IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1013

	BETWEEN	ROBT. JONES HOLDINGS LIMITED Plaintiff
	AND	NORTHERN CREST INVESTMENTS LIMITED Defendant

Hearing: 14 September 2009

Appearances: D.G. Chesterman - Counsel for Plaintiff
N. Gedye - Counsel for Defendant

Judgment: 23 September 2009 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 23 September 2009 at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] This is an application for summary judgment by the plaintiff, Robt. Jones Holdings Limited ("RJH") against the defendant, Northern Crest Investments Limited ("NCIL") seeking damages as a result of NCIL's purported repudiation and breach of a lease between the parties.

[2] The application is opposed by NCIL.

Background Facts

[3] On 25 August 2005, RJH as lessor, and NCIL as lessee, entered into a written Deed of Lease ("the Lease") over Level 12, Qantas House, 191 Queen Street, Auckland ("Level 12") and 2 car parks. The Lease was for a term of six years with a commencement date of 7 March 2005, and a termination date of 6 March 2011. In or around February 2006, the Lease was varied to include an additional 20 car parks bringing the total number of Qantas House car parks included in the lease to 22.

[4] The car parks made up a substantial proportion of the rent payable under the lease. To illustrate, the 2008 monthly rental of $23,452.49 (GST incl.) was comprised of the following amounts:

a) Premises rental - $8,148.63 plus GST
b) 22 car parks - $11,440.00 plus GST
c) Operating expenses - $1,258.03 plus GST
d) Rates charged separately.

[5] On 1 August 2008 NCIL failed to pay monthly rental and rates under the Lease.

[6] On 8 August 2008 RJH issued to NCIL a Notice of Intention to Cancel the Lease seeking payment of the unpaid rental and rates. These totalled $30,301.27 (GST incl.) they having fallen due between 1 May 2008 and 1 August 2008. NCIL, however, failed to comply with the Notice within the 10 working day period specified. This 8 August 2008 Notice of Intention to cancel the lease had followed

two similar Notices to NCIL dated 2 May 2008 and 9 June 2008 relating to earlier breaches of the lease by NCIL which it seems in each case were remedied.

[7] From 8 August to 25 August 2008, Mr David Robert Rankin ("Mr. Rankin"), New Zealand Investment Manager for RJH deposes that he witnessed individuals who worked on Level 12 moving a large number of boxes from Level 12 to a removal truck parked outside the Qantas House.

[8] Mr. Rankin goes on to state that on 25 August 2008 he re-entered Level 12 on behalf of RJH, during normal working hours. He deposes that it was vacant of any NCIL employees, and all files and computers had been removed. Level 12, Mr. Rankin says, appeared to him to be abandoned, and his belief is that it was in fact abandoned by NCIL. He states that NCIL had left Level 12 entirely empty, "covered with office refuse and debris and in an unacceptable state of disrepair".

[9] Upon re-entry Mr. Rankin issued to NCIL a Notice of Termination dated 25 August 2008 by attaching the notice to the entrance door of the Level 12 premises and delivering a copy of the Notice to NCIL's solicitors.

[10] What happened next is addressed at para. [17] of Mr. Rankin's 11 September 2009 affidavit, where he deposes:

> "…….. After the date of re-entry, I am unaware of any attempt by NCIL to access Level 12 or to assert that it had not abandoned Level 12. Subsequent to the re-entry, the only correspondence between RJH and NCIL related to RJH's demands for payment of outstanding monies owing under the Lease. RJH certainly did not receive any correspondence or advice from NCIL to the effect that it did not intend to abandon the Premises."

[11] At the date of hearing of this application before me, Level 12 and the 22 car parks remain untenanted. RJH seeks summary judgment here for loss of bargain damages for the loss of rent which would have been payable under the Lease, an order for future monthly payments for loss of rent into the future, and for damages for NCIL's alleged breaches of the Lease by leaving the premises in an unclean state, in disrepair, and its failure to 'make good' the premises.

Summary Judgment Principles

[12] Rule 12.2(1) of the High Court Rules provides:

> **"12.2 Judgment when there is no defence or when no cause of action can succeed**
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to [a cause of action in the statement of claim or to a particular part of any such cause of action].

[13] The principles of summary judgment have been recently summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187:

> "[26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried*: Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[14] Rule 12.3 High Court Rules provides:

> "**12.3 Summary Judgment on Liability**
>
> The Court may give judgment on the issue of liability, and direct a trial of the issue of amount (at the time and place it thinks just), if the party applying for summary judgment satisfies the Court that the only issue to be tried is one about the amount claimed."

