IN THE HIGH COURT OF NEW ZEALAND 24/10 **C.P. NO: 192/91**
WELLINGTON REGISTRY

2054

BETWEEN	**EAST COAST PERMANENT TRUSTEES LIMITED** a duly incorporated company having its registered office at Wellington, Property Owner **Plaintiff**
A N D	**JOHN DANIEL CHRISTIAN** of 9A Newhaven Terrace Mairangi Bay, Auckland, Company Director **First Defendant**
A N D	**LESLIE SHEAT BLACKMORE** of 451 Beach Road, Mairangi Bay, Auckland, Company Director **Second Defendant**

Hearing: 23 July 1991

Counsel: Mr S J Brown and Ms Rebecca Kitteridge for Plaintiff
Mr A Ivory for Defendants to Oppose

Judgment: 16 OCT 1991

JUDGMENT OF MASTER J H WILLIAMS QC

The plaintiff, East Coast Permanent Trustees, sues each of the defendants for $45,621.04 plus interest and costs by way of the summary judgment procedure, that being the sum which East Coast Permanent Trustees says is owed to it for rental for premises at 3131 Great North Road, New Lynn, Auckland, for the period 1 September 1988 - 31 March 1989

plus a proportion of the insurance premiums, water rates and local body rates for similar periods. The defendants say that they are arguably entitled to the defence that they had been released from any obligation to East Coast Permanent Trustees in the circumstances about to be discussed.

On 14 May 1984 the plaintiff as lessor entered into a lease of the Great North Road premises. The lessee was Dave Smith Electronics (1980) Limited. Messrs Christian, Blackmore and another signed that lease as covenantors. The lease was for 12 years from 25 November 1983 with a right of renewal for six years and at an annual rental at commencement of $31,499.00 payable by monthly instalments on the first of each month. The lease provided for the rent to be reviewed every two years on the second anniversary of the commencement date. According to the plaintiff the rent was reviewed as at 25 November 1987 and was set at $68,749.92 per annum or $5,729.16 per month. The relevant provisions of the lease are as follows:

(a) The lease provided in the usual way for the lessee to pay the rent together with electricity and other charges, rates and Land Tax.

(b) Clause 17 of the lease prohibited assignment or sub-letting without consent but it provided that:

> "...for the purpose of this clause -
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> "(a) That where the Lessee or sub-lessee is a corporation any sale transfer disposition or transmission or shares or stock or any new issues of shares or stock which has the effect of transferring the effective control of the corporation to any person or corporation not being a shareholder or stockholder of such first mentioned corporation at the time of it becoming the lessee or sub-lessee hereunder shall be deemed to be an assignment by the lessee and shall likewise require the consent of the lessor and the completion of a deed of covenant."

(c) Clause 33 provided a regime governing the manner in which the rent was to be reviewed but since the

defendants do not deny that the rent was validly reviewed as at 25 November 1987 - because they do not have the information on which to challenge the plaintiff's assertion in that regard - nothing further hangs on that.

(d) Clause 36 obligated the lessor to pay interest at 18% on rental and other charges in arrears.

(e) Clause 40 provided as follows:

> "Liability of Covenantor
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> "The covenantor is bound by all of the covenants and conditions on the part of the Lessee herein contained and implied and hereby guarantees to the lessor the due and punctual payment of the rent hereby reserved and the due and regular performance of all and each of the said covenants and conditions; and although as between the lessee and the covenantor he the covenantor may be merely a surety yet as between himself and the lessor the covenantor is a principal debtor (jointly and severally with the lessee) and his liability and obligations to the lessor shall not be affected or diminished by any indulgence, postponement or allowance of time granted by the lessor to the lessee or by any assignment of the interest of the lessee or by any consent by the lessor to an assignment or by the execution of any covenant to observe perform and keep the covenants conditions and agreements of this lease or by the fact that he the covenantor is not a party to any agreement or arbitration fixing rental or by any other circumstance which would affect the liability of one liable as a surety."

In March 1986 Messrs Christian and Blackmore sold their shares in Dave Smith Electronics (1980) Limited and thereafter had no further involvement in or control over that company's affairs. The evidence in this matter suggests that their sale of the shares in that company may have been to an existing shareholder and that accordingly the prohibition on assignment in Clause 17 of the lease may not have applied but in the view which

this Court takes of the matter, that question does not require decision. It is clear, however, that neither of the defendants ever entered into any formal termination of their obligations as covenantors of the original lease and that, although the shareholding may have changed, the lessee continued to be Dave Smith Electronics (1980) Limited.

