

JUDGMENT DISTRIBUTION LIST

NAME OF PROCEEDING: FREEHILLS LTD V BNZ PROPERTIES LTD

REGISTRY AND FILE NUMBER: WELLINGTON CP 183/95

JUDGMENT DATE: 24/8/95

JUDICIAL OFFICER(S): DOOGUE J

DESCRIPTION AND CATCHPHRASES

REMEDIES: - INJUNCTION AFFECTING PROPERTY - Lessee's fixtures - lease provided for retention by lessor - no right to injunction to remove or to prevent use by lessor despite their being property of lessee

1121

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 183/95

BETWEEN FREEHILLS LIMITED

Plaintiff

A N D BNZ PROPERTIES LIMITED

Defendant

A N D BARRY LEON COTTIER and
RICHARD DALE PETERSON

Counterclaim Defendants

NOT
RECOMMENDED

JUDGMENT OF DOOGUE J

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 183/95

BETWEEN FREEHILLS LIMITED

Plaintiff

A N D BNZ PROPERTIES LIMITED

Defendant

A N D BARRY LEON COTTIER and
RICHARD DALE PETERSON

Counterclaim Defendants

Hearing: 24 August 1995

Counsel: S.J. Brown with S.J. Kemp for plaintiff
P.C. Chemis with L.M. Trevelyan for defendants

Judgment: 24 August 1995

JUDGMENT OF DOOGUE J

This is a quite hopeless application for an interlocutory injunction arising out of the lease of certain retail space by the defendant to the plaintiff.

The plaintiff entered into possession of certain premises on 10 May 1993 for an initial term of three years. One of the inducements offered by the defendant in respect of the lease was that it fitted out the premises with the necessary fixtures and fittings which would normally have been provided by a tenant, becoming the property of the plaintiff automatically at the end of 18 months from the commencement of the term of the lease. There were from the commencement of the lease in respect of the retail premises, which were divided into three retail food selling areas, problems about the air conditioning and ventilation. The

plaintiff says that the defendant was responsible for those problems, although the defendant denies that. Those problems are not themselves part of the present proceeding. The defendant says, however, that because of those problems it took a conscious decision at a certain stage to cease paying rent. It says it paid the rent for the first 18 months, but that is disputed by the defendant which as a result submits that the plaintiff is not entitled to claim the property in the fixtures and fittings used in the fitting out operation and installed by the defendant.

Whatever the exact position in respect of that, the issue now in dispute is whether or not the defendant has to preserve the fixtures and fittings so installed and whether or not the plaintiff is entitled to remove the items. The plaintiff seeks an injunction to prevent the defendant dealing with the items and to enable the plaintiff to enter on the premises and to remove them. There is, however, a clause in the lease which makes plain that the plaintiff is not entitled to remove from the leased premises any fittings or fixtures brought upon the premises by the lessee. The lessee is entitled to remove items which had been installed solely at the lessee's own expense, with the lessor providing no credit or allowance therefor. It is, however, common ground that the lease does not contain a provision relating to fixtures or fittings supplied in the manner in which these fixtures or fittings were supplied, although understandably the plaintiff submits that they are not governed by the precise words of the lease, whilst the defendant submits that, when the plaintiff is not entitled

to remove fixtures or fittings which it had had itself installed, it cannot possibly be entitled to remove fixtures or fittings installed by the defendant in the manner which occurred. The position is that, because of the failure of the plaintiff to pay the rent or to take its disputes with the defendant to arbitration in accordance with the terms of the lease, the defendant re-entered the premises on 20 July 1995 and on the plaintiff's counter-claim rent of some \$108,000 is owing by the plaintiff to the defendant.

Quite apart from any issue as to whether there is a serious question to be tried, and on the face of the documents it is hard to see how that could be when it is clear that the intention of the lease was that no lessee's fixtures or fittings should be removed from the premises, the balance of convenience is clearly in favour of the defendant. The fixtures and fittings are not all of the same nature, but for the most part they relate to the nature of the premises set up in the area of the particular building used for food outlets. There is no suggestion that the plaintiff has any other use for the fixtures and fittings.

The injunction to remove the fixtures and fittings is solely a nuisance application by the plaintiff. There is no suggestion that the plaintiff can achieve one of its causes of action, namely the relief against forfeiture, when there is no apparent present ability to pay the rent outstanding. The Court must have some regard to the practicalities of the situation. The premises were set out with the particular fixtures and fittings so that they could operate for the

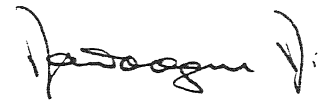
purposes then agreed between the parties. To suggest that the fixtures and fittings should be removed at the present time is quite nonsensical. To suggest that they should not be used by the defendant is equally nonsensical. There is clearly a right to damages in the plaintiff if the plaintiff's case is correct. There is no suggestion that the defendant is not in a position to meet any damages. The reverse is by no means clear.

When the plaintiff for whatever reason has failed for a substantial period to pay the rental due in respect of the premises, there can be no reasonable prospect that the plaintiff is in a position to pay any damages which the defendant might recover against the plaintiff under its counter-claim. Not only the balance of convenience but overall justice makes clear that the application must fail and the items must be permitted to remain within the premises and the defendant must be entitled to have the use thereof, with the plaintiff having its rights to its monetary remedies in terms of its proceedings if it is able to make out its case.

The application for the injunction will therefore be dismissed.

The defendant is entitled to its costs in respect of the application and those are fixed in the sum of \$1,500 together with any reasonable disbursements which the defendant might have incurred in respect of the application. In the event of there being disagreement as to such disbursements they can be fixed by the Registrar under Item 34 of the Second Schedule to the High Court Rules.

I would record that the defendant through Mr Chemis indicated that the plaintiff was entitled to reasonable access for any valuers should the plaintiff seek to have any of the fixtures and fittings in dispute valued. In addition, the defendant would preserve for a reasonable period from today any chattels which may have to be removed from the premises pending the outcome of the dispute. In the event of counsel being unable to agree, further application could, if need be, be made to the Court under the appropriate rules.

A handwritten signature in black ink, appearing to read "H. J. J.", is written in the lower right quadrant of the page.

Solicitors for plaintiff:
Morrison Morpeth, Wellington

Solicitors for defendants:
Buddle Findlay, Wellington

