NZLR

14/5

No Special Consideration

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A No. 904/79

427

BETWEEN E. C. COX & OTHERS

Plaintiffs

AND J.G. RUSSELL

First Defendant

AND NOVATYPE NOVAGRAPHICS (NZ) LTD

Second Defendant

AND OTHERS

Hearing: 16, 17, 18 April & 4 May 1984

Counsel: Mr Carden for Plaintiffs
Mr Woodhouse for Defendant

Judgment: 4 May 1984

(ORAL) JUDGMENT OF HILLYER J

This is a claim for rent and assorted associated moneys made by the plaintiffs against primarily the second defendant, Novatype Novagraphics (NZ) Ltd. The claims against the third defendant are not pursued, and the claims against the fourth and fifth defendants, which arose out of allegations relating to the way in which those defendants carried out levying of distress in circumstances I shall mention later, have not been proceeded with.

The plaintiffs are the owners of a property at No.52 Upper Queen Street, Auckland. The first named plaintiff, Edward Charles Cox, is a builder, and the others claim only in association with him. He was the only one of the owners to give evidence before me and was clearly the

person who had the conduct of the letting and subsequent dealings with the building that I have mentioned.

The second defendant is a company which was formed for the purpose of doing some type of printing work.

On 1 February 1976, a lease commenced from the plaintiffs to the second defendant, for a period of 3 years, at a rental of $562.50 per month for one floor of the building owned by the plaintiffs that I have mentioned. At that stage the second defendant company was owned and operated by two gentlemen who did not give evidence before me, and who in the events I am about to describe, took a very minor part, certainly towards the culmination of the problems that beset the defendant company. Eventually those two gentlemen, Messrs Wilson and Warland departed, leaving the conduct of the second defendant in the hands of the first defendant, John George Russell.

As I have said, the second defendant did not prosper, and by about the middle of 1977,certainly, was seeking assistance from a company called Commercial Management Ltd, which was run and it seems wholly owned and operated by the first defendant. It provided what was described as financial consultancy services.

I have mentioned that the lease commenced on 1 February 1976, and the second defendant went into possession of the premises on or about that time, but the lease was not in fact executed until 6 September 1977, or thereabouts, and at the time it was executed the first defendant had come into effectively providing the financial consultancy services offered by his company. He gave evidence as to the circumstances in which the lease was executed, and as to the arrangements made between the first-named plaintiff and himself on behalf of the second defendant.

Chronologically the first matter I should deal with is the question of partitions in the building. Initially the lease provided that an amount of $2400 was going to be paid for "work carried out by the lessor on the said premises for partitioning." The first named plaintiff as I have said, was a builder, and it was he who did the partitioning work. He said that the arrangement at that time was that the partitions would still belong to him, and that the $2400 being substantially less than the partitioners were worth, it was merely to be a contribution by the second defendant to the cost. It was not to be a purchase of those partitions by the second defendant. The partitions were to be fixtures in the building, and the owners of the building were at all times to retain ownership of them.

Following the installation of the initial partitions, apparently further partitioning work was done, and by August 1977 that further partitioning work was such that the amount that was agreed to be paid had increased to $4099. Mr Cox again says however, that that was not to be a purchase of the partitions, it was merely to be a contribution by the second defendant to the cost of installing them. The property in the partitions was still to remain in the owners of the building.

I have not heard evidence from either Mr Wilson or his co-director to the contrary. I have heard surmise from Mr Russell as to what the position was, but for the reasons I will later set out, I do not regard the evidence of Mr Russell as carrying sufficient conviction to make it over rule the impression I have formed of Mr Cox's evidence.

Mr Cox is getting on in years, and his hearing is not good, but I did form the impression that he was completely honest.