[15] In providing illustrations of the operation of this Rule 12.3, McGechan on Procedure at para. HR12.3.02 states in part:

> "**HR12.3.02 Illustrations**
>
> An order under this rule was made in *A-G v Rakiura Holdings Ltd* (1986) 1 PRNZ 12, where, although liability was plain and in the Judge's view ought not be litigated further, quantum was not plain, there being questions of mitigation to be resolved. Judgment was entered on the issue of liability and an order was made directing a trial of the issue of amount at a time to be fixed by the Registrar."

The Issues

First Cause of Action – Repudiation of the Contract

[16] A right to loss of bargain damages only exists if NCIL's breach of the Lease can be properly categorised as a repudiation of the contract - *New Zealand Land Law* Bennion & Others, para. 8.19.03 RJH's submission is that NCIL repudiated the Lease both by breaching the covenant to pay rent and by abandoning the premises.

[17] While NCIL accepts that it vacated the premises, it denies that it abandoned the Lease, or that it parted with possession in terms of cl 10.4.1(b) of the Lease. It says that no intention to abandon was ever communicated to RJH. Counsel for NCIL submits that, for the purposes of summary judgment, NCIL has responded satisfactorily to the prima facie evidence of abandonment advanced by RJH in the 24 June 2009 affidavit of Mr Neil Constantine Bell ("Mr. Bell"), a former employee of NCIL.

[18] The recent explanation put forward by Mr Bell in this affidavit is that, due to past dealings between RJH on the one hand, and NCIL and associated companies on the other, NCIL was concerned that RJH might re-enter Level 12 without notice and seize crucial NCIL records. As such, he maintains in this affidavit that NCIL removed their records from Level 12 without having any intention of abandoning the Lease or parting with possession. Although it is accepted that payment of rent was an essential and fundamental term of the Lease, which NCIL breached, counsel for NCIL submits that this alone cannot lead to a finding of repudiation.

[19] All of this, however, seems to fly in the face somewhat of acknowledgements made by Mr. Bell on behalf of NCIL in an earlier affidavit he swore on 4 December 2008. This affidavit was filed by NCIL in other proceedings it had brought against RJH to set aside a statutory demand. A copy of that affidavit was put before me in the present proceeding. Those acknowledgements are set out in statements at paras. 1-5 of that affidavit as follows:

> "1. I am a consultant engaged by a subsidiary of Northern Crest Investments Limited (**Northern Crest**). I am familiar with the issues in this proceeding and am authorised to give this affidavit on Northern Crest's behalf.

Background

2. On 29 July 2005, Northern Crest and Robert Jones Holdings Limited (**RJH**) entered into a Deed of Lease (**the lease**) over Level 12, Qantas House, 191 Queen Street, Auckland (**the property**). Annexed and marked "A" is a copy of the lease. The lease provided, *inter alia*, that:

   (a) the lease commenced effective 7 March 2005 for a 6 year term; and

   (b) the lease expired on 6 March 2011;

3. On 8 August 2008, RJH's solicitors issued a "Notice of Intention to Cancel Lease" to Northern Crest, on the basis of unpaid rent said to be $30,301.27. Annexed and marked "B" is a copy of the notice.

4. After receiving the Notice of Intention to Cancel Lease, Northern Crest vacated the property.

5. On 25 August 2008, RJH issued a notice of termination to Northern Crest, and advised that it has re-entered the property. Annexed and marked "C" is a copy of the termination notice." (emphasis added)

[20] Turning now to the issue of repudiation, whether a party has repudiated is to be determined in accordance with s 7(2) of the Contractual Remedies Act 1979 which states:

> "Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance." (emphasis added)

[21] Although the allegedly repudiating party's intention is key, the test is an objective one. Fisher J in *Betham v Margetts* [1996] 2 NZLR 708, 711 put it this way:

> "The question is whether in all the circumstances the communication should be regarded as an irrevocable indication that the party concerned would take no further steps to perform his or her obligations under the contract or alternatively that he or she would perform it only in a manner substantially inconsistent with the obligations which the contract imposed. If that were the objectively determined meaning of the communication it matters not what the party making it intended or wanted (*Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757; [[1979] 1 All ER 307]). "

[22] On this, counsel for NCIL points to *Morris v Robert Jones Investments Limited* [1994] 2 NZLR 275, 279, and states that whether or not a lessee's conduct amounts to repudiation is always a matter of fact and degree. It is submitted that the facts in the present case are not clear enough to justify summary judgment. Counsel stated that there had been a history of rental arrears between the parties, which had previously been rectified, and that this distinguishes the present case from one where

a lessee simply stops paying rent and every indication is that it has no intention of paying further rent. Counsel points to the rectification of rental arrears in or around June 2008, and to the claim in the affidavit of Mark Ronald Bryers ("Mr. Bryers") a director of NCIL that 20 days before re-entry he met with Mr Greg Riaka Loveridge ("Mr. Loveridge"), a director of RJH, to discuss subletting the car parks. In these circumstances, counsel for NCIL argues that the Court cannot be sure that the rental arrears were irrefutable evidence of repudiation.

