NCW, 19/5 MSR. SET 3

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. CP710/88

BETWEEN EILLIMS PROPERTY AND INVESTMENTS LIMITED

Plaintiff

[redacted]

A N D THE NEW ZEALAND SOCIETY FOR THE INTELLECTUALLY HANDICAPPED INCORPORATED

Defendant

Hearing: 24 April 1989

Counsel: P.J. Rutledge for Plaintiff
G.J. Venning for Defendant

Judgment: 15TH May 1989

RESERVED DECISION OF MASTER HANSEN

This is the plaintiff's application for summary judgment in the sum of $14,994.12. It relates to rent alleged to be owing for the months of September, October, November and December of 1988.

The defendant's opposition is based on its allegation that it was entitled to terminate the lease with the plaintiff because of the plaintiff's failure to carry out its obligations thereunder.

By deed of lease entered into on 8 November 1985 between the plaintiff as landlord and the defendant as tenant, the defendant agreed to lease from the plaintiffs the industrial property at 26 Sheffield Crescent, Christchurch for a term commencing on 1 June 1985 and expiring on 1 February 1991. Following a rent review the monthly rental from 1 April 1987 was $3,748.53 per month.

15.5.89 Eillims Property v NZSIHC

Clause 1.09 makes the tenant generally responsible for repair, but it does not place upon the tenant any obligation with respect to matters "which are the responsibility of the landlord under the covenant hereinafter contained".

Clause 1.10 requires the tenant to take due and proper care of fittings and windows and requires the tenant to preserve them from damage and deterioration and for the tenant to forthwith replace "such as may be broken or destroyed".

Clauses 2.03 and 2.06 make the landlord responsible for keeping the roof and exterior water tight and for exterior maintenance of the buildings.

The factual matters relied upon by the defendant are set out in detail in the affidavit of Mr Munro supplemented by an affidavit of Mrs Martin. As a background matter it is pertinent to note that before execution of the lease the defendant obtained a report of the Ministry of Works in relation to the buildings then ten years old. As a result of that report, the plaintiff and the defendant agreed that certain work should be carried out. Some of this by the defendant, and other by the plaintiff.

The defendant relies on the provisions of s.7(2) of the Contractual Remedies Act 1979. The section provides:-

> "Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that it does not intend to perform his obligations under it or, as the case may be, to complete such performance."

The defendant submitted that it was entitled to cancel the contract because the plaintiff had repudiated by making it clear that it did not intend to perform the obligations under the contract by failing to carry out some remedial work and by considerable delay in carrying out other work.

Alternatively, the defendant relies on the provisions of s.7(4). Section 7(3) provides:-

> "Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if -
> (b) A stipulation in the contract is broken by another party to that contract;"

> "(4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if, -
> (a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the stipulation is essential to him; or
> (b) The effect of the misrepresentation or breach is, or in the case of an anticipated breach, will be, -
> (i) Substantially to reduce the benefit of the contract to the cancelling party; or
> (ii) Substantially to increase the burden of the cancelling party under the contract; or
> (iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for."

Mr Venning on behalf of the defendant submitted that it was a stipulation of the contract that the work noted in a letter of 15 March 1984 was to be carried out. He said the failure to carry this out was more than trivial and clearly

the stipulation was in breach entitling the defendant to terminate.

Following the report from the Ministry of Works, the plaintiff wrote to the defendant undertaking to carry out certain work. In its affidavit in reply the plaintiff alleges that the work listed under 1 and 2(a) and (b) have been carried out, except that it concedes that work relating to the rigging of hoppers in the windows for "fusable closing" has been overlooked through inadvertence. However, in a further affidavit of the defendant, filed without leave, it is alleged that work involved in paragraph 2(b) relating to tying in the block walls to the purlin system had only been completed in relation to one bay and it is further alleged that the windows cracked before the defendant took occupation had not been replaced.

In a letter exhibited at "A" of the plaintiff's affidavit there are a number of complaints. This was addressed to the director of the plaintiff on 26 February 1987. For the purposes of this hearing the important matters arising therefrom are:-

(1) Foyer. A complaint of bad leaks in the external door which saturates the carpet causing water stains and smell.

(2) South Wall. Excessive leaking in wet weather.

(3) West Wall. Signs of leaking through the newly painted area in wet weather.

In paragraph 7 of the plaintiff's affidavit in reply Mr Smillie answers this as follows:-

"(a) External door - water entering the foyer had been a problem since the building was new. The defendant had occupied the building since March of 1985. The plaintiff did intend to do something about this problem and ultimately carried out the work in question shortly after the defendant vacated the premises. The defect was not of such a nature as to render the premises uninhabitable.

...

(d) South Wall - the south wall was resealed inside and outside.

(e) The West Wall - the plaintiff installed new butynol guttering; sealed the wall and repainted it."

In Mrs Martin's affidavit in reply at paragraph 5 she states:-

"(a) External door - the foyer was the main reception foyer where all visitors entered and it was also the source of access to the mezzanine floor. The mezzanine floor held the staff and meeting room. The foyer was used continually by staff, professional visitors and parents. The carpet was so damp from the rain that it smelt rotten. The state of the carpet effectively rendered the premises unsuitable for their proposed use.