By the middle of 1977 as I have said, the second defendant was in financial difficulties and was substantially in arrears with its rental payments. A circular letter was sent from Commercial Management Ltd to creditors of the second defendant in July 1978. The letter, which has been produced was signed by the first defendant and recites that in June 1977 Mr Wilson and Mr Warland approached Mr Russell to assist with their financial difficulties. That letter was dated 28 July 1978, but it does give a history of the dealings of the first defendant with the second defendant. In August 1977 there clearly was a meeting between Mr Cox and Mr Russell.

The essential point is that through Money Market Securities Ltd, the third defendant, a company also owned by the first defendant, an amount was advanced to the second defendant secured by way of debenture. That debenture eventually gave the third defendant the right to appoint the first defendant as the financial adviser of the second defendant, and in that capacity the first defendant in effect took over the control and management of the second defendant and eventually took over the shares.

At the time that the matter was argued before me, it was clear that the first defendant was totally in control of the second defendant and owned all of the shares in the second defendant.

In the end result the second defendant's business became in a worse and worse position, and finally as I have said in July 1978, the first defendant sent the circular letter I have mentioned. That went to the creditors of the second defendant, and a meeting was held which some of the creditors attended. Amongst them was the first named plaintiff, to whom by that stage something over $5000 was owing.

The first defendant said that at that meeting he made an offer to purchase the debts of the creditors for the sum of 10¢ in the dollar. Some of those who were present, noticeably those to whom very small amounts were owing, accepted immediately and have since been paid out. Others such as Kirk Barclay, to whom an amount of just over $1000 was owing, and the NZ Post Office, something over $600, did not immediately accept that offer, but have subsequently done so.

The first defendant said he chaired this meeting, and put a motion to the meeting that the offer made by his company, Money Market Securities Ltd would purchase the debts. Mr Cox said he did not accept that offer. Mr Russell says he asked if anybody at the meeting did not agree to the motion in the form "All those in favour say aye, all those against no." There were some murmerings of assent and no dissenting noises. He therefore took it that Mr Cox had agreed to sell the debt of $5000 odd to Money Market Securities Ltd, the debenture holder for 10¢ in the dollar.

I do not accept the first defendant's evidence in that regard, and I do not accept that the plaintiff who had still rights to his rent agreed to take the sum of $500 odd for the amount of $5000 odd that was due. Mr Cox said that he did not.

Finally, in October 1978 instructions were given by the first named plaintiff to distrain for rent. At that stage it was alleged an amount of something over $6000 was due. A Mr Macefield, who was the principal of Globe Investigations NZ Ltd, private investigators, was instructed. Mr Macefield and his company were the fourth and fifth defendants I have mentioned.

Mr Macefield received a warrant pursuant to the distress and Replevin Act 1908, and armed with this warrant

attended at the premises of the second defendant. There has been substantial criticism of the warrant by Mr Woodhouse, in particular that the property is described as No.50 Upper Queen Street, when in fact it was No.52. Further, that the amount of $6750 alleged to be due for rent was not in fact due. That is acknowledged by Mr Carden for the plaintiffs.

When Mr Macefield arrived at the premises, he was met by the first defendant and was told that he was too late to levy distress for the outstanding rent due on the chattels on the premises. Mr Russell told Mr Macefield that all matters between the second defendant and the landlord had been settled, and that the creditors had agreed, to accept 10 percent of the outstanding debts. On that advice Mr Macefield departed without proceeding further with his distress.

On his departure, Mr Russell said he immediately typed out a document calling up the money due on the debenture given to his company by the second defendant, gave it to himself as the financial adviser of the second defendant, and then typed out another document seizing on all the chattels under the debenture that had been given to his company, and gave that to himself as representative of the second defendant.

There were a number of obvious discrepancies in those two documents, which were apparent on an examination of the originals. The story told by Mr Russell in relation to those two documents, as to the way in which they were prepared, as to the way in which the heading was included, and as to the way in which the date was inserted, might have been accepted if the Court had been looking only - as apparently Mr Russell was - at xeroxed copies. But when the originals were produced to him, and when further Mr Carden produced the carbon copies of those documents, it was apparent that what Mr Russell had been saying about

those documents and the way in which they had been produced was completely false. At that stage I lost all confidence that the evidence given before me by Mr Russell was acceptable.