[23] In response, counsel for RJH submits that the present case is on all fours with the decision of Robinson AJ in *Culted Ltd v Wikeley* HC AK CIV-2008-404-2488 28 November 2008. In that case the assignee tenant of a lease failed to pay an instalment of rent which fell due. The plaintiff landlord exercised its right to re-enter the premises and thereby cancelled the lease. Robinson AJ found that the assignee had repudiated the lease, and that the guarantor of the lease was liable for loss of bargain damages.

[24] Contrary to the submissions put forward by counsel for NCIL, in my view this is a simple case where NCIL as lessee has stopped paying rent which the parties agreed in clause 10.4 of the lease goes to the essence of NCIL's obligations as tenant in line with *Culted Ltd v Wikeley* and in addition NCIL has both vacated and abandoned Level 12. This is not a case, like *Morris v Robert Jones Investments Limited*, where the amount of rent owing and the amount already paid by sub-lessees was unclear, a matter which the lessor in that case was aware of. NCIL endeavours to argue here that, despite their failure to pay rent and despite the fact that they moved out of the premises, it was never their intention to repudiate.

[25] On the clear facts before the Court, I must reject this argument. Contrary to his later claims, in his 4 December 2008 affidavit, noted at para. [19] above, Mr. Bell freely acknowledges that NCIL's response to the 8 August 2008 Notice of Intention to Cancel the Lease from RJH was to "vacate the property". RJH then re-entered Level 12. It was not until the present proceeding was issued that there has been any suggestion that NCIL did not abandon the premises in August 2008. It will be remembered that it is not in any way disputed that at that time, NCIL removed all its staff, its computers and its files. Subsequently, no attempts were made by NZIC to

itself re-occupy or to find a new tenant for Level 12 or to seek relief against cancellation of the lease under s. 253 Property Law Act 2007. And there is no dispute on the part of NCIL that when it "vacated" the premises in August 2008, they were left in any state other than that described by Mr. Rankin as "covered with office refuse and debris."

The Car Parks

[26] I turn now to the issue raised before me by NCIL regarding the car parks. On this, counsel for NCIL put forward a further argument that NCIL's non-payment of rent does not amount to repudiation, because RJH is effectively responsible for the non-payment because of its earlier unreasonable refusal to allow NCIL to sublet some of the leased 22 car parks.

[27] Mr. Bryers, director of NCIL, in his affidavit alleges that he had conversations with Mr. Greg Loveridge ("Mr. Loveridge") a director of RJH in July 2008 and on 5 August 2008 in which he asked Mr Loveridge whether RJH would agree to NCIL sub-letting the carparks. Mr. Bryers says Mr. Loveridge said no. Mr. Bryers goes on to state that he understood subletting would not be feasible without RJH consent (which the Lease requires) and so he did not pursue the plan any further. It does not appear that he or NCIL ever located any potential sub-lessees.

[28] Mr. Bell in his affidavit states that earlier in 2008, around April, he had asked Mr. Loveridge if RJH would take back some or all of the car parks under the lease, and that Mr. Loveridge refused that request.

[29] In response, Mr. Loveridge in his affidavit deposes that he never refused any request from any one from NCIL to sublet the car parks. He says that when Mr. Bell informally made a request to surrender the car parks, he informed him that RJH would refuse that request. This is consistent with Mr. Bell's evidence. As to Mr. Bryer's alleged request for sub-letting, Mr. Loveridge states that he told Mr. Bryers he would consider any sub-letting proposal submitted to RJH by NCIL if it met the requirements of the Lease terms relating to sub-letting. He says that NCIL never provided any sub-letting proposal. Mr. Rankin also states that he believes allegations

that RJH refused a request to sub-let the car parks are untrue, and that he understands the only request made and rejected was to surrender the car parks.

[30] Before me, counsel for NCIL endeavoured to suggest that all of this gives rise to a factual dispute which cannot be determined on summary judgment. As noted above, the rental for the carparks formed a significant part of NCIL's financial obligations towards RJH. NCIL argues that had it been allowed to sublet the car parks, this would have relieved some of the financial strain on the company and allowed it to meet its remaining rental obligations.

