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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1642/85

File

BETWEEN CHARLES WILLIAM EASON of Coopers Beach, Motelier and BARBARA JOAN EASON of Coopers Beach, Motelier

Plaintiffs

AND GRANT McINTOSH of Hamilton, Chartered Accountant and MILLICENT EMMA KATE RUTHERFORD of Te Aroha, Widow as Trustees for the RUTHERFORD FAMILY TRUST

First Defendants

AND TREVOR DAVID CLARK of Auckland, Worker

Second Defendant

Hearing: 16,17,18,19 June 1986

Counsel: Mr Fenton for Plaintiffs
Mr Dugdale for 1st and 2nd Defendants

Judgment: 11 July 1986

JUDGMENT OF WYLIE, J.

In this action the plaintiffs Mr and Mrs Eason seek, in essence, relief against forfeiture of their lease of a motel property at Coopers Beach, Mangonui, known as the San Marino Motel. The first defendants are trustees of a family trust, the Rutherford Family Trust. The Trust is the owner in equity of the motel property, being purchaser under a long term agreement for sale and purchase from the former owner, the second defendant, Mr Clark. He presently remains the

registered proprietor. The Trust is for the benefit of the children of a Mr Arthur Albert Rutherford who manages the affairs of the trust and was involved in the negotiations and events giving rise to these proceedings.

The motel property is some 12 years old. It was bought by the second defendant in 1981. He operated it himself until about May 1984 when he put in managers who continued to run it until the plaintiffs took possession on 8 November 1984. However, in March 1984 the first defendants had entered into their agreement to purchase the freehold and business from the second defendant but for a variety of reasons not relevant to these proceedings possession under that agreement was not taken by the first defendants prior to the sale by them of the business to the plaintiffs. In the meantime the first defendants had decided to abandon their original intention to operate the business and instead to sell it and lease the property. The consequence was that the first defendants and more specifically Mr Rutherford as the person having effective management of the trust, had not at any time been directly or personally involved in the running of the business. Thus it was that in the negotations I am about to describe, both Mr Rutherford and the second defendant Mr Clark, were involved.

In October 1984 through a real estate agent specialising in motel businesses, a Mr Griffin, the plaintiffs learned that the business was for sale. They were then at Cromwell where they owned a motel business which they had just leased for

15 years. They were looking for something larger. They came north and inspected the property with Mr Griffin, Mr Rutherford and Mr Clark. In the result a contract for sale and purchase of the goodwill and chattels of the business was entered into between the Rutherford Family Trust and the plaintiffs on 15 October 1984. The purchase price was $150,000.00 of which $75,000.00 was apportioned to goodwill and $75,000.00 to "the plant, fittings and fixtures of the vendor used in connection with the said business as set out more particularly in the schedule hereto". Attached to and forming part of the agreement were several pages containing lists of chattels in each of the motel units together with other chattels on the premises. The first of such pages is headed "San Marino (On Beach) Motel - Chattels List". Possession was to be given and taken on 8 November and that took place. The purchase price was to be paid as to $140,000.00 in cash ($10,000.00 as a deposit and $130,000.00 on possession), and the remaining $10,000.00 was to remain owing to the vendors for 12 months with interest at 20 per cent.

The agreement in Clause 10 contains a warranty that the turnover of the business had averaged not less than $1,730 per week for the immediately preceding 12 months. Clause 6 of the agreement contains the following warranty -

> "THE Vendor warrants that all the assets hereby agreed to be sold are his own sole and exclusive property and delivery of possession will pass to the Purchaser free from any charge or encumbrance whatsoever and further that the said plant fittings and fixtures will be in good operational order and condition at the date of possession."

There is a provision that the agreements, obligations and warranties were not to merge on possession or settlement.

The agreement also contains a provision that the parties are to enter into a lease at $38,000 per annum for the first two years with rent reviews at two yearly intervals and on terms specified therein. In the event no lease was entered into directly between the plaintiffs and the first defendants. A lease in accordance with the terms of the agreement was in fact entered into between the plaintiffs and the second defendant. The explanation for this was that the second defendant was still the registered proprietor and it was desired to give the plaintiffs a registered lase. Since the power of re-entry which was eventually exercised was a power in the second defendant rather than the first defendants, the raising of alleged contractual misrepresentations as between the plaintiff and the first defendants, as will shortly appear, as justifying relief against forfeiture seems somewhat illogical. However, Mr Dugdale for both defendants accepted that no point should be made of this and was happy to regard the first defendants and the second defendant as one for the purposes of these proceedings.