The result was that the following day, or the day after - (there seems to be some doubt as to when Mr Macefield came back, or what the date was when Mr Macefield arrived there, whether the 24th or 25th October 1978,) Mr Russell was then able to tell Mr Macefield that he was too late, that the goods had been seized by Money Market Securities Ltd. Mr Macefield however, proceeded to make an inventory of the chattels present, and he gave a copy of that inventory to Mr Russell. He did not secure the goods in any way, nor was there anything which could be construed as an agreement by Mr Russell or on behalf of the second defendant, that the goods would not be moved from the premises where they were contained.

Having given the inventory to Mr Russell, Mr Macefield departed, and it appears that for a period matters were in abeyance because an attempt was being made to wind up the second defendant.

Eventually however, Mr Macefield arrived back at the premises, instructed on behalf of the plaintiffs, the landlords to seize and sell in particular a photomix copier, which appeared to be the only substantial valuable asset. He found that that machine, and other chattels, had been shifted, and was unable to sell the chattels to pay the rent. That was in December 1978. On 1 February 1979 the term of the lease ended.

The claim is for first the rent that was due under the lease, and that claim is against the second defendant. It is accepted that the amount due up to 1 February 1979 arithmetically amounts to the sum of $10,0078.80, made up of rent, rates and the moneys agreed to be paid for the

partitions. Contrary to that claim however, Mr Woodhouse on behalf of the first and second defendants, first of all puts forward that the amount of rent that was due up to 30 June 1978, had been compromised by the landlords agreeing to accept the amount of 10¢ in the dollar. I have dealt with that matter, and I confirm that in my view no such agreement was made between the landlords and the first defendant to sell the debt to the 1st defendant's company, Money Market Securities Ltd, the third defendant.

A number of other different arguments were put before me, which in those circumstances do not arise, and I hold therefore that the amount of the debt should not be reduced by virtue of the alleged agreement to sell the debt to the first defendant's company.

The second basis on which those suggested amounts of $10078.80 should be reduced is that the plaintiffs were not the owners of the partitions, and that the amount due should be reduced because the plaintiffs refused to allow the first defendant to sell the partitions to a subsequent tenant. This claim is put forward by way of counterclaim, or set off, but I deal with it at this stage because it is clear in my view that ownership of the partitions was agreed to be and remained with the landlords. There was an agreement to pay a sum in respect of the partitions, but that was not to purchase the partitions.

There is further an amount of $728.99 claimed by the plaintiffs against the defendant. This arises from the fact that it is alleged that the second defendant put acid down the toilet without using a neutraliser, that this burnt out the copper plumbing, and the plaintiff had to incur this expense partly in his own work and partly for materials in replacing the plumbing.

This was alleged by Mr Russell to have been not agreed to prior to the lease being signed, but in my view if a tenant before or after a lease is signed, burns out the copper plumbing of premises by putting acid down the toilet, he properly should pay for the damage, whether it is breach of contract or negligence, and I hold that the second defendant is liable for that amount. No evidence was led to contradict the evidence given by Mr Cox, who was a builder, that that was a proper amount to pay.

I formed the opinion as I have said that he was completely honest, and I therefore hold that the total amount of $728.99 is due.

That amount therefore, of $10078.80 plus $728.99 is adjudged due by the second defendant to the plaintiffs, and I give judgment accordingly for that amount with interest pursuant to the Judicature Act, from 1 February 1979 down to the present time. That will be at the rate of 7.5% until 1 April 1980, and thereafter at 11%.

A further claim was brought by the plaintiffs against the first defendant and was for pound breach or rescous under the Distress for Rent Act, 1689, an Imperial Statute it was alleged was in force in this country.

