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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

12/3

M. NO. 1871/92

156

UNDER The Companies Act 1955

BETWEEN HOME IMPROVEMENTS COURTS LIMITED
(In Liquidation)

Plaintiff

A N D PEELERS INVESTIGATIONS LIMITED

Defendant

Hearing: 12 February 1993

Counsel: G D Stringer for the plaintiff/respondent
M H Benvie for the defendant/applicant

Judgment: 12 February 1993

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

In this matter the defendant seeks an order restraining the plaintiff from advertising or otherwise proceeding with the plaintiff's application to wind up the defendant.

The plaintiff's application is based upon the existence of an unpaid debt in respect of rent for the period December 1991 to May 1992 and failure to

comply with a s.218 Notice served on the defendant in respect of that debt. The defendant alleges that the plaintiff's application to wind it up is an abuse of the process of the Court because there is a bona fide dispute as to the existence of the debt.

As already indicated the debt which is relied on by the plaintiff arises in respect of unpaid rent. The plaintiff was the tenant of premises owned by J B King & Son Limited. The plaintiff conducted a kitchen appliance and fitting business in those premises. The premises included a mezzanine floor. The defendant, which is a private investigation and security company, was attracted to the mezzanine floor because of the front provided by the plaintiff's business.

Mr van Leeuwarden, the defendant's Director, who swore two affidavits in support of the application of a stay, spoke of "discreet cover" being provided by the existence of another business on the premises. According to Mr van Leeuwarden, the importance of having discreet cover was made known to the plaintiff, in the person of a Mr Sellar. A sub-lease was entered into between the plaintiff and the defendant which provided for the sub-lessor, that is to say, the plaintiff, to observe the terms of the head lease as they applied to the sub-leased premises and for the defendant to have quiet enjoyment of the premises. The relevant clauses are clause 2(b) and (c) of the sub-lessor's covenants which read as followed:

> *(b) The sub-lessor will observe perform and comply with all and singular its covenants obligations and restrictions contained or implied in the head lease.*

(c) *If the sub-lessee shall pay the rent hereby reserved in the manner hereby required and shall observe perform and comply with all and singular the covenants obligations and restrictions herein contained or implied and on the part of the sub-lessee to be observed performed or complied with then the sub-lessee shall peacably (sic) hold and enjoy the demised premises during the term hereof and any extension or renewal thereof without any interruption by the sub-lessor or any person rightfully claiming under or in trust for the sub-lessor.*

The head lease, which is exhibited to the affidavit of one of the liquidators of the plaintiff, Ms G E Edwards, contains the following clauses which are alleged by the defendant to be relevant in this case:

10. THE Tenant shall (subject to any maintenance covenant by the Landlord) in a proper and workmanlike manner and to the reasonable requirements of the Landlord:

(a) *Keep and maintain the premises including the Landlord's fixtures, fittings and floor coverings in the same clean order repair and condition as they were in at the commencement of this lease and will at the end or earlier determination of the term quietly yield up the same in the like clean order repair and condition....*

19. ....At the end or earlier determination of the term the Tenant shall remove any Tenant's name sign name-plate signboard or advertisement to the extent required by the Landlord and make good any damage to the reasonable satisfaction of the Landlord.

22. THE Tenant shall not

....

(c) *allow any act or thing to be done which may be or grow to be a nuisance disturbance or annoyance to the Landlord or any other person and generally the Tenant shall conduct the Tenant's business upon the premises in a clean quiet and orderly manner free from damage nuisance disturbance or annoyance to any such person BUT the carrying on by the Tenant in a reasonable manner of the business use or any use to which the Landlord has consented shall be deemed not to be a breach of this clause.*

30. THE Tenant not being in breach may at any time before and will if required by the Landlord at the end or earlier termination of the term remove all the Tenant's fixtures and fittings and make good at the Tenant's own expense all resulting damage and if not removed within seven (7) days of the Landlord's request ownership of the Tenant's fixtures and fittings passes to the Landlord."

Everything went well until the plaintiff vacated the premises in August 1991. The defendant alleges that at the time of quitting the premises and during the period afterwards the plaintiff removed various fittings from the building and left the building in a damaged and unsightly state. The particular complaints are set out in paragraph 13 of Mr van Leeuwarden's first affidavit in the following terms:

13. AT the time of and over a period following Home Improvement Courts' departure from the premises, Home Improvement Courts removed fittings from the building as follows:

(a) The prominent Home Improvement Courts' kitchen showroom signage was removed from the front of the building, leaving an unsightly appearance;

(b) The awnings were also removed from the front of the building;

(c) Lights and light fittings were ripped out, leaving exposed wires hanging;

(d) Pipes were left protruding from walls as a result of air conditioning units being removed;

(e) Carpet was uplifted from the floor, leaving bare floor boards;

(f) Pipes that had been concealed were now clearly visible;

(g) The removal of fittings left different coloured paint areas exposed;

(h) Sacks of rubbish and expendable joinery timber were left strewn around the premises.