In addition to the express warranties contained in the agreement to which I have referred the plaintiffs in evidence claim that oral representations to the like effect were made both as to turnover and as to the condition of certain plant and as to certain repairs having been carried out.

Within a very short time of their taking possession the plaintiffs became disillusioned with their purchase. They gave evidence of problems which they discovered almost immediately in relation to water supply, water seepage, drainage, water damage in some of the motel units and the like. They also gave evidence of certain equipment which they said was not in working order. Whether that equipment or any of it is within the express warranty in Clause 6 of the agreement is a matter of dispute which, for reasons I explain shortly, I do not intend to resolve. Within a short time too they became suspicious that the turnover in the preceding 12 months had not been as represented. Indeed in January Mrs Eason carried out an investigation of the motel bookings register which she claimed showed that the turnover for the preceding 12 months had been in the region of only $67,000. The annual turnover warranted at $1,730 per week would have been just on $90,000.

As a result of their dissatisfaction the plaintiffs had a number of discussions with Mr Rutherford. Mr Griffin's help was also enlisted to endeavour to reach a compromise. All these discussions in the long run came to naught and relationships between the parties became increasingly acrimonious. The plaintiffs in the meantime spent a substantial sum on carrying out certain repairs and replacements which they claim were necessary to make good the defects that they found. As a result of some of the

discussions with Mr Rutherford the plaintiffs decided to pay rent at a lower rate than that provided in the lease. I am satisfied that such a reduction was discussed and that Mr Rutherford was at one stage willing to accept for a period, the lower rental, but I make no finding as to whether there was a concluded agreement as to that matter or as to whether Mr Rutherford's willingness was conditional on the plaintiffs acceptance of other proposals. At a later stage the plaintiffs ceased paying rent altogether, claiming a set off for certain expenditure incurred by them. The end result of all of these difficulties was that the plaintiffs substantially short-paid their rent, claiming to be entitled to do so because of the expenditure incurred by them and claiming also to be entitled by agreement to pay a reduced rental, at least until November 1985 when their first year's turnover could be established. A meeting to discuss all of these matters took place in November 1985. Mr and Mrs Eason claim that Mr Rutherford then agreed to accept a rental of $32,000.00 p.a. for the next three years in lieu of the original rental provided in the lease of $38,000.00 p.a. for the first two years and thereafter to be reviewed.
Mr Rutherford does not dispute that that was discussed and that at one stage during the discussions he was willing to agree to that. Mr and Mrs Eason claim that when the discussions concluded there was agreement between the parties and that Mr Rutherford was to have written confirmation sent by his solicitors. Mr Rutherford denies that there was a concluded agreement on that matter and blames this on the

attitude of Mr Eason in regard to other matters. He says that at the conclusion of those discussions he said quite firmly to the Easons that he would have them out of the premises by Christmas. Mr Eason acknowledged that something of the sort was said, but in the context of his claimed understanding of the agreement that had been reached as to the new rental to apply and to be confirmed by Mr Rutherford's solicitors, he did not really understand what Mr Rutherford meant and did not attach any particular significance to it.

The letter which the plaintiffs expected was not of course forthcoming. The next event of consequence was the arrival at the motel premises on 17 December 1985 of a Mr Blake armed with an authority to re-enter the premises pursuant to Clause 31 of the lease, which contains the usual right of re-entry on non payment of rent or other breach. Mr Blake also carried with him a warrant to distrain against chattels on the premises for the sum of $20,166.62 being claimed arrears of rental, details of which were set out in the warrant. (I note that both the authority and the warrant were signed by Mr Rutherford as agent for the first defendants and not by the second defendant as lessor, but again no point is taken as to this). The plaintiffs left the premises peaceably, but immediately issued these proceedings and applied ex parte for an interlocutory injunction, the documents being filed in Court on 19 December. An interlocutory injunction was granted to restrain both the

first and second defendants from exercising any power of re-entry and also to restrain the exercise of any power of distress. As it happened the first order granted was ineffective in that the plaintiffs had already been dispossessed. They subsequently sought ex parte an amendment to the injunction to obtain an order restoring them to possession on an interim basis, but this was declined by the Judge who dealt with the matter on the basis that what was sought was in the nature of a mandatory injunction.