At some stage, the date of which does not appear in the evidence but which was prior to 14 March 1989, Dave Smith Electronics (1980) Limited went into liquidation and a Mr K R Smith of the firm of chartered accountants of Spicer and Oppenheim was appointed liquidator. At about the same stage, the company fell into arrears with its rental obligations.

It is clear from the evidence that at about the time when Dave Smith Electronics (1980) Limited was put into liquidation, Messrs Christian and Blackmore became aware of the then situation and were in fact involved in a dispute with the then shareholder over the unpaid portion of the purchase price for the shares. Messrs Christian and Blackmore say that at that stage Brierley Cromwell Property Limited was managing the lease on behalf of East Coast Permanent Trustees and that at an earlier period an officer of that company had approached them to sign a document concerning the rent review. They refused. At about the time of the liquidation of Dave Smith Electronics (1980) Limited, that same officer approached them to make a demand under the lease. That demand was not met. Instead the defendants' counsel wrote to Spicer and Oppenheim concerning the matter and received a reply dated 14 March 1989, the relevant portion of which reads:

> "The lease on the company's retail premises at 3131 Great North Road has not been formally disclaimed as onerous to the liquidation due to the unnecessary expense involved in pursuing this through the courts. The landlords have acknowledged that their claim is limited to outstanding rent and various

> expenses on the property as at 30th September 1988 and have filed a final proof of debt accordingly."

At about the same time, Messrs Christian and Blackmore were further involved in the affairs of Dave Smith Electronics (1980) Limited because they were the second debenture holders and in dealing with the events of this period, a Mr Johnston, the plaintiff's property manager, says:

> "It is true that the liquidator sent the letter referred to in...the first defendant's affidavit. It is also true that a formal proof of debt was filed with the liquidator in the sum of $12,000. However, no settlement was reached with the defendants and although a formal proof of debt was filed, no compromise was attained because when the liquidator paid out the company's funds to the creditors, the first and second debenture holders took all available funds, and the plaintiff as an unsecured creditor, received no money at all."

Notwithstanding that Mr Christian claims that Mr Blackmore and he have been prejudiced. He asserts in his affidavit that:

> "...a compromise had been entered into between the plaintiff and the liquidator whereby the lease was surrendered and the lessee's liability to the plaintiff fixed at outstanding rent and various expenses on the property as at 30 September 1988. Mr Smith advised in that letter that the plaintiff had filed a proof of debt in the liquidation in accordance with that compromise.
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> "Neither Mr Blackmore nor I were consulted in any way in respect of this compromise. We therefore had no opportunity to assess the plaintiff's claim; to consider whether it was appropriate for the lease to be surrendered thereby losing its value; or to negotiate a compromise of any potential liability we may have had prior to the compromise between the plaintiff and the liquidator."

These proceedings seek judgment against each of the defendants for rental for the Great North Road premises for the period 1 September 1988 - 31 March 1989 plus the insurance premium for the year to 31 January 1989 and the

period to 3 April 1989 ($873.81 and $130.74 respectively), water rates for an unspecified period ($72.64) and rates (again for an unspecified period) of $4,439.73. In argument, Mr Ivory for the defendants conceded that, even if his clients' version of events were correct, the defendants would still be liable to the plaintiff for the rental from 1 September - 30 September 1988 plus the appropriate proportion of the insurance premium, water rates and other rates.

Several matters were raised by the defendants in their notice of opposition but in the event two only were pursued, namely that the events of the period at about 30 September 1988 as evidenced in the liquidator's letter and Mr Johnston's affidavit amounted to a formal disclaimer of the lease between East Coast Permanent Trustees and Dave Smith Electronics (1980) Limited which released the defendants from their obligations as covenantors for rent and outgoings beyond 30 September 1988, but those circumstances amounted to an informal disclaimer having an identical result.

There are several general matters which need to be considered before embarking on a consideration of those claimed defences.

