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IN THE HIGH COURT OF NEW ZEALAND CP 3/98
GISBORNE REGISTRY

BETWEEN	**ENDEAVOUR LODGE MOTEL LIMITED**
	Plaintiff
AND	**ROGER ARTHUR LANGFORD and BRYAN JOSEPH GAVIN**
	Defendant
Counsel:	J B Samuel for plaintiff D J Sharp for defendants
Hearing:	14 August 1998
Date of judgment :	24 August 1998

JUDGMENT OF ELIAS J

Solicitors

Jennifer G Connell, PO Box 105-205 Auckland for plaintiff
Burnard Bull, GisbornePO Box 946 for defendants

In March 1996, the defendants as lessors re-entered motel premises leased to the plaintiff lessee. The re-entry was effected in reliance upon clause 4 of the lease. That clause provided:

> 4.1 If the rent hereby reserved or any part thereof shall be in arrears and unpaid for the space of twenty-one (21) days next after any of the days hereinbefore appointed for payment thereof, and whether or not any formal demand shall have been made therefore ... it shall be lawful for the lessor to re-enter upon the demised premises...

The plaintiff seeks relief against forfeiture by summary judgment. The application is opposed by the defendants on the grounds that procedure by way of summary judgment is inappropriate and that they have a defence to the claim.

Background

The background to the present claim is a longstanding and acrimonious dispute which has been before the Courts in a number of related proceedings. The history of the matter can be briefly outlined.

The plaintiff, a company of which Mr Kaua Te Rangi Reedy is a director, is lessee by transfer dated 11 May 1990 of a lease of motel premises. The defendants are trustees of a family trust of which Mr and Mrs Langford are beneficiaries. They became landlord under the lease, following transfer of ownership of the motel premises from the original lessors, in February 1996.

The lease of the motel premises is dated 22 April 1986. It was entered into for a term of 18 years from 27 March 1986. Rental was initially $35,000, payable in advance. The lessee's interest in the lease was transferred to Mrs Frances Reedy, late wife of Mr Reedy, in 1986. In May 1990 she had in turn transferred the lessee's interest to the plaintiff company, of which she and her husband were then the principal shareholders. Mrs Reedy died in 1992.

By the time the defendants acquired the property the subject of the lease, in February 1996, the plaintiff had therefore been the tenant for some years. In an affidavit filed in

the present proceedings by a former co-owner of the property, the plaintiff is described as having been a "most unreliable tenant". Its rental payments were said to have been frequently in arrears. At the time of sale of the property to the defendant trust, rental moneys then owing were not paid until a winding up petition was brought by the previous owners after the property had been sold.

On 2 February 1996 the solicitors for the defendants gave notice of default in respect of non-payment of rent, rates, power and Telecom accounts. On February 27 1996 the solicitors gave notice under s 118 of the Property Law Act 1952, citing breach of clause 4.1 of the lease in respect of a payment of rent of $3,562.50 due for payment on 26 February 1996. There was in fact no breach at the time demand was made. The rental claimed did not become due until 27 February.

On 27 February Mr Reedy gave a post-dated cheque to Mrs Langford for $1,500, to be paid on 2 March. Whether the acceptance by Mrs Langford of the post-dated cheque amounted to waiver of breach was a matter subsequently the subject of proceedings in the District Court and, on appeal, this Court. As is explained below, it was ultimately held that the acceptance of the cheque and its subsequent banking by Mrs Langford on 2 March did not amount to waiver of the breach.

On 20 March 1996 the defendants re-entered, terminating the lease. At the same time they took possession of chattels in the motel which were the property of the plaintiff company. The chattels have been the subject of a claim by the plaintiff in the District Court in an action against the defendants for conversion. That claim has not yet been dealt with by the Court.

The motel is said by the defendants to have been in a poor state when taken over. There is a current claim before the District Court by the defendants against the plaintiff for damages for breach of a maintenance covenant under the lease. Mr Samuel in this Court pointed out that the claim for damages has not been particularised and the defendants have not sought to give notice in respect of the alleged maintenance deficiencies under the Property Law Act 1952.

The plaintiff issued proceedings in the District Court at Gisborne in November 1996 seeking a declaration that the re-entry and subsequent forfeiture was wrongful and that the defendants' distraint upon the chattels in the motel was unlawful. As an alternative cause of action, the plaintiff sought relief against forfeiture and claimed damages, which were not specified. The proceedings also named Mr Reedy as a plaintiff in respect of other causes of action which are not relevant for present purposes.

