proposing. There was no indication given by the evidence either of Mr Calderwood or Mr Burrett, nor indeed was there in the evidence given by Mr and Mrs Reed, any mention of the precise financial circumstances of Mr and Mrs Burrett or the company they operated. Mrs Reed, indeed, who deposed to her knowledge of what took place at the meeting, was not clear whether Mr and Mrs Burrett were shareholders in the company Mayfair Pools Limited which she believed to exist or just who were the shareholders in that company. She, however, certainly thought that a company called Mayfair Pools Limited existed and was to be a tenant in the premises and indeed was, as is contended by Mr Reed and Mrs Reed to be thence-forth the tenant of the whole premises in substitution for

the defendant.

The issues raised by the defendant can now be stated with reference to the facts to which I have so far adverted. There is no dispute as to the exchange of letters to which I have referred or to the fact of the various payments being made as referred to in the evidence given on behalf of the plaintiff companies. It should, however, be noted here that the deed of lease which the letters exchanged clearly contemplated would be drawn up and signed by the parties was not at any stage executed by the defendant and indeed the position which ultimately arose in July, 1981 was that the defendant, through its solicitor, put forward the contention that the plaintiffs, through Mr Calderwood, had agreed to the substitution of the company Pacific Marketing Limited for the defendant as tenant and accordingly it was claimed that the defendant had no further liability of any kind to the plaintiff in terms of the lease arrangements referred to in the correspondence.

Referring to the pleadings, the defendant's final statement of defence contains an admission that it had ceased to occupy the premises itself in the month of March, 1981 and that it had subsequently to that date, namely on or about 27 May, 1981 entered into an agreement to sublet the lower level of the premises to the company Europarts Limited at a rental of $860 but the claim as regards this latter company was that the sub-leasing referred to was in fact an under-lease by it as sub-lessee from the company Pacific Marketing Limited. The pleading

is to the effect that the defendant entered into an arrangement with that company to take from it a sub-lease of the portion of the premises which it desired to retain for the purposes of its business in New Zealand for a period of 12 months, such sub-lease being arranged for on the basis that the rental payable to Pacific Marketing Limited would be met by the transfer by the defendant to that company of a quantity of mosaic tiles.

It is contended in the pleadings, first, that the leasing arrangements with the second-named plaintiff did not amount to a concluded contract because of the fact that the rental was thereafter increased and it is said that there was no consideration for this increase in rent. It is further pleaded that the plaintiffs demanded and received rent from the company Europarts Limited for the months of April to December, 1981, this being part of the period for which the plaintiffs are claiming rent from the defendant and that the plaintiffs had in fact entered into and retained the whole premises themselves from the month of April, 1981. Then it is pleaded that there was, on the basis previously indicated, an agreement between Mr and Mrs Burrett personally or, alternatively, Pacific Marketing Limited, or alternatively a company called L.F. Atkin Limited, or Mr and Mrs Burrett acting on behalf of such companies whereby they would take over the tenancy of the whole of the unit and this arrangement, it is said, was agreed to on behalf of the plaintiffs with the consequence that the plaintiffs agreed to release the defendant from any liability in respect of the premises after 28 February, 1981.

Following the order in the statement of defence, it is further pleaded that there was no actual contract entered into between the parties of a binding nature by the exchange of letters and no sufficient memorandum for the purposes of the Contracts Enforcements Act. It was further pleaded in this regard that the plaintiffs could not rely upon the letters exchanged as contractual because it was not shown that Mr Calderwood was authorised in writing to act on behalf of the plaintiffs. This particular defence, however, was abandoned it being based upon the Property Law Amendment Act 1980 which had in fact not come into force at the time of the alleged agreement under consideration. There were finally pleadings advanced on the basis that there were representations made by or on behalf of the plaintiffs and actions taken by or on behalf of the plaintiffs which resulted in their having brought any lease which was found to exist if the earlier contentions were not accepted, to an end or, alternatively, resulted in a situation whereunder the plaintiffs were estopped from relying on the correspondence and the circumstances generally as disclosing the existence of a binding contract upon which the action could be based.