The first is that counsel for East Coast Permanent Trustees Limited challenged the admissibility of Spicer and Oppenheim's letter of 14 March 1989. That objection, in this Court's view, is well-founded. Clearly the letter is hearsay and is not evidence of the truth of its contents. Following on from that, there was no evidence that an affidavit as to the circumstances set out in the letter had ever been sought from Mr Smith nor was there any evidence of any application under R.509 to have his evidence taken before the hearing of the summary judgment application. This is particularly important in view of the fact that formal demands dated 7 March 1990 were

served on each of the defendants and yet these proceedings were not issued until 28 March 1991. They were served on the defendants on 11 and 10 April 1991 respectively.

In those circumstances, where there is a conflict between Mr Johnston's sworn assertions on behalf of the plaintiff and the matters raised by the defendants, the Court is obliged to accept the former.

The second matter is that this is not a case where the circumstances of this claim as they occurred around about 30 September 1988 came to the defendants' notice later as a surprise. They were approached on behalf of the plaintiff at about the relevant period. They were involved in the matter as second debenture holders. They were paid the whole or part of the sum due to them at that stage. They could have taken steps at that point to protect their position and to avoid the prejudice which Mr Christian says they have suffered. The evidence does not suggest that they took any step at that stage.

The third matter is that the lease of 14 May 1984 is a deed. Subject to the later discussion in this judgment, it follows that any compromise of the parties' rights and obligations could only be effected by deed. There is nothing in the evidence to suggest that such a deed was ever executed.

Turning from those general matters to the question of the suggested compromise, this Court is of the view that Mr Christian's assertions do not pass the threshold of credibility in relation to that matter. The liquidator's letter makes it clear that no formal disclaimer of the lease was ever undertaken. The letter continues by suggesting that East Coast Permanent Trustees Limited have "acknowledged that their claim is limited to outstanding rent and various expenses on the property as

at 30 September 1988" but Mr Johnston's version of those events is that East Coast Permanent Trustees Limited would have been prepared to accept $12,000 in settlement of its claim for rent and other expenses due under the lease but that that settlement was never effected, all available funds being taken by the first debenture holder and the defendants as second debenture holders. In addition, it appears from the combined effect of the liquidator's letter and Mr Johnston's affidavit that the suggested compromise at $12,000 must only have related to rent and operating expenses up to 30 September 1988: this claim overlaps that period by one month.

It may well be true, as Mr Ivory submitted, that it was open to East Coast Permanent Trustees Limited and the liquidator of Dave Smith Electronics (1980) Limited to reach a compromise of the respective rights and obligations of lessor and lessee both for the period to 30 September 1988 and for the balance of the term of the lease but in this Court's view the admissible evidence is that no such compromise was ever effected and that accordingly there is no basis for the claimed defence.

As far as the second claimed defence is concerned, Mr Ivory submitted that there was an informal disclaimer of the lease which brought the defendants' obligations to an end.

The Companies Act 1955 s.312 relevantly reads:

> "Disclaimer of onerous property -
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> "(1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of

the property or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within 12 months after the commencement of the winding up, or such extended period as may be allowed by the Court, disclaim the property.

"(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

"(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

"(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

"(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it things fit, make an order for the vesting of the property in or the delivery of the property to any person entitled thereto, or to whom it may seem just that the property shall be delivered by way of compensation for such liability as aforesaid, or a trustee for hm, and on such terms as the Court thinks just, and on any such vesting order being made the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose."

"Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person

> claiming under the company, whether as underlessee or as mortgagee, except upon the terms of making that person-
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> "(a) Subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or
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> "(b) If the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date, -
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> "and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or underlessee declining to accept a vesting order upon those terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon those terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, encumbrances, and interests created therein by the company."

The effect of disclaimer on leases is conveniently summarised by the learned authors of Anderson's Company and Securities Law (1991) para Cos 312.11 p 1-567. It is to the effect that:

1. Where there is a lease which is assigned, the insolvency of the assignee does not release the original lessee from liability to pay rent (Hill v. East & West India Dock Co (1884) 9 App Cas 448)

2. Where there is a lease which has been assigned, the insolvency of the assignee does not release the surety of that assignee (Harding v. Preece (1882) 9 QBD 281).

3. Where there is a lease to a lessee who later becomes insolvent, the disclaimer by the lessee's liquidator discharges the guarantor of that lessee's obligations from the guarantor's obligations beyond the date of disclaimer (Stacey v. Hill [1901] 1 QB 660; In re Ice Rinks (Timaru) Ltd (in vol liq) [1955] NZLR 641, 643-4).