The claim had been preceded by correspondence between the solicitors for the parties. Earlier proceedings prepared, I am told, in August had not been accepted for filing because irregular.

The alternative claim for relief against forfeiture is a claim which should have been brought in the High Court. The claim was also incorrect in its reference to s 118 of the Property Law Act, which has no application to re-entry or forfeiture in case of non-payment of rent: s 118(7). The lack of jurisdiction in the District Court was a matter raised by the defendants in November 1996 and was pleaded in its statement of defence.

By agreement of the parties, the claim as to the validity of the forfeiture was set down for hearing ahead of the remaining claims. The case came before Judge McLean in three hearings in May, June and July 1997. In his reserved decision of 26 September 1997, he held that there was a valid re-entry. The plaintiff appealed that determination. The appeal was heard before Tompkins J on 4 December. In his judgment of 19 January 1998 he dismissed the appeal for reasons which differed slightly from those of the District Court Judge. Leave to appeal to the Court of Appeal was declined by me on 6 March, as was an application for stay of execution. In my judgment, I concluded:

> I add only this. It seems to me that the matter has pursued a technical route which may not ultimately have been in the interests of all the parties. The parties may have been better served if the application for relief against forfeiture had been the main focus. It is quite apparent this is a matter which seems to be getting out of proportion ...

Mr Samuel indicated in his submissions that the plaintiff had considered applying further to the Court of Appeal for leave to appeal on the question of the validity of the

forfeiture. Having decided not to pursue the appeal further, he made application to this Court for relief against forfeiture.

The application for summary judgment

The statement of claim in the present proceedings was filed on 29 April 1998. At the same time, the plaintiff filed notice of interlocutory application for order for summary judgment, in reliance on Rules 135-144 of the High Court Rules.

The defendants gave notice of opposition to the application for summary judgment. The grounds of opposition were:

> 1. That the defendants have a defence to the plaintiff's claim.
> 2. That the proceedings are for relief against forfeiture pursuant to s 118(3) of the Property Law Act and that relief against forfeiture should not be granted in the circumstances for the following reasons:
> (i) The plaintiff has failed to adhere to the terms of the lease over an extended period and it would not be equitable for the relief to be granted.
> (ii) The period of two years and one month had elapsed between the defendants' lawful re-entry and the filing of an action for relief against forfeiture in a Court of competent jurisdiction is too long to allow an application to be brought.
> (iii) The period of the said delay is such that prejudice may be presumed to have arisen to the defendants.
> (iv) The period of the delay has led to the situation where the defendants would suffer actual prejudice as a result of the delay on the part of the plaintiff.
> 3. The actions of the plaintiff had been such as to indicate an election to pursue one of two inconsistent remedies.
> 4. Material matters of fact between the plaintiff and defendants are in dispute and resolution of the material matters of fact will require witnesses being available for cross-examination.
> 5. The circumstances of this application for relief against forfeiture are such that the proceedings are unsuitable as a matter to be considered by way of summary judgment.

In support of the application for summary judgment the plaintiff filed an affidavit by Mr Reedy. In his affidavit Mr Reedy asserts that the plaintiff

> Is in a position to provide sufficient funds which may be properly due and payable to the Defendants in respect of their re-entry.

As it emerged at the hearing, although the plaintiff concedes that before obtaining relief against forfeiture it must be in a position to pay the arrears of rent and costs, the plaintiff contends that, in circumstances where rent was payable in advance, the rent required to be paid is that payable up to the date of re-entry only. The amount payable is of importance because the defendants claim that the plaintiff is of doubtful solvency and challenge the assertion in Mr Reedy's affidavit that he is in a position to pay the outstanding rental. The question of solvency of the company is a matter returned to by Mr Reedy in an affidavit in reply to the defendants' affidavit filed on 10 August 1998.