In relation to the question of the plaintiffs themselves having by their actions brought the lease to an end, reliance was placed, it should be mentioned, upon certain evidence given by Mr Calderwood and by Mr Reed showing that at one period the second plaintiff itself had taken up some occupancy of the premises by carrying on some operations therein relating to its own business or storing of building components or equipment in the premises.

A further defence raised by way of alternative defence was that the plaintiffs had failed to mitigate the loss by failing to re-let the premises or collect certain rentals from the persons who were in occupation thereof. It was also submitted that the plaintiffs having from 1 January, 1982 entered into a new lease with the company Europarts Limited in respect of the whole premises, the plaintiffs were unable to advance any claim on the basis of damages for the breach of the lease, they having themselves brought the lease to an end and being therefore unable thereafter to seek specific performance or claim damages for breach of the lease.

The first matter to be dealt with, of course, is the question of the existence and enforcibility or the alleged agreement. It is my conclusion, notwithstanding the submissions advanced as already mentioned, that there did come into existence here a binding contractual arrangement and a sufficient memorandum thereof for the purposes of the Contracts Enforcement Act 1956.

It has, of course, to be remembered that an agreement between parties can be complete and result in binding obligations even though every detail relating to the contract has not been worked out and agreed upon. The situation is made plain in the following passage from Halsbury, 4th Edn. Vol.9, para. 261:

> "...an agreement may be complete although it is not worked out in meticulous detail. Indeed, the parties may make it clear that,

> whilst they intend subsequently to enter into a detailed formal agreement, it is their intention that the provisional agreement be immediately binding. However, whether or not the parties intend a subsequent formal agreement, an outline agreement may achieve sufficient certainty for that agreement to be complete by reason of the maxim that that which is capable of being made certain is to be treated as certain: for instance, because the details not settled by the parties may be determined by recourse to implied terms, or usage, or by means of a reference to a third party; or because extrinsic evidence renders certain that which the terms of the written agreement between the parties left in doubt; or because the apparently uncertain terms are, in fact, meaningless. Furthermore, the courts are the more ready to find a concluded contract where the alleged contract is a commercial one, or is partially executed; and a fortiori where both factors are present."

This, in my view, has very clearly applicated to the position here shown to exist. The letter of 2 July, 1980 indeed in my view contains all the essential elements for the creation of a valid agreement to lease and indeed there are embodied therein references enabling any subsidiary matters of detail to be satisfactorily worked out. That is so, for example, with regard to the matter of the increased rental in respect of capitalised expenditure on the building to make it suitable for the purposes of the defendant. That matter of detail was, of course, as the evidence shows, in fact worked out and agreed upon between the parties. The evidence further showed that there was no dispute which subsequently arose between the parties with regard to the drafting questions which were raised by the defendant's solicitor with regard to the terms of the formal lease. In any case, of course, those matters could have been resolved by resort to a determination of what could properly be included as a

clause customarily employed by solicitors practising in Auckland. I do not think, therefore, that it is in fact necessary here for the plaintiffs to rely upon the doctrine of part performance as to which Mr Manley submitted there would be some difficulty.

The primary matter for determination is, of course, the question of what arrangements actually were made between the parties at the beginning of the year 1981 in the meeting to which I have already referred involving Mr and Mrs Burrett. Here the situation is that the Court is confronted with a diametrical conflict of evidence the conflict being between Mr Calderwood and Mr Burrett on the one hand and Mr and Mrs Reed on the other hand. I have sufficiently indicated the basis of agreement for which the latter contended and to which their evidence was directed.