Since then the business of the motels has been carried on by the first defendants, Mr Rutherford's wife conducting the day to day operations.

The proceedings were commenced by way of writ and statement of claim. The substantive relief sought against each of the defendants was limited to:

1. Relief against forfeiture.
2. An order restoring the plaintiffs to possession.
3. An injunction restraining the exercise of the right of re-entry and distress.
4. The usual prayers for general relief and costs.

However, in the statement of claim there were a number of allegations of misrepresentation as to turnover including a specific allegation of fraudulent misrepresentation. There were also allegations as to breaches of the warranty or representation in Clause 6 of the agreement as to the

condition of certain plant and other assets included in the purchase. These allegations seem to have been pleaded to support claims to set-off various amounts against the short-fall in the rental paid. Some of these claims to set-off were founded on an entitlement to a refund of excessive rent paid and some on expenditure incurred in making good the alleged defects. The totals claimed as set-offs in fact substantially exceed the arrears of rent alleged by the defendants. But as will be apparent from my recital of the contents of the prayer for relief there was no specific prayer for an order or declaration that the plaintiffs were entitled to these set-offs.

There was handed in at the hearing by consent a letter dated 12 June 1986, i.e. only four days prior to the hearing from the solicitors now acting for the plaintiffs (who it should be noted were instructed only very shortly before the hearing and did not frame the pleadings) to the solicitors for the defendants indicating, inter alia, the probability that separate proceedings will be issued claiming damages for misrepresentation.

It is unfortunate that such a claim for damages for misrepresentation was not incorporated in these proceedings. Most, if not all of the evidence in this action given over a period of three days will have to be repeated in a separate action for misrepresentation. The probability of another Judge being called on to decide issues of fact in those

proceedings renders it highly undesirable that I should go any further in my findings of fact than is absolutely necessary for the purpose of this decision. As this case is pleaded it is not necessary for me to make findings as to the rights of set-off or as to the alleged misrepresentations. Those are matters which must inevitably arise in a broader way in an action claiming damages for misrepresentation and I deliberately abstain from trespassing on matters which will have to be determined there.

That is not to say that the evidence which I have heard has been wasted. It has been valuable to enable me to reach a conclusion as to the conduct of the parties as an important element in the exercise of my discretion as to the relief, if any, to be granted.

I turn now to the basis on which relief may be granted. Mr Fenton for the plaintiffs based his case on the Court's equitable jurisdiction to grant relief against forfeiture for non payment of rent. He cited as illustrative of the principles of that jurisdiction Gill v Lewis [1956] 2 QB 1 and Daalman v Oosterdijk [1973] 1 NZLR 717. Mr Dugdale for the defendants, however, submitted that in New Zealand that equitable jurisdiction is now displaced by the Contractual Remedies Act 1979. He said that the claim should be one for relief under Section 9 of that Act on the basis that the re- entry was a cancellation under Section 7. Mr Dugdale of course acknowledged the provisions of Section 5 and

accepted that this was a case where the contract, i.e., the lease, expressly provided a remedy for repudiation or breach. It follows from that section that the provisions of Sections 6 to 10 must take effect subject to the contractual provision. At this point it is desirable to set out in full that contractual provision, viz. clause 31 of the lease:

> "31. THAT if the rent hereby reserved or any part thereof is unpaid and in arrear for the space of fourteen (14) days after any of the days whereon the same shall become due and payable (whether formally demanded or not) or if any covenant on the Lessee's part herein contained or implied shall not be observed performed or kept or if the term hereby created shall be seized attached or taken in execution or if any chattels plant and fittings belonging to the Lessee situated in the premises shall be seized attached or taken in execution or if the Lessee shall become bankrupt or in the case of a company go into liquidation it shall be lawful for the Lessor at any time thereafter without notice or suit to re-enter the premises or any part thereof in the name of the whole and thereupon the term hereof shall absolutely cease and determine but without prejudice to the rights of either party hereto in respect of any breach of the covenants, conditions terms herein contained or implied." (Underlining added).

