LOW PRIORITY

N2LR

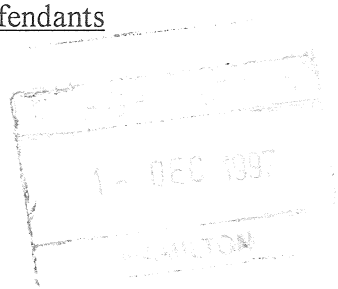
IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY CP 24/97

BETWEEN **ME HARRIS**

Plaintiff

AND **JW PATTON, CR PATTON and JB CONNOLLY** as trustees of the Carrera Property Trust

Defendants



Hearing: 5 November 1997

Counsel: MR Bos for plaintiff
EJ Hudson for the defendants

Judgment: 24 November 1997

JUDGMENT OF MASTER FAIRE

Solicitors:
Phillips Fox, DX CP 24027, Auckland for plaintiff
Schramm Law, PO Box 1069, Hamilton for defendants

The plaintiff issued proceedings seeking summary judgment. The proceedings sought remedies in the alternative.

The first remedy sought was an order by way of specific performance requiring the defendants to renew a lease for the next further term from 1 May 1997 to 30 April 1999 upon and subject to the covenants and agreements expressed and implied in that lease.

The second remedy sought an order pursuant to s 120 Property Law Act 1952 by the grant to the plaintiff of a renewal of the same lease for the next term from 1 May 1997 to 30 April 1999 upon and subject to the covenants and agreements expressed and implied in the lease.

Counsel for the plaintiff advised the Court that the first prayer for relief, that of an order by way of specific performance was abandoned. On that basis, the hearing proceeded as an application for summary judgment by way of an order pursuant to s 120 of the Property Law Act 1952 seeking relief in the form referred to above.

To this extent the case may be seen as breaking new ground. Neither counsel's research had located any reported decision where summary judgment had been granted in respect of an application for relief pursuant to s 120 of the Property Law Act 1952.

The background to this application is as follows. Mr SG Harris, a person not related to the plaintiff, entered into a deed of lease with the plaintiff dated 26 February 1993. Pursuant to that lease Mr SG Harris leased to the plaintiff a commercial premises and yard at Mary Street, Thames for a two-year period from 1 May 1993 and with five further rights of renewal for two years each. A deed of renewal of lease was executed and as a result the plaintiff obtained a renewal of the term of the lease for a further two-year period commencing 1 May 1995 and expiring on 30 April 1997. No issue was taken of the fact that the document evidencing the renewal had not been signed by Mr SG Harris.

Mr SG Harris then entered into an agreement with the plaintiff whereby he agreed to reduce the rent by 50% from 1 October 1985 (apparently a misprint for 1995) for the

balance of the present two-year term of the lease. The agreement was conditional upon any rents outstanding to that date being paid up to date and also provided that on the expiry of the balance of the two-year term, the rent would again return to the amount set forth in the renewed rental agreement. This was $2,187 plus GST per month. In late January 1997, the plaintiff received a letter from the first-named defendant which advised the plaintiff that the Carerra Property Trust had purchased the premises. The letter enclosed an automatic bank authority form for the payment of rent. It requested $1,230.31 by cheque for the February 1997 rent. It then went on to record the following

> "Of great concern to us, is the untidy appearance of your grounds. In particular weeds and rubbish in the open courtyard, rubbish stacked in front of the roller door facing Mary Street. This clearly has a negative impact on the building and the neighbours. At the Queen Street entrance, your practice of placing goods on the footpath and roadside, is in breach of Council by-laws. We ask that you stop this practice and comply with the by-laws, clean up your grounds, remove the rubbish to your premises and to the neighbourhood."

JW Patton, the first-named defendant, was the person who signed that letter. He is also the proprietor of a Mobil Service Station which is situated on the same property and is part of the same building which is leased to the plaintiff. The plaintiff replied on 30 January 1997, which reply included a reference to "your request to comply with town planning requirements" and an indication being given that until others in Thames complied he did not intend to do so.

The next development is the issue of a letter which purports to be a notice to renew the lease. There is a contest as to when such letter was received. The plaintiff said that he received the letter on 31 January 1997 from his solicitors and on receiving it took a copy of it to the first-named defendant. Bearing in mind that the lease term terminated on 30 April 1997, if service occurred on 31 January 1997, the notice was in fact given at least three calendar months before the end of the term as required by clause 35 of the lease. The defendants allege, however, that the notice was not received until as late as the following Wednesday. That would be some five days later and not within the time specified for giving notice of intention to seek a renewal of the lease as provided in clause 35 of the lease.