The first difficulty the defendant faces as regards this aspect is that it appears to me to be indeed extremely unlikely that Mr Calderwood would in all the circumstances as described in the evidence presented on both sides have simply agreed to release the defendant from the obligations of a 12 year lease at the substantial annual rental referred to, simply accepting instead as lessess Mr and Mrs Burrett or their company Pacific Marketing Limited, in the manner which I have already referred to. There was no indication at all given to any detailed information being submitted to Mr Calderwood as to the financial standing of the Burretts or the ability of their company to

operate and continue to operate a business which could be expected to meet the substantial obligations of a lease of this kind. There is also to be taken into account the inconsistency which on the face of it is presented by the fact of the defendant making certain payments to the first-named plaintiff in respect of rates, insurance and other matters for a period clearly designated as going beyond the date of the end of February, 1981 which Mr and Mrs Reed contended was to be the date upon which their obligations under the lease terminated. I say no more than that I found Mr Reed's explanation in respect of these matters quite unconvincing.

An important matter which I also take into account in relation to the question of which version of these arrangements in February I should accept relates to the matter of the subsequent arrangements admittedly made by Mr Reed with the company Europarts Limited. The matter is one of credibility and I find in relation to this that the arrangement with the company Europarts Limited which of course was recorded in a document signed on behalf of the defendant was this: Mr Reed in his evidence described in detail a meeting arranged by him between Pacific Marketing Limited and the directors of Europarts Limited. I refer to a portion of his evidence in chief following his being asked the question "What discussion did you have with the Europart representatives about Pacific Marketing?"

> "They met Pacific Marketing with me.
>
> Who did they meet? ... Alan Burrett, and it was specifically to introduce them and I made it clear to Europarts that we were closing down and leaving New Zealand. That we had

> prepaid 12 months rent to Pacific Marketing as a sub-tenant and that they, providing that Pacific Marketing had no objection, could move in and occupy the ground floor of the building for a maximum of 12 months, since we had no control over a 12 month period."

The fact of such a meeting taking place as so described was not put to Mr Burrett of Pacific Marketing Limited in cross-examination, the topic was not raised with him at all. It is, again, a version which is completely at variance with the evidence given by Mr Leppard of Europarts Limited. He, in his evidence, said that when the agreement dated 27 May, 1981 was signed he did not really know who Pacific Marketing really was. He said that he -

> "Just assumed that Global Spa and Pacific Marketing were one and the same."

This has to be considered in relation also to the general impression made upon me by the evidence of Mr and Mrs Reed and particularly Mr Reed. My conclusion is that the references in the agreement of 27 May, 1981 to Pacific Marketing Limited were included therein simply as a device intended to bolster up an argument that the defendant itself was no longer the actual tenant of the premises and entering into a sub-lease with the company Europarts Limited, but was instead itself a sub-lessee in the way that I have previously referred to. It was, of course, very understandable that Mr Reed on behalf of his company should be endeavouring to let portions of the premises to sub-tenants in order to reduce his liability. My conclusion is that he was well aware that his company remained fully liable in terms of the arrangements which had been entered into in

July, 1980 for the leasing of these premises and, overall, having regard to the matters to which I have referred and indeed a number of other inconsistencies in the version of matters put forward by Mr and Mrs Reed, with the evidence of other witnesses in the case and the unlikelihood of the version put forward on behalf of the defendant being the true one, I have concluded I should prefer in all respects the evidence of Mr Calderwood, Mr Burrett and Mr Leppard to that of Mr and Mrs Reed.

It remains then, however, to consider the other grounds of defence which were advanced. These must be considered on the basis of the specific findings which I now make, i.e. that the defendant itself arranged for a sub-tenancy of the premises to Mr and Mrs Burrett or their company for some period which I find myself unable to determine specifically on the evidence, but most probably simply by way of a monthly tenancy and, secondly, that that sub-tenancy was accepted by the plaintiffs through the agency of Mr Calderwood. I also find that without any consent having been obtained from either of the plaintiffs or any approval given by them the defendant created a sub-tenancy to Europarts on the basis of a monthly rental of $560 a month but that there was no specific term as was contended for by Mr Reed so that what was created was simply a monthly tenancy of portion of the premises which the defendant had agreed to lease.