The evidence

On behalf of the defendants seven affidavits are filed in opposition to the application for summary judgment. That of Alexander Stuart Mitchell, a former co-owner of the motel property, deals with his experience of the unreliability of the plaintiff company as lessee. The affidavit of Raymond Thomas Ferdinando, secretary of the Gisborne East Coast Branch of the Motel Association, deals with the poor state of the motel when re-entered by the defendants and its marked improvement when he revisited the property in June 1998. An affidavit by Todd Andrew Stevenson, a chartered accountant, is directed at the question of solvency of the plaintiff company and suggests that a figure shown in its 1995 accounts as owing from a major debtor of the company is unlikely to be repaid because of the insolvency of the debtor. An affidavit by Graham Douglas Tietjen, a registered valuer, deals with the condition of the motel property when visited on 25 March 1996 and its maintenance and appearance on re-inspection on 10 June 1998. An affidavit by Alan James Bond, a registered valuer, values the chattels left in the motel at the time of re-entry at $14,514 and describes them as not having been in good condition when the inspection was made in late March 1996.

Two affidavits by Roger Arthur Langford were also filed in opposition. The first, a substantial affidavit, indicates disagreement with the first affidavit of Mr Reedy and sets out the history of the dealings between the parties. He deposes that the chattels belonging to the plaintiff have been available for its collection and that the plaintiff has been told that it could collect the chattels. Mr Langford sets out the steps he and his wife have taken since re-entering the premises to run the motel themselves. He and his

wife relinquished their respective occupations to act as moteliers. They found it impracticable to put a manager into the motel because of its condition. Mr Langford says

> We work to attend to a significant amount of cleaning and maintenance work which was in disarray. We spent hours of our own time in trying to bring the motel to a standard where people would want to stay.

He says they have had to carry out work in repainting and refurbishing the premises and have expended money in buying chattels of an appropriate standard. They have paid $18,184.16 in maintenance of the premises and a further $54,025.77 for new chattels. They have entered into contracts for hire of equipment and for supplies. During the 2½ years since re-entry Mr Langford says that he and his wife have worked to build up the performance of the motel. They have increased the turnover of the motel despite the downturn in the motel industry in general, a fact confirmed by the affidavit of Mr Ferdinando. He suggests that by reason of the delay it would not be fair to grant relief against forfeiture because it would permit the defaulting tenant to take advantage of the defendants' hard work in improving the revenue of the hotel and raising its standards. Mr Langford says that in addition to the rent the plaintiff was in breach of obligations under the lease to pay all outgoings in respect of the premises and at the date of re-entry electricity, telephone and rates bills had not been paid. Mr Langford indicates that the defendants do not accept that the plaintiff is solvent. He says that the plaintiff has been to date unsuccessful in all litigation and has proceeded with it despite the availability of an application for relief against forfeiture. The defendants' legal costs have so far amounted to $22,872.95.

In his affidavit in reply, Mr Reedy denies that the plaintiff company is insolvent and puts forward information as to its position in relation to debts identified by the defendants.

The principles upon which relief against forfeiture is granted

The claim for relief against forfeiture invokes the equitable jurisdiction of the High Court. I accept the submission made by Mr Samuel, not in the end resisted on behalf of the defendants, that the plaintiff's challenge to the validity of the forfeiture is not

inconsistent with its present application for relief against forfeiture and does not indicate an election to pursue one of two inconsistent remedies: ***Amity Inns Ltd & Ors v R H & P L Papps Ltd & Ors*** (1992) 2 NZ ConvC 95,181 (CA). I accept too, the statement of principle in ***Hinde McMorland & Sim*** Land Law paragraph 1517 that in equity the provisions for re-entry on non-payment of rent are in general regarded as a security for payment of rent and that, provided the landlord can be put in the same position as before the forfeiture, relief will normally be granted on payment by the tenant of the rent and any expenses to which the landlord has been put. Other matters of complaint which the landlord may have are generally treated as irrelevant: ***Gill v Lewis*** [1956] 2 QB1; ***Paterson v Mayor of Dunedin*** (1913) XVI GLR 329. It is, however, necessary that payment of rental and the costs of the landlord should be paid, tendered or that the Court is satisfied such payment will be made forthwith: ***Gill v Lewis*** at 7-8 per Jenkins LJ; ***Treka Developments Ltd v Lehman Jackson Ltd*** (Auckland High Court, CP 1387/88 28 June 1988 Thorp J); ***Murt & Vessey v Michael Tololi Investment Holdings Ltd*** (Auckland High Court, 15 October 1990, M1353/90 Wylie J). Where a tenant is hopelessly insolvent, relief against forfeiture is not appropriate: ***Inner City Businessmen's Club Ltd v James Kirkpatrick Ltd*** [1975] 2 NZLR 636. Even where such insolvency is not demonstrated, clear capacity to pay arrears and put the landlord back in the position he would have been in had the obligation to pay rent been performed is necessary if the provision for re-entry is to operate effectively as security for the rent: ***Murt & Vessey v Michael Tololi Investment Holdings Ltd*** at p 7.