There is another important fact relating to the term of the lease which expired on 30 April 1997. The lease, which was in the Auckland District Law Society 1989 form, contains a business use provision in its schedule. That provision states

> "Business use: Sale of fruit, vegetables, grocery products and general merchandise."

The schedule is tied to clause 18.1 by which the tenant is prohibited without the prior written consent of the landlord from using or permitting the whole or any part of the premises to be used for any use other than the business use. The clause contains provisions for seeking landlord's consent which shall not be unreasonably or arbitrarily withheld subject to certain restrictions concerning competition with other occupants and being reasonably suitable for the premises and conforming with town planning ordinances and consents. The clause also makes provision for the payment by the tenant of any increase in the landlord's insurance premium by reason of the change of business use. The clause requires the written consent of the landlord to any change.

In October 1995, the plaintiff ceased selling fruit, vegetables and groceries from the premises and opened a secondhand furniture business and a bridal shop. The plaintiff obtained the verbal consent of the previous landlord, Mr SG Harris, and that matter was confirmed by Mr SG Harris, although the consent does not seem to have been given until 1996. The plaintiff acknowledges that in failing to obtain the landlord's written consent he is technically in breach of the lease and, on the authority of ***McGregor Motors Ltd v Barton & Others*** [1956] NZLR 297 he is not entitled to a decree of specific performance. It seems that this matter was not raised specifically until the first-named defendant's affidavit in answer was filed. It was then the reason for the abandonment by Mr Bos of the first of the alternative remedies, namely, the prayer for specific performance.

I return to the general chronology. In a letter dated 21 February 1997, the defendants' solicitors advised that the defendants would not grant a renewal of the term of the lease. The letter refers to the annual rent as set out in the deed of renewal of lease and not the

varied sum and also to an obligation to maintain the premises in a clean and tidy manner and concluded with the words

> "Due to the above issues our client declines to grant a renewal of the term."

A response was sent on 28 February 1997 which made reference to the agreement providing for a reduction in rent due, denied the allegation that the property was not being maintained in a clean and tidy manner and challenged the refusal to grant a renewal of the lease and advised that if it was maintained an application for relief would be made to the Court.

Further correspondence passed between the parties' respective solicitors which failed to resolve the matter and on 16 May 1997 the plaintiff issued these proceedings.

The defendants oppose summary judgment on, firstly, procedural grounds and, secondly, on the grounds that there are matters of fact in dispute and in any event the relief sought pursuant to s 120 of the Property Law Act 1952 is discretionary and therefore, in this particular case, summary judgment is not an appropriate application.

The procedural objection

The procedural objection is based on an alleged to failure to comply with R138(2) of the High Court Rules. Rule 138(2) requires the filing and service of the application for summary judgment of an affidavit by or on behalf of the plaintiff

> "(a) Verifying the allegations in the statement of claim to which it is alleged that the defendant has no defence; and
> (b) Deposing to the plaintiff's belief that the defendant has no defence to the allegations and setting out the grounds of that belief."

The first affidavit filed by the plaintiff did not attempt to cover the matters required by R 138(2). The second affidavit of the plaintiff did not verify the allegations in the statement of claim but did state

> "For the reasons set out in this affidavit and my first affidavit I believe that the defendants do not have a defence to my claim."

An affidavit in reply dated 18 August 1997, by the plaintiff, did verify the allegations and statements contained in the statement of claim as true and correct. By the time of the filing of that affidavit, however, notice of opposition and affidavit in opposition had been filed. Mr Hudson, for the defendants, noted that R 138(2) had not been complied with because the verification of the statement of claim had not been made in an affidavit filed and served at the time of the filing and serving of the application for summary judgment. He also submitted that there had been a failure to comply with the Rules because the plaintiff has not specified the grounds upon which he relies for the proposition that the defendant has no defence to the application for relief. He acknowledged that certainly in one part the defect could be cured by an application for enlargement of time under Rule 6 and that, in essence, if that was the only matter in dispute, no harm has been caused by the omission. He was, however, very critical of the failure to spell out precisely the grounds upon which the plaintiff relies for stating the plaintiff's belief that the defendant has no defence.