The argument proceeded on the basis that since Section 9 must, by virtue of Section 5, be read as subject to clause 31 the words I have underlined preclude any relief being given under Section 9 which would run counter to that express provision. Thus relief against forfeiture is precluded because there is an express provision that the term had ceased and determined. Counsel sought to reinforce his argument that the equitable jurisdiction in relation to cases of forfeiture for non payment of rent has been displaced by reference to Section 15 which provides, with certain exceptions not relevant here, that nothing in the Act is to affect, inter alia, Sections 117 - 119 of the Property Law Act

1952 relating to relief against forfeiture under leases. Those Sections do not apply to re- entry or forfeiture for non payment of rent except in limited circumstances (Section 118 sub-section 7). So, it was said, in effect Section 15 of the Contractual Remedies Act has saved the limited statutory right to relief but the equitable right has gone.

I can not accept that argument. Relief under Section 9 is only relevant to a cancellation made pursuant to Section 7. That is clear from the opening words of Section 9 (1) :

"(1) When a contract is cancelled by any party....."

and by further reference to Section 2 which provides unless the context otherwise requires, that "cancelled" means (in effect) cancelled in accordance with Section 7. There is nothing in my view to support the argument that the cancellation of the lease resulting from the re-entry is to be regarded as a cancellation under Section 7. That Section provides statutory grounds for cancellation to the exclusion of the common law and equitable rules as to cancellation for mis-representation, repudiation or breach. It does not provide those statutory grounds to the exclusion of express contractual provisions. That is abundantly clear from Section 5.

In my view the cancellation or forfeiture of the lease in this case arises from the exercise of the contractual right in clause 31 of the lease and has nothing to do with Section 7 of the Act. I confess I do not find it easy to

account for the express saving of Sections 117 to 119 of the Property Law Act 1952. Section 118 would appear to be applicable only where there is "a proviso or stipulation in a lease for breach of covenant condition or agreement". In such a situation Section 5 of the Contractual Remedies Act must apply. If I am correct in my view that that Act has no application to the circumstances of the present case, then equally, it would seem to have no application to any case to which Section 118 of the Property Law Act would apply without the need for the saving provision in Section 15.

However the difficulty of explaining the exclusion in Section 15 of the Property Law Act provisions (that being merely a savings section), should not obscure the, to me, plain meaning of the substantive provisions of the Act and I am not prepared to think that such a long established equitable jurisdiction (Mr Fenton's researches showed that it went back at least to 1625; Emanuel College v Evans (1625) 1 Chan. Rep.18: 21 ER 494) has been displaced by such an inferential construction derived from a savings Section. The following remarks of Lord Wilberforce in Shiloh Spinners Ltd v Harding [1973] A.C.691 at 725 are apposite:

> "In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise involves the conclusion that an existing jurisdiction has been cut down by implication, ..."

Perhaps as Mr Fenton suggested Section 15(g) was included ex abundante cautela.

I proceed therefore to deal with the matter as one for the exercise of the Court's equitable jurisdiction and to consider the principles applicable. These principles are well established. They are most conveniently summarised, I think, in Gill v Lewis but there are many authorities both in England and New Zealand where they have been applied. Strictly the discussion in Gill v Lewis was obiter but the Court of Appeal dealt with the matter fully notwithstanding its decision that the case before it could be disposed of on another ground without the question of relief against forfeiture arising. The exposition of the principles by Jenkins LJ is however particularly useful for his comprehensive review of earlier cases. Jenkins LJ at p.13, summed up his conclusions as follows :

> "As to the conclusion of the whole matter, in my view, save in exceptional circumstances the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant and so forth are, generally speaking, irrelevant. But there may be very exceptional cases in which the conduct of the tenants has been such as in effect to disqualify them from coming to the court and claiming any relief or assistance whatever. The kind of case I have in mind is that of a tenant falling into arrear with the rent of premises which he was notoriously using as a disorderly house: it seems to me that in a case of that sort if the landlord brought an action for possession for non-payment of rent and the tenant applied to the court for relief, the court, on being apprised that the premises were being consistently used for immoral purposes, would decline to give the tenant any relief or assistance which would in any way further his use or allow the continuance of his use of the house for those immoral

> purposes. In a case of that sort, it seems to me it might well be going too far to say that the court must disregard the immoral user of the premises and assist the guilty tenant by granting him relief."