In the light of those findings it is necessary to reach a conclusion as to whether or not the plaintiff

companies or either of them did in fact effect a re-entry into the premises at any stage so as to have the effect of determining the lease prior to 31 December, 1981. After that date, of course, as the plaintiffs clearly by their pleadings accept, the lease was treated by the first-named plaintiff as having been terminated upon the basis of it having been repudiated by the defendant it of course having failed to pay the rent due for many months prior to that time and having abandoned entirely its occupancy of the premises and indeed it appears its business in New Zealand.

The payments of the cheques by Pacific Marketing Limited directly to the first-named plaintiff and the acceptance thereof by the first-named plaintiff I do not in the circumstances here pertaining regard as any evidence upon which could be based a finding that the plaintiffs or either of them were accepting the company Pacific Marketing Limited as a tenant in lieu of the defendant. The arrangements which had been discussed with Mr Calderwood and as to which there is no dispute make it clear that both Mr Gaulter and Mr Calderwood would not be occasioned any surprise by the fact of cheques coming forward in this way from Pacific Marketing Limited. A creditor of course is entitled to accept from his debtor any cheque drawn by any party if such is tendered in satisfaction of the debt and it is common practice to do so. In the present case, however, there was nothing surprising or likely to put the plaintiffs on guard in any way in my view in these payments being made in this way because of the indication given that the retail side of the defendant's business would be being attended to,

in some manner or other by this company Pacific Marketing Limited or Mr and Mrs Burrett. The company Pacific Marketing Limited was accepted in my view as a sub-tenant only and in the circumstances it was quite a neutral circumstance that the cheques for rent were paid by that company direct for the short period to which I have referred.

The situation, however, is of course different as regards Europarts Limited. There again, however, I cannot accept the contention advanced that the evidence indicates an acceptance of that company as a tenant and the releasing of the defendant in consequence.

Mr Manley referred me in this regard to the passage in Halsbury, 4th Edn. Vol. 27, para. 450, referring to a surrender by the landlord by a lease to a third person with the tenant's consent. The situation to which that paragraph refers has in my view no application at all to the present situation. All that here happened, I find, is that the plaintiffs, confronted with the situation whereunder an unauthorised sub-tenant had taken up portion of the premises and the apparent abandonment of the tenancy by the defendant and the departure from New Zealand of its principal shareholder, simply took the step of accepting the situation of a sub-tenancy ex post facto and receiving the rent payable to the account of the defendant and in reduction of the defendant's liability. This is indeed, I think, a situation which is to be treated in accordance with what is said in the case of Relvok Properties Ltd. v. Dixon and Another [1972] P.&.C.R. 1 to which Mr Manley

referred. He referred to the passage at p.7 of that judgment as to the final view adopted in the circumstances of that case. The important passage as regards the circumstances here presented, however, in my view, is that appearing at p.5 beginning:

> "In my judgment Judge Irving correctly applied the principles which emerge from Oastler v. Henderson [1877] 2 QBD 575, where the Court of Appeal held that attempts by a landlord to let premises which had been abandoned by a tenant did not constitute an unequivocal act operating as acceptance of a surrender. The result of that and other authorities is that as the law stands it is open to a landlord whose tenant has absconded both to protect the security of his premises and the state of their repair and yet maintain his rights for rent against that tenant until a fresh one is found and he then thinks fit to enforce the forfeiture. Whether in any individual case the landlord has done more than thus protect his interests is of course a question of fact in each case. The onus lies on the tenant to prove that more has been done and thus the lease terminated."

In my view that passage assists the plaintiffs and not the defendant in the present circumstances. Indeed, the defendant as I have mentioned has advanced the plea that the plaintiffs were under a duty to mitigate the damages and this I of course accept. There were also submissions advanced on behalf of the defendant on the basis of an estoppel being able to be pleaded against the plaintiffs' claim. I have in this regard considered the references to authority to which Mr Manley has made, viz., Spencer Bower And Turner Estoppel, 3rd Edn., para. 198, Nickells v. Atherstone [1847] 10 QBD 944, Oastler v. Henderson [1877] 2 QBD 575 and Phene v. Popplewell [1962] 12 CBNS 334.