Mr Hudson referred me to a judgment of Justice Doogue in ***Registered Securities Ltd v Lemrac Farm Ltd*** (High Court, Hamilton, M 184/86, 24 October 1986). His Honour there noted at page 3 that he could not find any provision within the Rules to permit the amendment of the original proceedings or for further proceedings to come before the Court under the Rules. He noted at page 6 that the affidavits in support do not spell out the grounds for the plaintiff's belief so that one is left to guess from the affidavit what those grounds were.

The strict approach to the application of the rules to summary judgment procedure, as evidence from the early cases, has been modified to a certain extent. The Court of Appeal in ***Cegami Investments Ltd v AMP Financial Corp (NZ) Ltd*** [1990] 2 NZLR 308 confirmed that amendments to the proceedings were possible in the summary judgment procedure. Rule 5 of the High Court Rules provides that a non-compliance will not nullify the proceedings or any step taken in them. Amendments are granted provided the applicant satisfies three hurdles, namely

(a) that the amendment is in the interests of justice

(b) that it will not significantly prejudice the defendant, and

(c) that it will not cause significant delay. ***Elders Pastoral Ltd v Marr*** (1987) 2 PRNZ 383, 385

I invited Mr Hudson to specify whether there was specific prejudice in this case. His response, understandably, was that having been put on notice the plaintiff still did not comply precisely with the Rules. He submitted that the defendants are accordingly not able to deal precisely with the various matters put forward in support of the proposition that the defendants have no defence. I have some sympathy for the defendants' submission. However, having regard to the conclusion I reach on the merits, there is no harm caused in this case by my treating the procedural irregularity as cured. I proceed on that basis.

The next broad basis for opposition to summary judgment raised by the defendants relates to the specific issues raised by the application for relief under s 120 of the Property Law Act 1952. The objection is based on the fact that the remedy is a discretionary remedy, that there are factual issues which are in dispute and which, in any event, are not fully enunciated in the affidavits filed.

Before dealing specifically with the objection to summary judgment on the merits, it is appropriate to record the specific obligations of the parties in relation to a summary judgment application. They are

1) the plaintiff has the onus of establishing that there is no defence. High Court Rule 135, ***Pemberton v Chappell*** [1987] 1 NZLR 1, 3

2) the words "no defence" has been expressed in a variety of ways as, for example

> "no *bona fide* defence, no reasonable ground of defence and no fairly arguable defence" *Pemberton v Chappell* (supra) pp3-4

3) hypothetical possibilities in vague terms, unsupported by any positive assertion or corroborative documents advanced by the defendant, will not frustrate the obligation on a plaintiff to discharge the onus of proof. In *Pemberton v Chappell* (supra) p3, Somers J said:

> "If a defence is not evident on a plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which is claimed ought to be put in issue. In this way a fair and just balance will be struck between the plaintiff's right to have his case proceed to judgment without tedious delay and the defendant's right to put forward a real defence."

4) the position must be looked at carefully where the relief claimed in summary judgment involves the exercise of a discretion. In *AGC v Wyness* [1987] 2 NZLR 326 the Court of Appeal held there was no gloss on the Rules which prohibit the grant of summary judgment in such case. The Court said

> "Where, as in the two cases mentioned, the evidence before the Court shows that an inquiry is necessary, or there is insufficient to enable the Court to be satisfied the defence must fail or that discretionary relief will not be given, the proper course will be to refuse to enter summary judgment." p330

In principle there would seem to be no reason why the same factors should not apply where it is the plaintiff who seeks the discretionary relief. Under s 120 of the Property Law Act 1952 the plaintiff starts from the position of acknowledging a breach of contract. If, however, the breach is clearly a technical one, that can be explained as having no adverse consequence to the defendant, there would seem to be no reason why an application for summary judgment could not succeed. Having said that, however, where a party seeks discretionary relief based on an acknowledged breach by that party, there is obviously a need for careful scrutiny of the issues before a Court can come to the conclusion that the plaintiff has satisfied the onus that the defendant has no defence. Save for the technical breach that I have referred to, it seems to me, that in most instances an application for summary judgment will not be appropriate when a plaintiff seeks relief pursuant to the provisions of the Property Law Act 1952, whether pursuant to s 120 or s 118. I adopt the reservation contained in the judgment of Fisher J in *Claydon v Herron*

(1994) 7 PRNZ 631 when His Honour was considering the discretion under the Illegal Contracts Act 1970. At page 634 he said

> "notoriously when one comes to the exercise of a judicial discretion, unforeseen circumstances can have a bearing upon what at the moment may seem obvious."