Similarly Hodson LJ at p.17, concluded:-

> ".....I think the court must always keep in mind, that there may be cases where the court will refuse relief because the conduct of the applicant for relief is such as to make it inequitable that relief should be given to him. Particularly must that be so where his conduct is in relation to the premises in question as in the instance which my brother gave, where a tenant is supposed to have been conducting the premises as a disorderly house; it could hardly be thought I should suppose in such a case that the court would grant relief."

Thus it is recognised that the "right" to relief on payment of rent and costs is not absolute where the interests of third parties are not affected, as appears to have been suggested in Newbolt v Bingham (1895) 72 L.T. 852.

It is still a matter for the Court's discretion and it does not seem to me to matter very much whether one describes the cases where relief will not be granted on payment of rent and costs as "very exceptional" as did Jenkins LJ or whether one adopts a rather less stringent test as is indicated by the words used by Hodson LJ. The authorities seem to me to show the proper approach to be that the right of re-entry and forfeiture is ordinarily to be regarded as security for monies owing and that one commences with the premise that relief should be granted unless to do so would cause an injustice in the circumstances. It does not seem to matter whether those circumstances arise from the conduct, whether wilful or otherwise, of the defaulting lessee.

Illustrations of circumstances in a sense outside the control of the lessee are to be found in two cases mentioned by Mr Dugdale. Relief was refused in Inner City Businessmens Club Ltd v James Kirkpatrick Ltd [1975] 2 NZLR 636 where the applicant for relief was "hopelessly insolvent" and in Earl Bathurst v Fine Ltd [1974] 2 All ER 1160 where the applicant, having left the United Kingdom temporarily, was refused readmission because of some unspecified misdemeanour while abroad, personal occupation of the premises being an essential aspect of the tenancy. Mr Dugdale in opposing the exercise of discretion in favour of the applicant (whether in equity or under S.9 of the Contractual Remedies Act) argued that the earlier cases, in which he no doubt included Gill v Lewis, had to be read subject to the decision of the House of Lords in Shiloh Spinners Limited where Lords Wilberforce and Simon in particular placed emphasis on the reluctance of the Court to give relief where the default was wilful. That decision however, was not one relating to simple forfeiture for non payment of rent. There a forfeiture had occurred for breaches of other covenants and the approach of their Lordships is summed up in a few words by Lord Wilberforce when he said at page 723 that:

> ".....it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by an uncovenanted payment".

Lord Wilberforce distinguished several categories of case that fall to be considered in the context of equitable relief against forfeiture at page 722, and referred particularly to the kind of case arising out of forfeiture for

non payment of rent in these words :-

> "Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power. There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs (Peachy v Duke of Somerset and cases there cited). Yet even this head of relief has not been uncontested: Lord Eldon LC in his well known judgment in Hill v Barclay expressed his suspicion of it as a valid principle, pointing out, in an argument which surely has much force, that there may be cases where to oblige acceptance of a stipulated sum of money even with interest, at a date when receipt had lost its usefulness, might represent an unjust variation of what had been contracted for .....".

I think it is clear that when later Lord Wilberforce said (at p. 725) :

> ".... that wilful breaches should not, or at least should only in exceptional circumstances be relieved against...."

he was dealing with the wider question of forfeiture for breaches of covenant other than the mere non payment of rent. I think the same is to be said of the remarks of Somers J in McIvor v Donald [1984] 2 NZLR 487 at p.494. So while I accept that the wilfulness of the non payment may be a matter to be taken into account in the exercise of the Court's discretion in the sense that I have derived from Gill v Lewis, I do not accept that wilfulness is of itself an answer to an application for relief so as to disentitle an applicant to the intervention of equity to relieve him against forfeiture.

What then is the position here? Evidence was given, which I accept, that the plaintiffs are in a position

immediately an order is made in their favour, to pay the full amount claimed by the landlord as arrears of rent even without allowing any of the set offs claimed by the plaintiffs. Evidence to that effect was supported by production of a letter from the plaintiffs' bank confirming that arrangements had been made for an advance of $20,000.00 for that purpose, provided the plaintiffs were restored to possession and their lease reinstated. I am prepared to assume that in addition the plaintiffs will be in a position to meet any order for costs made against them in favour of the defendants.

Nevertheless, Mr Dugdale submits that I should exercise my discretion against the plaintiffs on several grounds.

