NZLR

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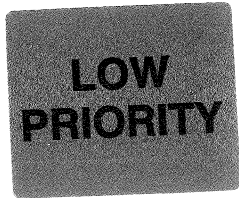
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 266/98



IN THE MATTER of s 118 of the Property Law Act 1952

BETWEEN **FLORA INVESTMENTS LIMITED** a duly incorporated company having its registered office at Auckland, Landlord and Lessee

Plaintiff

A N D **SAMSON CORPORATION LIMITED** a duly incorporated company having its registered office at Auckland, Landlord and Lessor

Defendant

Hearing: 10 July 1998

Counsel: A W Johnson for Plaintiff
P J Napier for Defendant

Judgment: 14 AUG 1998

RESERVED JUDGMENT OF PATERSON J

Solicitors
Martelli McKegg Wells & Cormack, DX CP24036, Auckland
Keegan Alexander Tedcastle & Friedlander, DX CP 21504, Auckland

The application before the Court is for an interim injunction to restrain the defendant (Samson) from re-entering on to the land which it owns at 123 Neilson Street, Onehunga, and determining the lease between itself and the plaintiff (Flora) of such land. There is a dispute between the parties as to the obligations of Flora under the lease, and in the substantive proceedings Flora alleges that the work which Samson has asked it to carry out under the repair covenant in the lease is beyond the scope of the repair covenant. While the relief sought in the substantive proceedings is a permanent injunction restraining Samson from terminating the lease on the basis of alleged breaches of the repair covenant, Flora is in effect asking this Court to make a declaration on the effect of the repair covenant. As a second cause of action, which is presumably an alternative cause of action because of the nature of it, Flora alleges an estoppel and seeks to prevent Samson from enforcing a breach of the covenant of repair. Finally, it seeks relief against forfeiture pursuant to the provisions of s118(2) of the Property Law Act 1952 if it, has in effect, breached the covenant to repair. Samson does not oppose the application for relief but takes the position that there has been a breach of covenant and that Flora is entitled to relief against forfeiture subject to such relief being conditional upon Flora remedying the breach of the repair covenant. In arguing on this interlocutory application that there is not an arguable case, Samson is, in effect, seeking to have the substantive matter resolved upon the interlocutory application.

Background

Under a Memorandum of Lease dated 9 March 1973, the Onehunga Borough Council leased to S and L M McMillan the land at 123 Neilson Street, Onehunga (the lease). In July 1973, S & L M McMillan transferred their interest in the lease to Flora. In 1997 Samson became the registered proprietor of the estate in fee simple of the land and now Samson is the lessor and Flora the lessee. A variation of lease was completed in April 1983 and both the lease and the variation of the lease have been registered at the Land Transfer Office, Auckland.

The lease contains, inter alia, the following covenants -

(3) The Lessee will erect a building covering at least 10% of the site and which will comply with the bylaws of the Borough of Onehunga then in force, within two

years of the commencement of the term of the lease, failing which at the Lessor's option the lease may terminate and in that event all rental paid to the Lessor shall be retained by and remain the property of the Lessor.

(8) *The design and site or position of any and every building whatsoever to be erected by the Lessee on the demised premises shall be first approved of in writing by the Lessor.*

(9) *The Lessee will repair and keep in good and substantial state of repair all buildings or improvements now or hereafter erected on the demised premises including windows, yards, conveniences and drains and generally will keep and maintain the whole of the said premises in a clean and sanitary condition and the Lessee will not remove or demolish any buildings or improvements now or hereafter erected on the demised premises without the consent of the Lessor first obtained.*

(15) *If the lease is determined by effluxion of time, forfeiture, re-entry or otherwise, all buildings and improvements on the land demised shall absolutely revert to the Lessor free from any payment or compensation whatsoever.*

The variation of lease completed in April 1983 varied the lease by including therein the following provisions -

(1) *That notwithstanding anything to the contrary contained in the said lease the Lessee shall be entitled to install a fire door in the wall of the building situated on the boundary between the leased land and the adjoining land presently leased to Titan Chemicals Limited and containing 1.2140 hectares being Lot 1 Deposited Plan 66064 Part Section 5 Block 5 Otahuhu Survey District and comprised and described in Certificate of Title 22A/503 upon and subject to the following conditions: ...*

(b) *That the Lessee will, if requested to do so by the Lessor, in all things and at its own cost demolish the said fire door and in the apertures of the boundary wall created to install the door, build a wall which complies with the bylaw requirements as to a four hour fire rating and all other relevant requirements to the building bylaws for the time being in force within the Borough of Onehunga -*

(i) *upon the sale of the said property of the adjoining property referred to herein;*