I next pass to consider the specific discretion which is reserved to the Court under s 120 of the Property Law Act 1952. There is one preliminary point in considering this aspect of the case. Although the notice of opposition recorded one of the grounds as being that the application for relief had not been made within the time limits imposed by s 121 of the Property Law Act 1952, Mr Hudson acknowledged that that specific ground was not relied upon and, accordingly, I consider it no further.

Section 120 of the Property Law Act 1952 provides as follows

> "(3) Where--
>
> (a) By any lease to which this section applies the lessor has covenanted or agreed with the lessee that, subject to the performance or fulfilment of certain covenants, conditions, or agreements by the lessee, the lessor will--
>
> (i) On the expiry of the lease grant to the lessee a renewal of the lease or a new lease of the demised premises; or
>
> (ii) Whether upon the expiry of the lease or at any time previous thereto assure to the lessee the lessor's reversion expectant on the lease; and
>
> (b) The lessee is in breach of any such covenant, condition, or agreement, or has failed to give to the lessor notice of his intention to require or to accept a renewal of a lease or a new lease or an assurance of the lessor's reversion, as the case may be, within the time or in the manner, if any, prescribed by the original lease; and
>
> (c) The lessor has refused to grant that renewal or that new lease or to assure that reversion, as the case may be,
>
> the lessee may in any action (whether brought by the lessor or the lessee and whether brought before or after the commencement of this Act), or by proceeding otherwise instituted, apply to the Court for relief.
>
> (4) The Court, having regard to all the circumstances of the case, may grant or refuse relief as it thinks fit, and in particular may decree, order, or adjudge--
>
> (a) That the lessor shall grant to the lessee a renewal of his lease or a new lease, as the case may require; or
>
> (b) That the lessor's covenant or agreement to assure the reversion ought to be specifically performed and carried into execution, and

> that the lessor shall execute such assurances as the Court thinks proper for that purpose,--
>
> on the same terms and conditions in all respects as if all the covenants, conditions, and agreements aforesaid had been duly performed and fulfilled.
>
> (5) The Court may grant relief on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise as the Court in the circumstances of each case thinks fit."

In *Vince Bevan Ltd v Findgard Nominees Ltd* [1973] 2 NZLR 290 (CA) Turner P at 297 said

> "This section ... enacted as a remedial measure, should be construed as conferring upon the Court a very wide jurisdiction to do equity in relieving against refusals by lessors to renew leases."

McCarthy J at 299 said that

> "The text of the section demonstrate not only that the Court should have the fullest powers to grant relief but also that the jurisdiction to enter upon an issue should not be viewed narrowly ..."

In *Weatherall Jewellers Ltd v J Hendry & Son Ltd* (CA 135/83, 11 September 1984) Richardson J at page 8 said

> "Clearly the Court has to do justice as between lessor and lessee having regard to all the circumstances of the case and having regard to the relative prejudice occasioned to the lessor or lessee by the grant or refusal of relief and by any terms imposed under subs. 5."

Mr Bos, for the plaintiff, acknowledged that the reason for the application for relief under s 120 of the Property Law Act 1952, that is the breach which makes such application necessary, was the failure to comply with the covenant in the lease relating to business use. The balance of the matters raised in the correspondence between the parties, he submitted, were either not breaches or were so trivial that they did not justify the stand taken by the defendants in refusing to grant a lease. I propose to deal with each matter that has been raised, bearing in mind this is a summary judgment application and not the determination of these matters on the merits

The first matter, and a convenient starting point, is the business use provision in the deed of lease. As earlier mentioned, the business use provision requires by the operation of

clause 18 of the lease and the part of the first schedule, that the tenant shall not without prior written consent of the landlord permit the whole or any part of the premises to be used for any use other than the business use. The business use described is that of the

> "sale of fruit, vegetables, grocery products and general merchandise."

Affidavits were filed by the plaintiff and the former owner of the premises. The former owner said that the plaintiff operated a secondhand furniture business and bridal shop from the premises since early 1996, well before the defendants purchased. The former owner said that the plaintiff obtained his verbal consent before opening the secondhand furniture business and bridal shop.