Under the time limit imposed by s 2 of the Landlord and Tenant Act 1730 (Imp), which remains in force in New Zealand (Imperial Laws Application Act 1988), application for relief against forfeiture must be made within six calendar months after execution of judgment for execution in favour of the landlord. Relief against forfeiture under s 2 is also conditional upon the lessee paying the rent and arrears, together with full costs. Although in the present case the re-entry was not effected under the provisions of s 2 of the Landlord and Tenant Act 1730 but under a power reserved in the lease, these statutory restrictions have been treated as guides to the exercise of the discretion to grant relief against forfeiture in cases wholly within the equitable jurisdiction.

In the present case the application for relief against forfeiture was brought over two years after the re-entry. Even the proceedings filed in the District Court were brought more than six months after re-entry. The rental arrears and costs have not been paid. The amount due is controversial and there is a dispute as to whether the plaintiffs indication of preparedness to pay upon quantification by the defendants amounts to tender of payment and whether it is, in any event, capable of fulfilment by the plaintiff because of the impecuniosity of the company.

Even if these impediments are overcome by the plaintiff, relief against forfeiture is discretionary. Of particular significance will be any prejudice suffered to the landlord by reason of the delay in having the matter disposed of, and the circumstances put forward by the defendants which are said in combination to be exceptional and to require relief to be declined, even if the rents due to the landlord and any costs are fully restored. These exceptional circumstances include the change in the character of the business in the interim, deficiencies in the tenant's performance of its obligations, and its doubtful solvency.

Availability of summary judgment

The principles upon which summary judgment is available are not in dispute. The plaintiff must establish that there is no fairly arguable defence: ***Pemberton v Chappell*** [1987] 1 NZLR 1, at 3. It is no bar to summary judgment that the relief sought relies on the exercise of a discretion: ***Australian Guarantee Corporation (NZ) Ltd v Wyness*** [1987] 2 NZLR 326. But before it would be proper to enter summary judgment which entails exercise of a discretion, the Court must be satisfied by the plaintiff that the discretion could only be exercised against the defendant, here to grant relief against forfeiture.

In ***Harris v Patton*** (High Court Hamilton, CP24/97, 24.11.97, Master Faire), relief by summary judgment under s 120 of the Property Law Act 1952 was declined. Master Faire accepted that if the breach had been a technical one, having no adverse consequences for the defendant, there would be no reason why an application for

summary judgment could not succeed. In most instances, Master Faire was of the view that an application for summary judgment would not be appropriate where a plaintiff seeks relief under the provisions of the Property Law Act, "whether pursuant to s 120 or s 118". Such caution seems to be entirely appropriate. As Fisher J noted in ***Claydon v Herron*** (1994) 7 PRNZ 631, it is notorious that, in the exercise of a judicial discretion, "unforeseen circumstances can have a bearing upon what at the moment may seem obvious".

Where the availability of a defence or the exercise of a discretion turns on matters of disputed fact, summary judgment is inappropriate, unless it is clear that the defendants' allegations are baseless. In many cases it will be necessary for a defendant to put forward evidence to counter evidence on behalf of the plaintiff which, if unchallenged, would be sufficient to establish a claim. But it is not possible in summary judgment proceedings to come to a conclusion where there are conflicting affidavits for the plaintiff and defendant, save in the exceptional circumstances where the defendant's affidavits are on their face not credible: ***Bilbie Dymock Corp Ltd v Patel*** (1987) 1 PRNZ 84.

Here, on the affidavits filed, there is conflict upon a number of critical issues. They include whether payment of rent has been tendered and assessment of what is payable to the landlord (although these turn in part upon questions of law), the prejudice claimed to have been suffered by the defendants (turning in part upon the condition of the motel at the time re-entry was effected and the improvements introduced by the defendants), and dealings between the parties (which bear upon the reason for delay and the overall discretion).

Decision

I have no doubt that the summary judgment application must be declined. Given the complicated and acrimonious history of the matter and the time that has elapsed since re-entry, the procedure adopted was misconceived. The plaintiff has not satisfied me that the defendant has no defence or that the discretion could only be exercised in favour

of relief against forfeiture. The rationale for relief against forfeiture is that it is inequitable that the benefit of the lease should be lost to a tenant who has restored to the landlord all that he is entitled to under the lease. In the present case I am not able to be satisfied on the evidence that such condition for relief is made out. If it is not established, the defendants have an arguable defence.