The reason for that last proposition is explained by Collins LJ in Stacey (at 665) in the following passage:

> "The effect of the disclaimer in such a case is...that the bankrupt lessee gets rid of all his liabilities, and loses all his rights under the lease; and there is no need of any provision to revest the property in the landlord, but the natural and legal effect is that the reversion becomes accelerated. The result being that the liability of the lessee for future rent under the lease is determined, the obligation of the surety under his guarantee in respect of such rent can never arise, because no such rent can ever become in arrear."

and a gloss on that dictum appears in the judgment of McGregor J in Ice Rinks where that learned judge held (at 644-5):

> "Even if the effect of a disclaimer in the present instance would be to discharge the original lessee from liability, it seems to me that this is an added reason for the refusal of leave to disclaim. It seems to me that it would be inequitable that the lessor, who had contracted originally with a solvent lessee, should suffer the loss of the future rent and that the original lessee should, while still in a position to pay, obtain a release of his liability by the insolvency of his assignee. If this were the position, it would seem to me always to be the advantage of a lessee to procure an assignee whose solvency was uncertain."

In considering those authorities, it is also necessary for the Court to bear in mind the difference between insolvency, where the property of the bankrupt vests by Statute in the Official Assignee, and liquidation, where

the property of the company in liquidation remains vested in its name.

It is clear, presumably for the reasons set out in Mr Smith's letter of 14 March 1989, that no application has ever been made to the Court under the Companies Act 1955 s.312(1) for leave to disclaim the lease. Disclaimer amounts to the statutory right to breach the contract disclaimed. For that reason and for the reasons discussed by McGregor J in Ice Rinks (supra), it is therefore understandable that it is necessary for the leave of the Court to be sought and granted and for the interests of others interested in the disclaimer to have an opportunity to be heard before disclaimer will be permitted.

It is clear that in this case that never occurred. The lessee went into liquidation owing money to, amongst others, East Coast Permanent Trustees Limited and the defendants. East Coast Permanent Trustees Limited decided to do what it could to recover what it could from the liquidation. It was unsuccessful in recovering anything. For practical reasons none of the parties took any step to bring the lease to an end in any formal way. Without some formal step such as disclaimer, surrender or termination, the lease remained in force. So long as the lease remained in force, the obligations of the defendants as covenantors remained in force, particularly when the lease which each of the defendants signed provided that their liabilities as covenantors should not be affected by any of circumstances set out in clause 40 and in particular by "any other circumstance which would affect the liability of one liable as a surety". It therefore follows that the defendants as covenantors were deemed by contract to be principal debtors and that their liability as such persisted beyond the liquidation of Dave Smith Electronics (1980) Limited, it not having been brought to an end by any step taken by that company or

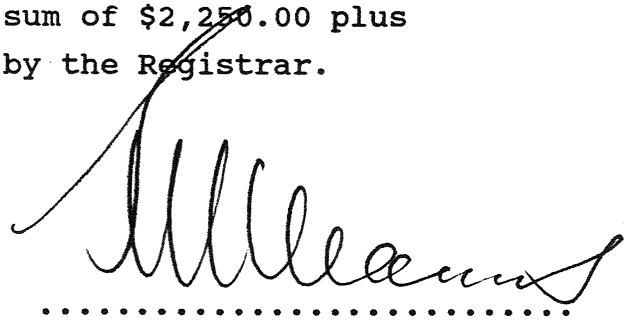
its liquidator or by any of the parties to this proceeding - and this in a situation where the defendants were not unaware of the circumstances surrounding the matters in issue at that stage.

In all those circumstances, the Court concludes in relation to this claimed defence that, it too, does not reach the threshold of credibility and is accordingly rejected.

Both the defendants claimed defences having been rejected, the Court's formal orders are as follows:

1. That the plaintiff is entitled to summary judgment against each of the defendants for the sum of $45,621.04 plus interest on that sum calculated in accordance with the statement of claim and down to the date of judgment. Leave is reserved to apply further in the event of there being any difficulties in the calculation of the amount for which judgment is to be entered.

2. The plaintiff is entitled to one award of costs against both defendants, which having regard to the hearing time and the other circumstances of this matter is fixed in the sum of $2,250.00 plus disbursements as fixed by the Registrar.



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Master J H Williams QC

Solicitors: Morrison Morpeth, Wellington, for Plaintiff
Craig Griffin and Lord, Auckland, for Defendants