28/3/85

IN THE HIGH COURT OF NEW ZEALAND M. 1056/84

AUCKLAND REGISTRY

No Special Consideration

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IN THE MATTER of Section 120 of the Property Law Act, 1952

BETWEEN GRAEMARK CABARETS LIMITED

APPLICANT

A N D CITY INVESTMENT LIMITED

RESPONDENT

Judgment: 30 OCT 1984

Hearing: 19 October 1984

Counsel: Lusk for Applicant
Everard for Respondent

JUDGMENT OF CASEY J.

Graemark operates the "Main Street" Cabaret in Upper Queen Street, Auckland and Mr Soljan is its Managing Director. It took possession in August 1980 and according to Mr Soljan (whose evidence was not seriously contested on this) spent some $230,000 over a period of 18 months in upgrading and refurbishing the premises. On 24th August 1983 it was granted a lease for two years with a right of renewal for a further two by the previous owner, Cabaret Metropole Limited. In January 1984 City Investment acdquired the land and Mr Soljan informed its Director (Mr Johnson) that he intended to rewnew the lease on 1st November 1984 and explained what had been spent on upgrading and future plans, expressing an interest in acquiring a longer term. Up to this time Graemark had appacently been up to date with its rent and other payments, but Mr Soljan (who was its principal shareholder) began to experience severe

financial problems over attempts to make additions to his house at Takapuna, resulting in the Cabaret rent falling into arrears.

He made an offer in late March to purchase the freehold but nothing came of this. City Investment increased the rent on 1st April from $3,333 to $4,120 per month but subsequent enquiries suggested this contravened the Rent Freeze Regulations. On 6th April 1984 the landlord's solicitors sent a notice which recited default under the lease in paying the instalments of rent and rates due in February and March, and stated that pursuant to the power in Clause 24, City Investment "doth hereby re-enter the premises demised by the said lease and doth hereby cease and determine the term of the said lease." A letter from the solicitors of the same date informed Graemark that they would receive any offer it wished to make to reinstate a tenancy, which could only be a monthly one. The landlord took no physical action in relation to the premises and Graemark continued in possession.

There was a meeting on 11th April of which conflicting accounts were given and both Mr Soljan and Mr Johnson were cross-examined. I prefer the latter's evidence where there is any conflict; it is also supported by Mrs Ashridge, the Respondent's Property Manager, and by Mr Ansley, its solicitor. Mr Soljan asserted that there was general agreement he should remain in possession on the basis of three months notice on either side at the current rental, until he was able to bring the arrears up to date and then the lease would be reinstated. Mr Johnson says there was nothing of the kind; he made it clear that the lease was at an end and was only prepared to allow Graemark to continue in possession on the basis of a new lease from 7th April until 31st October 1984 (the expiry date of the former lease) with three months notice on either side. He says it was further agreed that Graemark would pay $2,000 per week on account of current rent, charges and arrears. At this rate it was

estimated to take about 16 weeks to clear them. He referred to evidence suggesting that Mr Soljan was thinking of quitting the premises and he felt the arrangement was one that suited him. He denied that there was anything temporary about this, or that the old lease was to be reinstated.

In cross-examination Mr Soljan maintained that Mr Johnson gave him an assurance that the lease would be reinstated during a previous phone conversation in which the 11th April meeting was arranged. In fact he went further and said he would consider offering him a new lease with a longer term, as he had earlier requested. Mr Johnson said this account was misleading and he had simply told Mr Soljan, that the former lease having been forfeited, they would not even consider granting a new lease until arrears of rental had been paid. City Investment's solicitors sent a draft lease to Graemark's solicitors shortly after that meeting embodying the terms as Mr Johnson understood them; they did not return it nor did they make any comment upon it. Mr Soljan said that he was advised it should not be executed, being told to accept nothing less than reinstatement of the lease.

He had arranged for the current monthly instalments of rent to be paid by bank order but some of these were dishonoured and on 12th June City Investment gave a further notice of re-entry and forfeiture of the tenancy, described as granted on 11th April 1984, on the grounds that the rent was in arrear for over 21 days in respect of five weekly instalments during April and May. There was an actual physical re-entry on this occasion, but Mr Soljan succeeded in borrowing enough to pay the arrears, contending that the amount claimed was excessive, and he was allowed back into possession. He asked Mr Johnson whether Graemark could have the new longer lease which had been previously mentioned and was told that a formal request should be made by his solicitors. They wrote on the same day requesting

consideration "to the reinstatement of five year lease in favour of our client". Mr Lusk conceded that the wording was unfortunate; Mr Everard said this, coupled with the other evidence, amounted to a clear acknowledgement that the original lease had been forfeited.