It is common cause between the parties that the plaintiff's lease from J B King & Son Limited continued after it vacated the premises.

The plaintiff has filed an affidavit by Mr Sellar denying the complaints made by Mr van Leeuwarden; but that evidence is contradicted by an affidavit in reply by Mr Brockie King of J B King & Son Limited filed by the defendant. The plaintiff made repeated requests, according to Mr van Leeuwarden, to the plaintiff, in the person of Mr Sellar, to tidy up the storeroom and restore it to a satisfactory condition. According to Mr Leeuwarden, on a number of occasions Mr Sellars said that this would be done. However, it was never done. These allegations by Mr van Leeuwarden are not denied by Mr Sellar.

The consequence of what happened, according to Mr van Leeuwarden, is that the defendant lost the discreet cover which it had and also suffered from security problems. It lost the discreet cover because instead of having an operating business in the front of the building it had an empty space so that there was no other business than the defendant's own to which persons entering the building could be going. The security problem arose because of the landlord, J B King & Son Limited, placing the premises on the market for re-leasing and real estate agents showing respective tenants around the building. On one occasion, according to Mr van Leeuwarden, an uninvited real estate agent had to be escorted from the defendant's mezzanine floor offices.

The state of the premises had an adverse effect on the defendant's customers. Criticisms were made by them of the state of the premises to the defendant. In November 1991 the defendant made the decision to

relocate. It paid rent until the time that it relocated. The rent which is unpaid and on which the plaintiff relies is the rent from the date at which the defendant relocated. The evidence adduced on behalf of the defendant includes the following paragraphs in Mr van Leeuwarden's first affidavit:

> *19. THE relocation by Peeler's was at a not inconsiderable cost. Reinstallation of the telephone system and other technical equipment together with removal costs (furniture, computers, photocopier, etc) meant that Peeler's was put to unnecessary expense by Home Improvement Courts actions. In addition, further costs were incurred and revenue lost in respect of:*
>
> *(a) The faulty installation of the telephone system which resulted in Peeler's telephones being inoperative for 2 days. Communication by telephone is particularly vital to Peeler's business operations;*
>
> *(b) All of Peeler's staff were unable to effectively conduct work whilst the relocation was carried out. There was a considerable amount of "down time".*
>
> *If the Court wishes, evidence from an appropriately qualified professional could be obtained to provide details of the further costs and loss of revenue.*
>
> *20. I reiterate that Peeler's rental was paid for the duration of its tenancy at the premises until November 1991. However, the manner of Home Improvement Courts departure and the resultant effect on the premises was such that Home Improvement Courts had fundamentally breached its obligations to Peeler's as a tenant of the premises. Furthermore, I believe and Peeler's believe, that in addition to Home Improvement Courts' breaching its obligations to Peeler's, the costs and losses of revenue caused by Home Improvement Courts' actions should be set-off against any possible rental owed. Peeler's have made their dispute known to the liquidators agents, Law Debt Collection Limited on a number of occasions.*

There is no evidence of the quantum of the relocation costs or of any other loss that may have been suffered.

In a case such as this, where both parties have had the opportunity to file affidavit evidence in respect of the defendant's application for the stay, the defendant has to establish a strong prima facie case of the existence of a bona fide dispute on substantial grounds as to the existence of the debt. See eg, ***Pink Pages Publications Limited v Team Communications Limited*** (1986) 2 NZLR 704 and ***Nemesis Holdings Limited v North Harbour Industrial Holdings Limited*** (1989) 1 PRNZ 379.

There are two questions for me in this case:

1. Is there a strong prima facie case that the plaintiff was in breach of the terms of the head lease and therefore of the sub-lease and/or was in breach of the covenant of quiet enjoyment;
2. If I am satisfied that there is a strong prima case of such breach, what course should I take in view of the absence of evidence of quantum from the defendant's case?

Dealing with the first of these questions, it itself has to be considered in two parts:

(a) The alleged breaches of the head lease;

(b) The alleged breach of the covenant of quiet enjoyment.

Mr Benvie, for the defendant, relies on clauses 10, 19, 22(c) and 30 of the head lease and the facts established by Mr Leeuwarden's evidence and referred to above by me to establish breach of those clauses. I am satisfied, on the evidence before me, that there is a strong prima facie case of breach of clauses 10(a) and 22(c) of the head lease. There may well also be breaches of clauses 19 and 30 but I think the case in respect of them is less

strong because of the scope of those clauses. The facts, of course, are the same. I therefore hold there is a strong prima facie case of breach of the terms of the head lease.