The defendants' deponent, however, complains not only of the use to which the shop premises are put but also raises matters relating to the lease of carparks, and the operation of what appears to be a market from the yard. It is perhaps understandable that the extent of the potential problem caused by the plaintiff's use was not fully explained in the affidavits as it is a summary judgment application. I endeavoured to ascertain from counsel whether there was what might be called a "quick fix-it" for this issue. Both counsel agreed that it would be pointless to grant relief by granting a renewal of the lease without directing, pursuant to subsection (5) of s 120, some alteration to the lease to cope with what is clearly the plaintiff's present and future intentions as to the style and type of business that would be operated from the premises. Although a form of words was suggested by Mr Bos in argument, it seems to me on the reflection, and particularly having regard to the fact that such a change had not been formally notified or, for that matter, formally defined by notice to the landlord or even in the affidavits filed in the summary judgment application, that it would be dangerous to deal with the matter simply based on oral submissions. This issue highlights the difficulty in dealing with this application by way of summary judgment. In my view, this was a circumstances not specifically addressed by the parties in the summary judgment application which makes summary judgment inappropriate. There are a range of potential problems that need to be addressed if a change to the business use provision is made a condition of a Court's order.

In addition, issues are raised concerning carparking and the use of the yard as a market place. The plaintiff's response is really to treat these matters as trivial and of no concern. In my view, the extent of the breach, if it is exists, does need to be analysed.

I shall deal with the balance of the matters raised in opposition to the exercise of the discretion in order in which they are set out in the notice of opposition. The defendants assert that the plaintiff failed to give three months' notice of intention to seek a renewal.

There is a conflict of evidence as to whether or not the written notice was hand delivered by the plaintiff to one of the trustees. Mr Hudson conceded when I put to him that service on 31 January 1997 would comply with the time requirements of the lease for service. That, of course, is the plaintiff's position. The defendant trustees' position, however, is that they did not receive the letter until the Wednesday following, which would be some five days late. By itself, a delay of that magnitude is not great and unless there were special circumstances would not prevent the exercise of a discretion to renew. ***In re lease McNaught to McNaught*** [1958] NZLR 73 Henry J at 77, dealing with a notice given fourteen days late, said

> "The breach was trifling and the passage of time was short and as a result the applicant was likely to be a heavy loser not only of valuable of rights but also substantial sums of money he had expended on improving the property upon reliance on his right ultimately to acquire the property."

I emphasise, however, that I cannot finally determine the matter but can only given an indication.

The next matter raised was an allegation of rental arrears. There are two aspects to this matter. The first is the rent due to the new owner for the period up to and including determination of the term of the lease, that is 30 April. The plaintiff's position is that such period is covered by the agreement of October 1995 which provided for a 50% reduction. Irrespective of that, however, the plaintiff under cover of his solicitor's letter of 20 March 1997 made a payment for the amount specified in the lease itself, that is $2,460.62 including the GST. The payment was made with a statement

> "This payment is made with a denial of liability and entirely without prejudice to my client's right to assert that it is not payable should your client not go ahead and renew the lease."

The letter goes on to make it clear that if a renewal is granted the cheque may be unconditionally receipted. In the light of that statement, it is difficult to see how non-payment of rent, for the term which expired on 30 April 1997 could be relied on.

There is next a dispute as to the payment of rent for the period beyond 1 May, that is in the holding-over period. Although there is an argument as to the point in time when such higher rental became due and payable, what is of perhaps most significance is that the new rent figure was paid by cheque dated 25 June so that, at the very worst, all that has occurred is a late payment. Had this matter required a determination on the issue of failure to pay rent, then, in my view, from the material advanced, that would not have been an impediment to the grant of relief in this case. The issue of non-payment of rent does not seem to be a matter justifying the defendants' position.

The next issue raised is one of maintenance and care of the premises. Evidence was adduced by both plaintiff and defendants on these matters. Understandably there is a conflict between the parties as to the extent of the problem, indeed if a problem exists. For the plaintiff's part he at least has the support of the former owner. Be that as it may, I cannot rule out a breach of the lease based on this claim of failure to maintain the premises and failure to maintain and care for the yard and grounds. In essence, the core of the breach is made out by the defendants so that I cannot be satisfied that they have no defence. That is all that is required. ***Pemberton v Chappell*** [1987] 1 NZLR 1, 8. The defendants' evidence, in fact, deposes to damage to the building. It includes a request to the plaintiff to repair some spouting and an allegation that the request was ignored. There was an allegation of failure to paint a wall. There are allegations concerning the manner in which the grounds were kept. These matters, of course, are disputed by the plaintiff. The extent of the problem clearly is something that needs to be resolved but not in a summary judgment context. The comments that I have made under this heading in fact cover the particulars set forth in the defendants' notice of opposition dealing not only with

maintenance and care of the premises, the yards and grounds but also relate to the question of rubbish.