This request was declined on 26th June and on the same date the Board of Commercial Securities Limited (the holding company) accepted an offer by Chase Corporation for the sale of its shares in City Investment for $850,000. Mr Soljan was told of this and the Corporation informed him settlement was due on 1st November and the building would be immediately demolished. On 1st July he said he forwarded a cheque for $9,244.88 to pay the instalments of rent to date together with an insurance premium, although the amount was disputed. The cheque was obtained from a friend and he said it was returned through the mail without any explanation or covering note. Mr Johnson deposed that City Investment had no record of it and if it had been received it would most certainly have been banked. There was an affidavit from the friend who said that when Mr Soljan returned the cheque to him he simply tore it up as not being needed. I find Mr Soljan's account of this unconvincing.

On 12th July Graemark's solicitors wrote giving notice pursuant to Clause 26(i) of the original lease exercising its right of renewal for a further two years from 1st November. This drew a reply from City Investment's solicitors pointing out that there was no such right because the lease had been forfeited, and that Graemark was estopped by its conduct from denying this. With that letter was enclosed one month's notice to quit and they pointed out that the building had been sold to the Chase Group on the basis of vacant possession, so that if the notice was not complied with immediate steps would be taken for recovery and the tenant would be held responsible for any losses.

On 17th August the present motion was filed seeking orders granting relief against forfeiture and against the Respondent's refusal to grant a renewal of the lease. At the end of that month Mr Soljan's problems with his house were resolved in a way that he claims now relieves him of the financial pressures giving rise to the defaults, and he anticipates no further problems. The tenative date of hearing on the motion was fixed for 29th September, but on 27th City Investment again re-entered the premises and had the locks changed and asked a security firm to oversee them. Graemark sought an interim injunction to enable it to regain possession and this was granted by Barker J. on Friday 28th September, conditional upon the Applicant bringing all payments up to date and this was duly done. There were a number of affidavits suggesting that an entry had been forced earlier that afternoon by Mr Soljan or with his connivance. This is not now material to these proceedings but again I found the explanation of this incident given by Mr Soljan and his witness unconvincing. The present position is that Graemark is back in possession with all payments up to date and with an interim injunction in force to protect its possession until the determination of these proceedings.

With this summary of the mass of material put to me in the affidavits and in cross-examination I now turn to consider first the application for relief against forfeiture. It is accepted that this relates to the notice dated 6th April 1984 in respect of the original lease. It is also accepted that the provisions of s.118 of the Property Law Act, 1952 dealing with relief against forfeiture do not apply as they are excepted by subsection (7) in the case of non-payment of rent. Graemark can therefore rely only on the equitable jurisdiction of the Court and the general rule is that the lessee will be granted relief on payment of the rent and any expenses to which the lessor has been put, on the basis that equity regards the powers of re-entry as being merely security for the payment of the rent.

The principles upon which the discretion may be exercised were discussed by Jenkins L.J. in Gill v. Lewis (1956) 2 Q.B. 1, 13. Save in exceptional circumstances, the Court's function in exercising this jurisdiction was to grant relief when all that is due for rent and costs has been paid, "and (in general) to disregard any other causes of complaint that the landlord may have against the tenant." He referred to "very exceptional cases" where the latter's conduct might disqualify him, but this does not normally include other occasions when the rent has been in arrear. So far as Graemark is concerned there are now no considerations on its side which would justify the refusal of this relief. Mr Lusk referred to a number of cases of refusal where the rights of innocent third parties have intervened, but he distinguished them on the grounds that they had already entered into possession of the premises or spent money on them; or became without fraud the registered proprietor; or there were other very exceptional circumstances. I think this summarises their effect and I was referred to Catholic Supplies Limited v. Jones (1922) NZLR 196, where Stout C.J. refused relief, firstly on the grounds of delay, and secondly on the ground that a new lease had been granted to a third party who had entered into possession and would be affected, and the applicant had not made tender of the overdue rent.

Each case must be considered in the light of its own circumstances and here the intervention of the interests of the Chase Corporation is put forward as the exceptional factor which should influence the Court in the Respondent's favour. I do not think any point can be made against the tenant on the score of delay, having regard to the discussions which took place and Mr Soljan's expectation (whether justified or not) that he could negotiate a longer term lease once his financial problems had been resolved, this belief being borne out by the letters from his solicitors. Whatever his views, it must be accepted that Graemark failed to assert any right to have the original lease reinstated, and left the landlords with the impression

that it had accepted the forfeiture. As a result, the holding company made the profitable sale to Chase Corporation on the basis that it could give immediate possession. While it cannot be said that this can be regarded as being on all fours with those cases in which relief has been refused because an innocent third party has entered into possession, nevertheless I think the involvement with Chase Corporation and the way it arose is a serious consideration, which could constitute an exceptional circumstance of the type to be taken in account in the exercise of my discretion.