My conclusion is that no case for the operation of the doctrine of estoppel arises here on the facts as I have here found them to be. In the defendant's pleading there are a number of references to representations made by or on behalf of the plaintiffs but it is clear all that is really relied upon is the situation with regard to the two special contingencies to which I have adverted as creating the estoppel. The essential point of course which in my view prevents any estoppel arising is that there is here on my findings no question whatever of the defendant altering its position or relying in any way upon anything done by or on behalf of the plaintiffs so as to cause it to take the course of action which it would not otherwise have done.

The facts here as I have found them to be do not bring this case within the principles applied in the cases to which Mr Manley referred.

The final matter to be dealt with is the question of alleged failure to mitigate and the question of whether certain sums not allowed for by the plaintiff in its pleadings should be brought into account. One of these was based upon evidence given as to the higher rental obtained from Europarts Limited when the lease to that company came to be arranged from the beginning of January, 1982. As to that, the situation in my view is that the mere fact of the re-letting having been arranged at an annual rental $730 in excess of the rental provided for under the leasing arrangements with the first-named plaintiff does not take the matter far enough for the defendant to be able to contend that it is

entitled to any credit in this regard. The case cited by Mr Manley, Walls v. Atcheson [1926] 3 Bing 462 which I have considered does not go as far as to enable the finding which Mr Manley seeks to be made here. There is here no evidence as to what the actual market rental could be said to be at 1 January, 1982. The plaintiff L.R. Allen Group Limited would of course in any event have been entitled to the review of the rental of 1 October, 1983 and it would be impossible for me to make any determination on the information before the Court as to whether the plaintiff was in fact better off or not as a result of the lease entered into with Europarts.

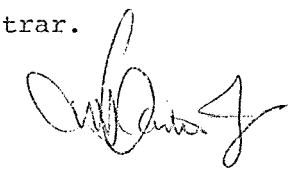
The question of a failure to collect rental from Pacific Marketing Limited for the months of June and July is, I think, to be determined by me on the basis of the evidence and I find that no such rental could have been in any case demanded because of the absence of contractual relationships but, furthermore, on the balance of probabilities on the evidence I conclude that this company had vacated in May, 1981 as Mr Burrett says was, he believed, the case.

The question of the carpets is one I have already dealt with in the course of discussion with counsel during the submissions made and I can find no evidence upon which a deduction could be made against the plaintiffs' claim on the basis of the reference in the evidence to the cost of the carpets.

The only other matter is the question of some value being attributed to the use made of the premises over a period in July or August or over these two months as is referred to in the evidence of Mr Calderwood and Mr Reed. With regard to Mr Calderwood's evidence, however, it has to be noted that he made reference to the necessity for certain work to be carried out in the repairing of the premises following their being vacated by Pacific Marketing Limited. There is no indication that another tenant could have been obtained at this time and indeed the evidence of Mr Calderwood is to the contrary. Altogether I find the evidence as to this aspect insufficient to enable me to place any value upon this item to which the defendant should be entitled.

The result accordingly is that I find the plaintiffs' claim established and there will be judgment for the plaintiffs for the sum of $14,575.62. As regards interest, I think that the case is one where the Court should exercise its discretion under the Judicature Act but interest should not, I conclude, be allowed for any period prior to 30 March, 1982 because that appears to have been the earliest time at which the defendant was acquainted of the precise amount which was claimed to be due by it in terms of its obligations under the lease agreement. The interest will accordingly be allowed from 1 April, 1982 to the date of judgment at the rate specified in the Judicature Act.

There will be costs according to scale and I certify for a second day. I certify $100 per day for second counsel. Disbursements and witnesses expenses will be as fixed by the Registrar.



SOLICITORS:

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