(ii) *upon the lease being surrendered forfeited assigned or any subletting of the premises referred to being undertaken.*

(2) *That it is agreed between the parties that the premises are presently sublet to McMillan Motors Limited a duly incorporated company having its registered office at Auckland with the consent of the Lessor and the reinstatement of the fire wall required pursuant to clause 1 hereof shall be completed if for any reason the subtenancy to McMillan Motors Limited be terminated and come to an end.*

The lease, as varied, remains in full force and effect. It is for a term of 99 years from and inclusive of the first day of September 1972. In March this year Samson served on Flora a written notice dated 20 March 1998 and issued pursuant to s 118 of the Property Law Act 1952 (the Property Law Act notice). This notice alleged that Flora had failed to keep the premises in repair and good and substantial state of repair and specified twelve matters which required attention because of this alleged failure to repair. The notice advised that if Flora did not within two months of the date of service remedy such breaches of covenant, Samson would thereupon enforce by action or otherwise all or any of its rights of re-entry or forfeiture under the proviso or stipulation in that behalf contained in the lease.

It is the position of Flora that it is not responsible for the matters identified by Samson as needing repair. This is said to be because there is an inherent defect in the land caused by its previous use as an uncontrolled tip site and the tidal effect of mud flats. As such the land is not capable of sustaining the building. Further, it is alleged that Samson, as successor in title to the Onehunga Borough Council, is estopped from enforcing the repair covenant.

Although estoppel was not included in the notice of application as one of the grounds upon which Flora seeks interim relief, the issues before the Court at this stage are -

(a) Whether Flora is required by the repair covenant to attend to the work set out in the Property Law Act notice; and

(b) If Flora is required to undertake the repairs, whether Samson is now estopped from enforcing the breach of the covenant of repair; and

(c) Whether this is an appropriate case for interim relief.

Inherent Defects

Flora's position is that it is not responsible for much of the work which Samson alleges is repair work, because that work arises from inherent defects in the building. Samson says that the principle of inherent defects does not assist Flora in the circumstances of this case. The principle of inherent defects is stated in the following terms in one of the leading texts on landlord and tenant -

> *"It has been said that "if a tenant takes a house which is of such a kind that by its own inherent nature it will in the course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair." This gave rise to the commonly held conception that a tenant could not be liable to eradicate "inherent defects." However, the true test is that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised."*[1]

The inherent defects principle has been acknowledged in England in a series of cases[2], and has been accepted as part of New Zealand's law.[3] The basis of the rule known as the inherent defects rule is *"that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised."* [4] It has been judicially said that in deciding the question, the proportion which the cost of the disputed work bears to the value or cost of the whole premises may sometimes be helpful as a guide. However, cost can only be a guide if some of the work which the tenant is required to do in repairing the premises arises from a defect in the inherent nature of the building or land. If all the work which the tenant is required to do falls within the provisions of the repair covenant, then cost itself is not a factor. In the present case, the cost of the remedial work has been accepted by an engineer retained by Flora to be more than $500,000 and is therefore a substantial amount. If all that amount is to pay for work which falls within the repair covenant properly construed, then that cost is irrelevant. If on the other hand, a proportion of the cost is to remedy inherent defects which do not fall within the repair provision, then it becomes a matter of degree as to whether or not the tenant is required to carry out that work.

There are further principles which may be of assistance in applying the principle in any particular circumstance. If an old building is leased and there is a covenant to repair,

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1 **Woodfall Landlord and Tenant** para 13.031.

2 ***Lister v Lane & Nesham*** [1893] 2 QB 212, ***Sotheby v Grundy*** [1947] 2 All ER 761, ***Ravenseft Properties Ltd v Davstone (Holdings) Ltd*** [1979] All ER 929, ***Elmcroft Developments Ltd v Tankersley & Sawyer*** (1984) 270 EG 140, ***Quick v Taff Ely Borough Council*** [1986] QB 809.

3 ***McKenzie v Bowler*** (HC Christchurch, A112/82, 7.5.85, Henry J.)

4 ***Ravenseft Properties Ltd v Davstone (Holdings) Ltd,*** supra, p937.

the tenant is not required to return the building in a renewed form at the end of the term, as the natural operation of time and a diminution in value caused by the ageing of the building constitute a loss which insofar as it results from time and nature, falls upon the landlord. Further, a tenant is not required to convert a timber house which is rotting into a brick house, nor is he required to replace wooden piles in soft ground with concrete piles. In summary, the tenant is required to repair what he took and is not required to make something else out of it. Thus, in ***Lister v Lane*** the tenant leased a house which had been built on a platform of timber on muddy soil. The only way to repair the house was to underpin it by digging down through 17 feet of mud until solid gravel was reached, and then building up from that to the brickwork of the house. If the tenant had been required to do this, he would have been required to give the landlord a different house from the one he leased and he was therefore not required to do this work under the repair clause in the lease.