Were it not for the very substantial amount which Graemark has spent on the premises in the expectation of a secure occupancy, I think the balance would have come down in City Investment's favour. However, in deciding whether exceptional circumstances exist, I think I am entitled to weigh up the effects of refusing relief on the landlord and tenant respectively. I am influenced in my judgment by the terms of the agreement for sale and purchase, which contain a provision for Chase Corporation to avoid the contract in the absence of early possession and recover its deposit; thereafter it is to be of no further force or effect. Although I heard no evidence about the matter, I think it highly probable that this is exactly what will happen if Graemark remains in possession. Mr Johnson referred to financial problems that City Investment might suffer if this sale falls through, but this was not pursued in any detail and I have no reason to believe that it would have an impact in any way comparable to what Graemark would suffer if it had to vacate now. I am therefore prepared to exercise my discretion in its favour by granting relief in terms of the motion "from the purported forfeiture" of the lease.

It was described in this way as a consequence of Mr Lusk's additional submission that the notice of 6th April 1984 did not effect a valid forfeiture and consequently the original lease is still in existence because nothing taking

place since could alter the position. This submission was based on the passage in 27 Halsbury (4th Edn.) para. 428 stating that if a landlord elects to determine the lease for a forfeiture he must do so by re-entry, which he may effect by physiclly entering upon the premises with the intention of determining the tenancy, or by the issue and service of proceedings for their recovery. Moore v. Ullcoats Mining Co. Ltd. (1908) 1 Ch. 575 illustrates the application of this principle and Mr Lusk referred me to the comments of Warrington J. at p. 587, to the same effect as the passage in Halsbury. As the notice given by City Investment of 6th April was not followed by either re-entry or the issue of proceedings, I think Mr Lusk's argument is well founded that it was not effective to determine the lease. Mr Everard suggested that what had taken place thereafter amounted either to a surrender with a new tenancy expiring on 31st October, or to some kind of estoppel. I am satisfied that this is not so; both parties and their legal advisers were clearly under the mistaken impression that the notice had operated effectively as a forfeiture and their subsequent actions were governed by this, not by any presumed intention to give up the existing lease or enter into a new tenancy in substitution thereof. Nor could it be said that the landlord, being firmly of the belief that the lease had been validly terminated, was induced to act to its detriment by the same mistaken belief on the part of the tenant. I therefore find that on either view of the matter the Applicant is entitled to the declaration it seeks in para. 1 of its motion and make an order accordingly.

This brings me to the application for relief under s.120 of the Property Law Act against the Respondent's refusal to grant the renewal. The Court is given a wide discretion under this section, summarised by Richardson J. in the recent decision of the Court of Appeal Weatherall Jewellers Limited v. J. Hendry & Son Limited (C.A. 135/83;

11th September 1984). He said at p. 8 of his judgment:-

> "Clearly the Court has to do justice as between lessor and lessee having regard to all the circumstances of the case and so having regard to the relative prejudice occasioned to the lessor or lessee by the grant or refusal of relief and by any terms imposed under subs (5)."

Having regard to the considerations discussed in the earlier application, I am satisfied that the interests of justice require a similar exercise of discretion in the lessee's favour, notwithstanding the defaults which have taken place. They are unlikely to be repeated and some weight can be given to Mr Soljan's expressed intention to make further improvements; it is certainly in his interest as much as in the landlord's to maintain the premises up to their present standard. It is also probable that the land will retain its value over the next two years so that City Investment could expect an equally favourable sale if it decides to dispose of the property then. Otherwise it will be available for its original intention of development in accordance with its building programme planned for some three years after its purchase. There will accordingly be an order in terms of para. 2 of the motion. In view of the past difficulties I propose extending the interim injunction granted by Barker J. to protect Graemark's occupancy until the further order of the Court.

Normally Graemark would be entitled to the costs of this application. However, this situation arose because of Mr Soljan's misguided attempt to have City Investment finance his building problems by diverting the rent due to them. When the pressure was applied he demonstrated his ability to raise money from other sources to pay his landlord, which did no more than exercise its rights in a normal commercial situation, the problems being compounded by the failure of Graemark and its solicitors then to come to

grips with the situation at a much earlier stage. In these circumstances I make no order for costs.

M E Casey J.

Solicitors:

Bell Gully Buddle Weir & Co., Auckland, for Applicant
Nicholson Gribben & Co., Auckland, for Respondent