Turning to the question of whether or not there is a strong prima facie case of breach of the covenant of quiet enjoyment, Mr Benvie has referred me to the decision of the Court of Appeal in ***Kalmac Property Consultants Ltd v Delicious Foods Limited*** [1974] 2 NZLR 631 and to the following passage in the judgment of Haslam J at page 637:

> *"A breach of a covenant for quiet enjoyment can occur without actual physical interference. It is sufficient if there is substantial interruption which prevents the lessee from enjoying its premises for the very purpose for which they were leased."*

Mr Benvie referred me also to a number of other decisions as examples of the application of the principles stated by Haslam J. Two cases in particular I consider to be relevant: ***Owen v Gadd*** (1956) 2 All ER 28 and ***Chong v J P Scott & Associates Limited*** (unreported, Master J H Williams, QC, 6 March 1990, Wellington Registry, CP 1042/89). I am satisfied on the authority of these decisions that, if there is an interruption of access or the creation of a situation which discourages the exercise of access to leased premises, there is a breach of the covenant of quiet enjoyment. Mr Benvie submits that there has been a breach of the covenant of quiet enjoyment because of the following factors:

(a) *The premises were leased for the business of private investigation (clause 1(f) Deed of Lease);*

(b) *The requirement for "discreet cover" was made known to and understood by HIC;*

(c) *The damage to the premises upon HIC's departure and the resultant state of disrepair;*

(d) *Peelers requests to HIC for rectification of the damage and HIC's unfulfilled promises to do so;*

(e) *the loss of the "discreet cover" for the business, but more importantly the unsuitability of the disrepaired premises for a professional firm;*

(f) *Security problems - real estate agents and prospective tenants;*

(g) *Adverse comments made by Peelers' clients as to state of premises;*

(h) *Necessity for Peelers to move to new premises and resultant costs.*

I am satisfied that paragraphs (a), (c), (d) and (e) of the above list are established to the necessary standard on the evidence before me. I hold that the requirement for discreet cover, although made known to and understood by the plaintiff, has no contractual effect. I therefore find that paragraphs (b) and (e), even if established as a matter of fact, have no legal effect and must be ignored for the purpose of determining whether or not to grant a stay. I find the allegation made in paragraph (f) to have been proved to the necessary standard. In all the circumstances - and the contrary has not been argued by the plaintiff - I am satisfied it was necessary in the interests of the preservation of its business for the defendant to leave the premises. For these reasons I consider that there is a strong prima facie case of a breach of the covenant of quiet enjoyment.

These findings make it necessary for me to consider the second question to which I referred earlier, namely what course should I adopt in view of the absence of evidence of quantum. It is apparent from what Mr Benvie has

said that the absence of evidence of quantum is due to a misunderstanding by those who prepared the papers of the evidence which was necessary on an application of this nature where the defence relied on is a set-off. Clearly, on the findings I have made, there is a strong prima facie case of the existence of a set-off; but the evidence does not extend to the point of showing that that set-off equals or exceeds the sum claimed and hence is not a complete defence. In all the circumstances of this case, and because the omission of this evidence has been explained in the manner I mentioned a moment ago, I have come to the conclusion that the proper course is to adjourn the matter for a short period to enable the defendant to provide such evidence of quantum as it is able and for the plaintiff to reply to that if it is able. I intend to impose conditions on this adjournment, however. The first is that the sum in question, $10,843.73, be paid immediately into Court to await my decision on the adjourned hearing as to whether or not to grant a stay. Whether that money is required to remain in Court after that date will depend upon what decision I come to at the adjourned hearing. Secondly, I require the defendant to pay to the plaintiff forthwith the wasted costs occasioned by the need for a further appearance. I fix those in the sum of $250.

The application for stay is adjourned to 3 March 1993 at 2.15 pm (2 hours maximum allowed). The defendant is to file its affidavits in respect of the question of quantum by 19 February. The affidavits are to be limited to the question of quantum, in other words to the heads of loss outlined in paragraphs 19 and 20 of Mr Leeuwarden's first affidavit. The plaintiff is to file its affidavits, if any, in reply by 26 February. Leave is reserved to both parties to apply to on 24 hours notice for amendment of the timetable

orders if necessary. Both parties are required to file and serve their written submissions in respect of the issue of quantum by 1pm on the day preceding the hearing. There will be an interim stay at this stage to the adjourned date of hearing.

MASTER T KENNEDY-GRANT

Solicitors

Morrison Morpeth, Auckland, for Defendant
Inder Lynch, Manurewa, for the Plaintiff