In this case, Flora's position is that much of the repair work is required because of the inherent defect in the building. These inherent defects are said to be caused by the land upon which the building is erected being reclaimed land previously used as an uncontrolled tip site, and by the fact that the land is subject to tidal pressures from the Manukau Harbour. These factors are said to have caused structural problems both to the building and to the services of the building. The evidence suggests that the building does have structural problems which have been caused by unstable and defective foundations. It is Flora's position that these foundation problems have been caused because of the nature of the land and there is, therefore, no obligation on it to carry out repair work caused by the faulty foundations. On the other hand, Samson's position is that not all of the items which require rectification and/or maintenance are related to the settlement of the building, and further, that as Flora built the building under its obligations under the lease, it is no answer to say that because it did not build the building properly, it does not have to maintain it. Samson's basic submission on this point is that the basis of the inherent defects principle is that it is unfair to require a tenant to improve the landlord's property. This principle can have no application when, as part of the agreement between the landlord and tenant, the tenant erects the building and assumes an obligation to keep it in good repair. Flora cannot relieve itself of an

arduous obligation to maintain because it did not design or construct the building properly. Mr Napier, counsel for Samson, also says that there is no obligation on Samson to maintain, and that if Flora does not maintain, the building will fall into disrepair.

Samson's submission is based upon what it says are the obligations of Flora under the lease. Neither party suggested that Flora had obligations other than those set out in the lease. It is therefore necessary to consider Samson's submission solely against the terms of the lease. The lease was initially a lease of land for a period of 99 years under which the tenant covenanted to erect the building in question within two years of the commencement of the term of the lease. The rental payable to the landlord was, and still is, to be reviewed each five years and is to be fixed by valuation of the land including any buildings and other improvements thereon, erected or made by the landlord, but excluding any other buildings thereon. As the building in question was not erected by the landlord, but by Flora under the obligation contained in the lease, the value of the building is not taken into account in assessing the rental. It was necessary, when erecting the building, to comply with the by-laws of the then landlord, the Onehunga Borough Council. It was also necessary for the design and position of the building to be first approved in writing by the Onehunga Borough Council as landlord but, once erected, it was Flora's obligation under Clause 9 of the lease to "*repair and keep in a good and substantial state of repair*" such building. This obligation included the windows, yards, conveniences and drains. There is no exception for fair wear and tear, nor is there an exception for fire, earthquake, tempest or acts of God. Thus, during the term of the lease, the building erected by Flora was and is to be maintained by Flora and it has no obligation to pay rent in respect of the value of such building. It is not permitted to remove or demolish the building without the consent of Samson and at the end of the term, whether by effluxion of time, forfeiture, re-entry or otherwise, the building so erected and other improvements effected by Flora are to revert to Samson free from any payment or compensation whatever. Although it is not necessary to determine the issue, it is difficult to argue against Mr Johnson's suggestion that the building is a fixture and, as such, has vested in Samson as the landowner, although under the terms of the lease, the value of the building is not to be taken into account in assessing the rent.

The circumstances differ from those cases cited in support of Flora's position in that the building was not an existing building owned by the landlord. Samson as owner has not erected the building, and is not entitled to rental from it. It is entitled to take over the buildings at the end of the term of the lease. Flora had an obligation to erect the building, to maintain it, and to deliver it up to Samson or its successor in title at the end of the term. Its obligation is to keep in repair the building which it erected and which the Onehunga Borough Council approved. An obligation to "keep something in repair" includes an obligation to "put" it in repair[5] and "repair" may extend to the renewal of parts of a building, even if this necessitates the replacement of a part, such as a floor or a roof. Further, the notion of repair may mean replacement of part after part until the whole has been replaced.[6] However, it will not be repair if what is required is to change the nature or character of the building as a whole rather than a subsidiary portion of it. The agreement between the parties, as recorded in the lease, is that Flora, having erected the particular building approved by the then landlord on a particular piece of land, has a continuing obligation to repair that particular building, even if that necessitates Flora replacing portions of that building. The inherent defects principle does not apply merely because part of the structure such as the foundations have failed and require replacing. It is only if the repairs necessitate Flora providing a building which is wholly different from the building which Flora erected in 1974, that the inherent defects principle can apply. If the repairs cause some changes to the building, it then becomes a matter of degree as to whether the nature or character of the building has changed. The parties, when they entered into the lease, agreed that the tenant would erect and keep in good and substantial state of repair the building, and Flora is therefore required to effect the necessary work to achieve this end even if that means reconstruction of part.