(d) The work on the south wall was commenced late 1986. The work was not completed. Again in late 1987 (early 1988) further work was carried out on the wall but again it was not completed. When the defendant vacated there still remained a gap of approximately two to three feet uncompleted.

(e) Right up until the defendant vacated there were still leaks on the western wall."

There are also complaints from the defendant in relation to glass falling from an overhead area; repairs relating to the doors and jammed fire doors. The plaintiff in reply states that the glass pane falling was a one-off incident and that it was clear that the defendant had extensive glazing work carried out themselves and this must have caused it. In relation to the jammed fire door he said it was caused by a build up of rubbish outside the door and it was the responsibility of the defendant to keep this area clear. In relation to the doors he said the problem was caused by the defendant leaving them open in windy conditions resulting in them "flogging backwards and forwards" and occasioning damage. He said despite the fact that he attached bolts to fasten the doors open, the defendant still allowed this to happen. Mrs Martin in her affidavit says that there were in fact other occasions when glass panes had fallen from the overhead area following a southerly storm. This apparently occurred in January of 1988 and in her affidavit she goes on to say:-

> "The fact that a pane of glass fell out in February was reported to the plaintiff's office, in fact to Mr Smillie's sister at the office. I also believe there was another incident of glass falling out earlier than January 1988."

She also added that the doors were not damaged by the defendant's use but by the fact that the aluminium frames were inadequate to support the heavy central doors. She went on to refer to the fact that the history of the lease

had been dogged by the continual failure of the landlord to comply with his obligations and referred to a letter to the plaintiff in July 1986 complaining of work not done.

Mr Rutledge on behalf of the plaintiff submitted that even if the allegations made by the defendant were accepted they were not grounds for termination of the lease. He said at most one could accuse the plaintiff of delay but this was not enough to say that the plaintiff had repudiated the contract by reason of it making clear it did not intend to perform its obligations. He said the real motivation of the defendant was revealed in letters in September and October 1987 where the defendant sought to be released from the terms of the lease agreement.

Mr Rutledge submitted that the requirement to pay rent is fundamental. He said it was unarguable that at common law, even if a landlord was guilty of a breach of an expressed covenant to repair, there was no implied condition that a tenant may quit the premises if the repairs are not done or further that the tenant would not be liable for rent. In support of this he referred to Surplice v Farnsworth (1884) 7 Man and G 576 at 584; Chatfield v Elmstone Rest Home Limited (1975) 2 N.Z.L.R. 269; "Landlord and Tenant" by Woodfall para 1-1464; and "Land Law" by Hinde McMorland and Sim. He submitted that Chatfield's case was of particular relevance because the judgment proceeded on the basis that the roof and outer walls of the building were not in good and water tight repair and condition at the relevant time and further that the landlord was in breach of

his covenant to repair. He submitted it was found in that case:-

1. That a covenant to repair does not impose an absolute obligation on the lessor to have the roof and walls in water tight repair and condition at all times as the obligation arises only when the landlord has actual knowledge or its notice from the tenant.

2. The landlord need only start carrying out the works of repair when given notice and it must be given a reasonable time to complete.

3. That even where the lessor is in breach of such an obligation the lessee must still pay rent.

4. That in the factual context of that case it could not be argued by the tenant that the landlord had repudiated the lease by its breach of covenant. It was held that the actions of the landlord did not amount to repudiation, that is the defaulting party in relation to the rent must show clearly that the landlord was no longer performing its side of the bargain.

5. That a tenant in answer to an action for arrears of rent might counterclaim in respect of damage suffered as a result of want of repair.

He accepted that a tenant may be entitled to raise by way of equitable set off against the claim for rent the cost of repairs carried out by a tenant occasioned by the landlord's breach, or even that there could be a claim for damages for loss suffered as a result of the breach by the landlord of such covenant. He said however in this particular case the defendant had not raised any such claim, nor given any particulars upon which such a claim could be based. He said it chose to base its argument entirely on the grounds that the actions and default of the landlord gave it the right to terminate the lease.

Mr Rutledge accepted that the authorities he relied on were pre Contractual Remedies Act cases. Referring to the Act, however, he submitted that Chatfield's case was authority for the proposition that the defendant could not argue in this case that the plaintiff had repudiated the lease "by making it clear that he does not intend to perform its obligations under it or, as the case may be, to complete such performance". He said repudiation only occurred when there was a distinct, unequivocal and absolute refusal to perform. Referring to the "Contractual Remedies Act 1979" by Dawson and McLauchlan at p62 where the learned authors state:-

> "The criticial question must always be whether it can be said that one party made it quite plain his own intention not to perform the contract."

Mr Rutledge also specifically referred the Court to the matters discussed by the learned authors at p64 of the textbook.