It is not clear to me what arrears of rent are payable under the lease. Mr Samuel did not cite any authority in support of his contention that the plaintiff continues to be liable only for arrears at the date of re-entry and that further rent would only accrue and become "due and owing" on a day by day basis. It is, I consider, arguable that the amount required to be tendered would be the rental up to the date of restoration of the lease by relief against forfeiture, subject to an adjustment of the profits made by the landlord in the interim. Whatever amount is properly payable, it will need to be adjusted by amounts acknowledged by the landlord to be due to the tenant in respect of the chattels. The exact amount is a matter of controversy between the parties.

Mr Samuel submitted that there is no rent outstanding. He invites me to infer from the fact that the defendant did not claim in the winding up proceedings brought by the previous owners of the property against the plaintiff that no rental was owed to them because of the set off obtained from the chattels. That is a matter I am not able to determine on the evidence available. The correspondence suggests an acknowledgment by the plaintiff to pay rent. While it appears that some adjustment will be required for the chattels if they are in fact retained by the defendant, there is no suggestion on the contemporary material that the arrears of rent are exhausted by any such set off. I decline to draw the inference suggested on the material available to me.

Although Mr Samuel argued that "payment of rent arrears and costs has been tendered" by the landlord's retention of the plaintiff's chattels as security and by a payment into court in the District Court proceedings (on terms which permitted the plaintiff later to withdraw a substantial proportion of the funds to apply in payment of another creditor), these matters are the subject of disputed facts affecting assessment of the plaintiff's liability to the landlord and the question whether payment was tendered at all.

If payment has not been tendered and if the case law (as some of the cases suggest) permits relief against forfeiture to be granted if the tenant is in a position to make immediate payment, then on the evidence before me I am not satisfied that such capacity has been demonstrated by the plaintiff and that the defendant has no arguable defence on this ground. Apart from Mr Reedy's assertion that he is in a position to pay the rental arrears and costs of the landlord (without quantification of what sum is owing), the present financial position of the plaintiff company is not substantiated in any satisfactory way. The last accounts proffered on its behalf in the evidence are those for the financial year 1995. Although Mr Reedy indicates the position of the company's bank balance as at 20 March 1996 and refers to the deposit of funds into the District Court and the chattels retained by the defendants (but subject to the plaintiff's claim for conversion), I have no evidence upon which it is possible to conclude that the plaintiff is in a position to make immediate payment of the arrears of rent.

Nor am I satisfied by the plaintiff on the evidence available that the defendant will not succeed in resisting relief against forfeiture on the basis of delay and resulting prejudice. Assessment of prejudice turns on hotly disputed matters of fact which are not capable of resolution in summary judgment procedure. It is a disputed fact that whether or not the defendant consented to the delay, so that the challenged to the forfeiture could be heard first. Even if the six months cut off suggested by the 1703 Act is not appropriate (a point upon which I express no view since it has not been adequately argued), it is clearly well arguable that a delay of more than two years will be a defence to relief against forfeiture, particularly in circumstances where the lease is of a business which has been operated in the interim and which will inevitably have changed during the period of landlord management. The extent to which any value in the lease has been enhanced by the defendants' management over the past two years is an issue I am not able to determine and is one of disputed fact. It bears upon whether the discretion to grant relief against forfeiture is equitable in all the circumstances. Any prejudice to the defendants arising out of alteration of position is likely to be determinative. A credible evidential foundation for the plaintiff's claim of prejudice is available on the affidavit evidence. It is not possible to resolve it without a full hearing.

Additionally, the dealings between the parties and the suggestions of unreliability on the part of the plaintiff when tenant in combination with the other circumstances already referred to, arguably amount to exceptional circumstances which would justify relief against forfeiture being withheld, even if the plaintiff is in a position to tender arrears of rent and costs. No case has been cited to me in which relief against forfeiture has been granted after delay in application exceeding six months, much less the two years before application was made here.

For these reasons, I am unable to conclude that the defendants have no arguable defence or that the discretion I have to grant relief against forfeiture must inevitably be exercised against the defendants. It follows that the application for summary judgment must be declined.

Questions of costs are reserved.

S Elias J