There is an obiter suggestion in ***Lurcott v Wakely and Wheeler***[7] that the application of the inherent defects principle in ***Lister v Lane***[8] is explicable because the change of circumstances which had arisen could not have been in the contemplation of the parties

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5 ***Chatfield v Elmstone Resthome Ltd*** [1975] 2 NZLR 269.

6 ***Lurcott v Wakely and Wheeler*** [1911] 1 KB 905 and ***NZ Insurance Co. Ltd v Keesing*** [1953] NZLR 7.

7 ***Lurcott v Wakely and Wheeler***, supra, per Cozens-Hardy MR, p913.

8 ***Lister v Lane & Nesham,*** supra.

and it would not, therefore, be reasonable to construe the covenant to repair as applicable to that change of circumstances. In that case, the changed circumstances had rendered it necessary to either pull the house down or to underpin it to a depth of 17 feet and build upon a structure from that depth. In the present case, the nature of the subsoil was presumably known to Flora at the time it erected the building and it may have difficulties in establishing that the need to repair foundations was not in contemplation at the time. The report from the engineer advising Flora suggests that the obtaining of building consents from the Auckland City Council, the successor of the Onehunga Borough Council, will not be straightforward. However, there is no evidence of the territorial authority's requirements before the Court, and it is therefore inappropriate at the interlocutory stage, particularly as submissions were not made on the point, to determine the effect, if any, such requirements may have on Flora's obligations.

On the evidence before the Court it is not possible to determine that Flora does not have an arguable case. Its engineer believes that most of the damage and failures now present in the building are the result of the land filling undertaken by the Onehunga Borough Council and the failure of the piles within the landfill. On the basis of the contractual agreement between the parties recorded in the lease, these facts on their own would not give Flora an arguable case as it has an obligation to keep the building in a good and substantial state of repair, even if that means renewing parts of it. The possibility that there may be problems with territorial authority consents may create an arguable case if Flora is then required to repair the building to a state which makes it something different from what was built in 1974. While I am prepared to hold that there may be an arguable case, I note that, on Flora's own evidence, it cannot be said to be a strong case. This is particularly so when the quote for the repairs does not seem to indicate that the building, if the repairs are carried out, will be something different from the building originally built. A factor which may be relevant in determining Flora's obligations under the repair covenant is that the then landlord, which approved the building, was the relevant local authority at the time. The legal implications of the dual role of the Onehunga Borough Council and the effect of this on the contemplation of the parties was not addressed by counsel on this interim application.

Interim Relief

Although I have reservations about the strength of the arguable case, I am prepared to grant the interim relief sought in this case. There are two reasons for this. First, Samson is not seeking to forfeit the lease but is seeking to have the repairs effected. It is probable that it would not move to terminate the lease in the interim even if interlocutory relief were not granted. Secondly, the consequences to Flora will be very severe if relief is not granted and Samson did move to terminate the lease. It has a considerable capital investment in the property and has more than 70 years to run on the present lease. It is reasonable in the interests of both parties that the obligations under the repair covenant be clarified, and for this reason, Samson will be restrained until such further order of this Court, from re-entering the land at 123 Neilson Street, Onehunga, and from determining the lease between itself and Flora in respect of that land.

The Estoppel Question

In view of the relief granted, it is not necessary to consider the estoppel matter. I note however that I would not have been prepared to issue an injunction based on estoppel. A failure to enforce a breach of covenant does not normally amount to an estoppel and although both silence and conduct can amount to an estoppel, the facts as alleged in this case, based on the evidence currently before the Court, fall short of what would normally be required.

Procedural Orders

In order that the substantive matter may be resolved without delay, the following timetabling orders are made:

(a) The defendant is to file and serve a statement of defence within 14 days of the date of this judgment;

(b) Both parties are to file and serve verified lists of documents within 28 days of this judgment;

(c) Inspection is to be completed within a further 14 days;

(d) Any further interlocutory applications to be filed and served within 28 days from the date that the verified lists of documents are filed and served;

(e) A directions conference to be held on the first available date after 23 October 1998 by which time it would be anticipated that a fixture for the substantive matter can be made.

Costs

Costs are reserved for determination by the Trial Judge.

Result

(a) The defendant is restrained until such further order of this Court from re-entering the land at 123 Neilson Street, Onehunga, and from determining the lease between itself and the plaintiff in respect of that land.

(b) The timetable orders referred to above are made.

(c) Costs are reserved.

B J Paterson J