First that default in payment of the rent was wilful. As to this Mr Eason admitted in cross examination that he had made deductions and refrained from paying rent in spite of legal advice "that it was not the legal thing to do". For present purposes only I am prepared to assume, but without deciding (for the reasons I have already indicated), that the plaintiffs were not entitled to make the deductions they did or to cease payment of rent as they did, at any rate, to the extent which they did. Nevertheless I am satisfied that the plaintiffs in their own minds felt that they had a genuine grievance over what they believed to be misrepresentations and thought they had, at the least, a moral justification for taking the steps they did and indeed viewed

their actions as the only practical way of protecting their interests at the time.

In those circumstances I am not prepared to regard the wilfulness of the default as so contumacious or discreditable as to disentitle the plaintiffs to relief to which they would otherwise be entitled.

Secondly Mr Dugdale urged on me that the wilful withholding of rent was made by the plaintiffs with the knowledge that the defendants had their own financial commitments in relation to the motel (specifically a mortgage) on which payments had to be made and that they either knew or should have known that their failure to pay rent could embarrass the defendants in that respect. The plaintiffs did not dispute that they were aware that the first defendant did have a first mortgage and commitment to meet thereon and there is at least a suggestion that Mr Eason took the view that he did not care what happened to the first defendants in respect of their mortgage because the plaintiffs were fully protected by a registered lease.

Again I am not prepared to regard that as such misconduct on the part of the plaintiffs as should disentitle them to relief. At the stage when these exchanges were taking place between the plaintiffs and Mr Rutherford, relationships were obviously very strained and I have no doubt that things were said in the heat of the moment which on

calmer reflection may have been regretted. My impression of both Mr Eason and Mr Rutherford, and in particular of the latter, is that each is capable of becoming very agitated on this whole topic and I am not surprised that attitudes were taken which may not have reflected totally to the credit of either party.

Then Mr Dugdale referred to the lapse of some six months since possession was taken by the first defendants during which they, through Mrs Rutherford, have carried on and, it is claimed, improved the business. I think this submission was put, on the basis that it would be unfair for the plaintiffs to benefit from any improvements in the business effected by the first defendants, and also possibly in the context of the impossibility of restitutio in integrum.

While both of those aspects may be true in themselves I do not think that they are of such moment as to disqualify the plaintiffs. While I accept that the argument was put simply as a factual situation rather than as a matter of blameworthiness on the plaintiffs' part, I think it is relevant that the plaintiffs are not in any material respect to blame for the time lapse. They issued proceedings for relief as promptly as could reasonably be expected and I do not detect any lack of diligence in their bringing the action to a hearing. Furthermore during that six months period the first defendants have had the use of the plaintiffs' chattels in the conduct of their business. If indeed they have

improved the business they themselves may well have profited thereby. In that respect it is to be noted that the period of their occupation has coincided with the busiest time of the year in the motel business. Accordingly that matter raised by Mr Dugdale does not weigh with me very much.

Finally Mr Dugdale pointed to what he said were grave doubts as to the plaintiffs' ability to operate the business profitably if they were restored to possession. He rightly pointed out that the arrears of rent were to be paid by the plaintiffs from further borrowing from their bank. He pointed out also that the plaintiffs had not paid the $10,000.00 balance of purchase price which was to have been paid one year after possession date and that they had not given any evidence of their willingness or ability to pay that sum now. He also said that the trading account produced by the plaintiffs showing a substantial loss during the period of their operation of the business would still have shown a loss as operated by the plaintiffs even had the warranted turnover been. In making this submission I think Mr Dugdale was endeavouring to bring this case as close as he could to the circumstances of Inner City Businessmens Club Ltd v James Kirkpatrick Ltd, but I think this case is a far cry from that. I do not think the fact that the plaintiffs have to borrow to pay the arrears of rent is of any real significance. There is no suggestion that the plaintiffs are in any way approaching insolvency. It is clear they still have a substantial asset in Cromwell from which they receive a

substantial rental. It is true that the out-goings on their mortgage on the Cromwell property, which was raised by them to purchase the business of the San Marino Motels, exceed the rental from the Cromwell property, but I do not think that fact coupled with the alleged inability to make a profit from the San Marino Motels entitles me, in the absence of a complete investigation into the plaintiffs' financial affairs, to assume that they will necessarily or even probably be unable to meet future obligtions. There is no evidence as to other assets nor am I prepared to accept at face value Mr Dugdales somewhat superficial, if I may say so, reconstruction of the plaintiffs' operational accounts assuming a higher turnover. As to the non payment of the $10,000.00 balance purchase price I think that is an extraneous matter not to be taken into account. The first defendants have their remedy in respect of that matter if they choose to exercise it. I note that Jenkins LJ in Gill v Lewis said at page 13 :

> "I do not consider that today it would be, generally speaking, legitimate to take into account other breaches of covenant"

and later in the extract I have already cited he said :

> "and the view taken by the Court is that if he (i.e. the lessor) gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant and so forth are generally speaking irrelevant".