Turning to the provisions of s.7(3) and 7(4) he noted that the text of Dawson and McLauchlan comments that this subsection represented a codification of the law at which an innocent party can only cancel the breach of a "condition" or "essential term". He referred to the reference to Hong Kong Fir Shipping Company Limited v Kawasaki Kisen Kaisha Ltd (1962) 2 Q.B. 26 at p97 of the text. He said the reference is upon the basis of which this section was constructed pursuant to which the right to cancel the contract depends upon whether the breach gives rise to any event to which the innocent party is deprived substantially of the whole benefit which it was intended he should obtain from the contractors. Mr Rutledge referred to the Court's greater willingness to allow cancellation of executory contracts rather than executed contracts. He submitted in this case other than the matters pertaining to the falling pane of glass there was nothing to bring the defendant within the provisions of s.7(4)(b). He said the falling pane of glass happened midway through the term of the lease and if there was any default on the part of the plaintiff it was merely a matter of delay. He said further the defendant was also guilty of delay in its slow response to replying to the plaintiff's suggestion for repairing the glass problem.

It seems to me that Mr Rutledge has overlooked an important statement by the learned authors of the Contractual Remedies Act, Dawson and McLauchlin at p62. There the learned authors state:-

> "A repudiation may be found to exist even though there has been no express renunciation of the contract. If the conduct of one of the parties to a contract has been such as would lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract, the other party, whatever may have been the actual intention of the first party, may treat such conduct as an intimation that the contract has been repudiated. One useful indicator of whether a repudiation by conduct has been made out is to ask whether the defaulting party's conduct is such as to shatter the other party's confidence in the former's willingness to perform the contract. <u>But whether what actually takes place amounts to a repudiation is largely a question of fact to be determined by a consideration of all the circumstances and of the defendant's conduct</u>." (my emphasis)

Furthermore, s.7(2) is not limited to the party repudiating by making it clear he does not intend to perform his obligations but as an alternative includes that he makes it clear that he does not intend to complete the performance of his obligations. Mr Rutledge characterised the defendant's position as one of exaggeration and their motivation as being an attempt to escape from the lease they had already indicated they wished to get out of. One has a degree of sympathy with Mr Rutledge's submissions because it is quite clear that the affidavit of Mr J.B. Munro is, to put it mildly, extremely misleading. There are a number of photographs exhibited to that affidavit, supposedly recording faults occasioned by the plaintiff or repairs not carried out by the plaintiff. It is now clear that some of those photographs illustrate work that had been carried out by or on the instructions of the defendant. There is further a photograph of the fire door and it is not denied

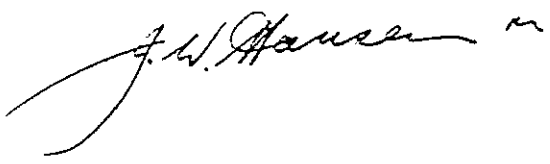
that this was simply blocked by rubbish. It is a matter of regret that officers of the defendant have either wittingly or unwittingly exhibited photographs which, as I say, are misleading.

However, even on the plaintiff's own admission there has been delay. Whether that delay amounts to conduct amounting to repudiation under s.2, can in my view only be concluded by a determination of facts taking into consideration all of the circumstances and the defendant's own conduct. As but one example, the complaints relating to the foyer go back to at least February 1987. Mr Rutledge submits that until Mrs Martin's affidavit, there was no suggestion by the defendant that this rendered the premises unsuitable for their proposed use. That again seems to me to be a matter that requires factual resolution. There is an allegation of constant leaking in wet weather that led to soaked and stained carpets, musty and rotting smells, and clearly extreme inconvenience to the defendant. Whether this makes the building unsuitable for its intended use requires factual determination. It seems to me that the question of whether or not the plaintiff's performance of its obligation to repair, given the extreme delay, amounts to conduct entitling the defendant to repudiate is a question of fact that needs to be resolved taking into consideration all the surrounding circumstances. Again, I am satisfied that the same comment applies in regard to other complaints of the defendant. The pane of glass falling is not the small matter Mr Rutledge seeks to

characterise it as, as Mrs Martin's affidavit makes it clear that it occurred on more than one occasion.

Furthermore, if the defendant can make out the complaints it alleges in the affidavits, i.e. the plaintiff's extreme delay and failure to carry out repairs, it is clear a stipulation in the contract has been broken. Whether or not the broken stipulations come within the provisions of s.7(4) again in my view requires factual resolution requiring a consideration of all the circumstances. It would be impossible, as an example, to determine whether or not the breaches have substantially reduced the benefit of the contract to the defendant without full enquiry as to the facts.

Accordingly, I am satisfied that the plaintiff has failed to discharge the onus imposed on it by Rule 136 to show there is no defence and its application for summary judgment will be dismissed. Given the misleading nature of some of the exhibits to Mr Munro's affidavit, and given the clear dispute on the merits, I do not consider it appropriate for an award of costs to be made until the facts have been determined by the Court. However, as to quantum, for the benefit of the trial Judge, costs are fixed at $1,200 plus disbursements as fixed by the Registrar.



Solicitors:

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