I have had careful and interesting submissions made to me by both counsel on a number of different defences put forward by Mr Woodhouse on behalf of the first defendant in opposition to this claim, and replied to by Mr Carden on behalf of the plaintiffs. In particular Mr Woodhouse questioned first whether the Distress for Rent Act remained in force in this country. He was not deterred by the fact that in Miami Buildings v Sullivan 1970 NZLR 653, Richmond J stated that the Act was in force, and before that in Cleave v Commercial Loan & Finance Co Ltd 1930 NZLR 925 Herdman J accepted that the statute was in force in this country, pursuant to the English Laws Act 1908.

Mr Woodhouse pointed out that the question does not appear to have been argued, and he put forward careful and reasoned arguments to indicate that the Act may not be in force.

I do not propose to deal with that argument, competently as it was presented, because in the view I now have of the matter, even if the Act was in force, no claim for damages under the 1689 Act would be payable. Under that Act S.3 provides that treble damages may be obtained in the case of pound breach or rescous.

It is submitted by Mr Carden that when Mr Macefield attended at the premises of the second defendant, and gave the notice, he thereby impounded the chattels, or alternatively, having given the notice and said that the chattels were not to be shifted, there was in effect an agreement by the tenant not to shift them.

This matter was dealt with in the Miami Buildings case that I have mentioned. In that case Richmond J held that where a bailiff executing a warrant to distrain chattels on premises owned by the plaintiff, took an inventory but left the chattels undisturbed, and did not move, mark or physically secure them in any way, the goods were not impounded or otherwise secured in the true legal sense.

I am unable to accept that the actions of Mr Macefield when he attended at the premises on either occasion amounted to impounding the chattels. They were simply left in the position where they were when he took the inventory, no steps were taken to secure them.

Equally, although Mr Macefield did distrain on the goods by taking an inventory of them and giving that inventory to Mr Russell, there was certainly no agreement by Mr Russell that the goods would not be shifted. In those circumstances I cannot accept that the tenant was guilty

of pound breach in moving the chattels, nor was Mr Russell, who would be an offender within the meaning of S.3 of the 1689 Act. Before pound breach can be committed there must have been an impounding and there was no impounding in this case.

Treble damages however, can also be obtained if in the wording of the Act there was rescous. This occurs after distress has been levied, and is an attempt to prevent impounding. In this case, as I understand the situation, after levying the distress, Mr Macefield departed. He did not come back until December. It appears that the goods were not moved until approximately 11 November, and I cannot accept that they were moved for the purpose of preventing them being impounded. Mr Macefield did not, as I understand the situation, have any intention of doing what I have set out was necessary to impound the goods. The actions of Mr Russell therefore, did not prevent the goods being impounded. I doubt whether either Mr Macefield or Mr Russell appreciated that the goods had not been impounded, or indeed that it was necessary to impound them.

Whatever may be the situation, in my view the extremely technical requirements necessary to establish rescous and thus give rise to treble damages under what is in effect a penal statute, were not complied with.

It therefore appears that no claim will lie against Mr Russell for pound breach or rescous, amounting to three times the damage suffered by the plaintiffs, and the claim against Mr Russell will be dismissed.

In the circumstances I do not allow costs in his favour against the plaintiffs.

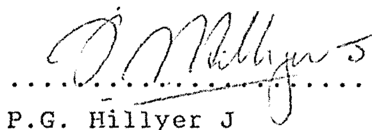
There are a number of other arguments put forward, for example that the warrant to distrain was defective; as to

the effect of the debenture making the chattels not those of the tenant or the person in possession; as to the value of the chattels, but interesting and all as these arguments undoubtedly were in this immediate oral decision I do not need to deal with them, nor do I propose to do so.

I need only say that I am obliged to counsel for the careful and comprehensive way in which these matters were argued before me.

Costs will be allowed to the plaintiffs on the judgment given against the second defendant. I shall receive submissions in writing from the parties as to the amount of those costs if they are unable to reach agreement as to what they should be.

The claim against the third defendant is dismissed.



....
P.G. Hillyer J

Solicitors:

Gaze Bond Carden & Munn for plaintiffs
Glaister Ennor & Kiff for defendants