See also Mayor etc. of Dunedin v Searl (1915) 34 NZLR 861 at 867. Further, the obligation to pay $10,000.00 does not arise out of the lease, and is not a matter in respect of which a right of entry and forfeiture could have arisen. That obligation arises solely out of the agreement for sale and purchase.

I conclude therefore that the plaintiffs are entitled to be relieved against forfeiture of their lease and it is a question of the terms on which such relief should be given. As I understood the case for the plaintiffs the evidence and argument as to the plaintiffs right to set off various amounts was directed not as a challenge to the validity of the re-entry and forfeiture but as justifying relief being granted without the Court necessarily imposing a term that the whole of the rent claimed as arrears of rent by the landlord should be paid. Certainly, as I have said, there was not a specific prayer for an order or declaration as to the rights of set off, nor was there any pleading that the exercise of the right of re-entry was unlawful on the grounds that no rent was in fact, in arrears. Some of the set offs claimed were said in evidence to arise from agreement by Mr Rutherford to accept liability but there was no specific pleading that a contractual liability had arisen.

Mr Fenton presented a careful and comprehensive argument as to the right of set off and Mr Dugdale of course argued to the contrary. That is an area which I do not propose to embark upon, for the reasons I have already expressed that questions of liability for misrepresentation, breach of warranty and so on, should be left for determination in separate proceedings claiming damages for such misrepresentation and breach. A determination of the right of set off or as to the quantum thereof is not essential in order

to give the primary relief which the plaintiffs seek. It will I think be no injustice to them if they are required at this stage to pay the full amount of arrears of rent which are claimed to be in arrear. They will have the opportunity for redress, if indeed they are entitled to it, for all the matters for which they now claim a right of set off if they choose to issue their proceedings for misrepresentation because all their claims to set off arise in one way or another out of those allegations. The only adjustment I consider it appropriate to make in the amount to be paid by the plaintiffs as a term of their relief is in respect of the period from 17 December 1985 to 7 January 1986 being that part of the unexpired portion of the monthly rent due on 8 December 1985 claimed by the first defendants as arrears but being payable in advance, unexpired at the date of repossession. That amount according to counsel for the plaintiffs and not disputed by counsel for the defendants is $2,290.42.

In accordance with the conclusions I have reached above I order as against both the first and second defendants :

1. That the plaintiffs be relieved against forfeiture of their lease being Memorandum of Lease No.B 404774 between the plaintiffs and the second defendant in respect of all that piece of land containing 1060 square metres more or less being Lot 1 Deposited Plan 81280 and being all Certificate of Title Volume 37D Folio 816

conditional upon payment within 14 days of the sealing of this order of the sums for rent and costs hereinafter set out.

2. That as a condition of such relief the plaintiffs pay to the second defendant the sum of $17876.20 being the arrears claimed in respect of which the right of re-entry was exercised $20166.62 less $2290.42 being rental as claimed in respect of the period from the date of re-entry, viz. 17 December 1985 up to and including 7 January 1986, such payment to the second defendant to be deemed to be in satisfaction to the like amount of the claim of the first defendants for arrears of rent.

3. That as a further condition of such relief the plaintiffs pay the sum of $4500 for costs plus disbursements and witnesses expenses if any to be fixed by the Registrar.

4. That on payment of the above sums within the time prescribed the plaintiffs be restored to and put in possession of the premises affected by the said lease to hold the same in pursuance of and under the terms of the said lease.

5. That the interim injunctions granted by Casey J on 19 December 1985 be enlarged and continue in force until payment of the rent referred to in (2) above and thereupon be discharged.

Should any other orders be thought necessary to give effect to this judgment leave is reserved to any of the parties to apply further.

J.

Solicitors: Thorne Dallas & Ptnrs, Whangarei for Plaintiffs
Rudd Watts & Stone for 1st and 2nd Defendants