The next breach alleged by the defendants relates to trading hours. The foundation for the defendants' claim is, of course, clause 18.2 of the lease which provides

> "If the premises are a retail the shop the tenant shall keep the premises open for business during usual trading hours and fully stocked with appropriate merchandise for the efficient conduct of the tenant's business."

No evidence was placed before me of what the normal trading hours in this area are. There is evidence that part of the plaintiff's operation was closed on a Monday and Tuesday. Once again, I cannot exclude the possibility that there is a breach of the lease under this heading. In addition, it seems to me, that if the business calls for a particular precision in relation to trading hours then this might well be the subject matter of a special term imposed if relief under s 120 is granted pursuant to the provisions of s 120(5). Once again, it seems to me, that the issue raised here is one which requires resolution outside the summary judgment context.

The next area raised in the notice of opposition is the breach of clause 23 of the lease and, in particular, the provision which requires the tenant to comply with all statutes, ordinances, regulations and by-laws in any way relating to or affecting the premises or the use of the premises by the tenant. The core of this alleged breach is the defendants' allegation that the plaintiff traded from the sidewalk and grass verge outside the front of the premises and that that activity was in breach of Council's ordinances. There is immediately an issue as to whether or not such an activity, if it is true, is a breach of a statute, ordinance, regulation or by-law which relates or affects the subject premises or the use of the subject premises. Counsel did not address specifically on the two parts of this provision, that is, the first part a statute, ordinance, regulation or by-law affecting the premises on the one hand, or a statute, ordinance, regulation or by-law relating to or affecting the use of the premises. The evidence of trading on the sidewalk would not appear to infringe a Council ordinance affecting the premises but it might affect some ordinance relating to the use of the premises. I am simply not in a position to rule on the matter. All that can be said is that it is not the only matter which is complained of by the

defendants and is simply part of the whole picture that the defendants put forward in answer to the obligation cast on the plaintiff of establishing that the defendants have no defence to this proceeding.

In their statement of defence the defendants add yet a further alleged breach, that of erecting signs without consent in breach of clause 21 of the lease. It was not expressly raised in the notice of opposition. I signal that it is a matter that will be the subject of resolution when this matter is finally resolved by the Court but for the purposes of the summary judgment application I do not rely on the allegations made by the defendants as evidence of breach of the lease.

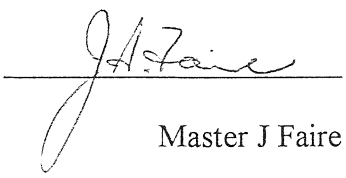
In summary, this is an application which seeks relief by way of a grant of a renewal of a lease pursuant to s 120 of the Property Law Act 1952. The plaintiff, in making the application, acknowledges a breach in relation to the business use provision. The defendants raises other breaches which justify the refusal to grant a renewal. The issue, however, under s 120 is whether they are matters of substance which should be determined on the merits and in such circumstances that I now conclude that they can amount to matters of opposition to the exercise of the discretion to grant a renewal pursuant to s 120. I have referred to the fact that even if a renewal is granted, in my view, it is most likely that terms will be attached pursuant to the power vested in the Court by s 120(5) of the Property Law Act 1952.

When I weigh all these matters up I am unable to find that the plaintiff has satisfied me that the defendants have no defence to this application for summary judgment. The result then is that the application for summary judgment must be dismissed. Having reached the conclusion I have, it is unnecessary for me to specifically rule on the procedural objections earlier referred to in this judgment.

There is an ongoing relationship between the plaintiff and defendants in this proceeding. I invited counsel to inform the Court whether the plaintiff would be left in possession while these proceedings were brought to finality. A final answer could not be given. It does emphasise to me, however, the need for the imposition of strict timetables so that this

matter is brought to a speedy resolution. A statement of defence has been filed so there is no need to direct the filing of same now. Mr Hudson indicated to me that the only outstanding interlocutory issue was completion of discovery and inspection. I would expect the parties to complete discovery and inspection promptly. However, rather than impose interlocutory directions without hearing counsel, I propose to adjourn the proceeding to the chambers list at 2.15pm on 1 December 1997. At that time I will give such directions as may be appropriate pursuant to Rule 142 of the High Court Rules.

With respect to costs, it is usual for the costs to be paid by the party seeking the indulgence, in this case the plaintiff. I propose to follow the usual position which applies in summary judgment applications where the application is dismissed and to reserve costs. ***NZI Bank of New Zealand Limited v Philpott*** [1992] NZLR 483. Costs are reserved.



Master J Faire