[31] Counsel for RJH in response submitted that the Court should not rely on the evidence put forward by NCIL with regard to this matter, noting that there is no record of the alleged request to sublet and that the only evidence is of an informal oral discussion: *Eng Mee Yong v Letchumanan*. However, counsel went on to submit that even if it is accepted that NCIL had made the request alleged, RJH was under no obligation to grant NCIL's request. In this regard clause 5 of the lease was noted, this clause stating:

> **"5.1 Control of Sub-letting and Assignment**
>
> The Lessee shall not sub-let, assign, transfer, or part with the possession of the Premises or any part or parts thereof or the lease thereof or any estate or interest therein to any person PROVIDED ALWAYS that the Lessee may with the prior written consent of the Lessor transfer or assign the whole of this Lease or sub-let the whole or part thereof AND the Lessor will not unreasonably withhold its consent to a transfer or assignment of this Lease or a sub-letting to a respectable responsible solvent and suitable transferee, assignee or sub-tenant but before giving such consent to a transfer or assignment of this Lease or a sub-letting and as a condition precedent to the giving of such consent the Lessor shall be entitled to performance and satisfaction of the following conditions:
>
> …
>
> 5.1.2 all rent and other moneys payable by the Lessee to the Lessor up to the date of proposed transfer assignment or sub-letting shall have been paid;
>
> 5.1.3 there is not any existing unremedied breach of any of the terms of this Lease;…"

[32] On 5 August 2008, when NCIL alleges that it made the sub-letting request, it is clear that it was in breach of the obligation to pay rent under the Lease which had fallen due on 1 August 2008. Counsel then pointed to cl 4.6 of the Lease which refers specifically to car parks:

> **"4.6 Assignment of Carparks**
>
> The Lessee shall not without the prior consent of the Lessor assign or sub-lease a Carpark except to any person who is a permitted assignee or sub-lessee of part of the Premises pursuant to an assignment or sub-lease consented to by the Lessor and then only from the Carparks

> allocated to the floor of which the part of the Premises comprised in such assignment or sub-lease forms part."

[33] In my view, this clause 4.6 indicates a legitimate desire on the part of RJH as Lessor that car parks not be leased to non-occupants of the building, although subleasing would still presumably be possible with Lessor's consent. As I read it, the existence of cl 4.6 does not in any way suggest that cl 5.1 is not applicable to the car parks. The fact remains, which counsel for NCIL failed to address, that even if NCIL did make a request to sub-let the car parks on 5 August 2008, and RJH did not otherwise have a reasonable excuse for refusing consent, NCIL then being in default under the Lease was not entitled to any such consent pursuant to cl 5.1.

[34] In those circumstances, I am satisfied that no argument advanced by counsel for NCIL here affects the conclusion that NCIL has clearly repudiated the Lease, and that RJH is entitled to loss of bargain damages for unpaid rates and rent up to the date of hearing of the present application. This is the financial loss sustained by RJH as the innocent party as a result of the loss of the future performance of the Lease by NCIL as defaulting party – see *Land Law in New Zealand* – Hinde & Others, para. 11.176.

Future Rental

[35] I turn now to consider the issue of future rental. As discussed above, I am satisfied that on its face, RJH is entitled to loss of bargain damages covering the loss of rent and rates under the lease up to the hearing date of the present application, 14 September 2009. RJH, however, also claims loss of bargain damages into the future, and seeks an order that NCIL make monthly payments to RJH until such time as Level 12 is re-let. The usual approach to a loss of bargain damages claim in a situation such as this is to have a valuer provide evidence of the present value of the entire remaining term of the lease, which RJH has not done.

[36] Counsel for RJH accepts that his current request constitutes a relatively novel approach, but submits that it is an effective way of providing for RJH's continuing right to loss of bargain damages following repudiation of the Lease. He suggests that it incorporates the interests of NCIL as well, in that the parties can come back to

Court in the event that something is to happen in the future which would change RJH's entitlement to damages.

[37] At this point, however, I am not prepared to grant the order sought by RJH as to quantum for future rental beyond 14 September 2009. I say this, given the uncertainty of what might happen in the future to affect the quantum of these damages properly payable to RJH. By way of example, RJH may in the future fail in its duty to mitigate its loss: *Butler & Sweeney v RF & SA Bluck Ltd* [1996] 1 NZLR 675. I am not satisfied that the right of the parties to return to Court in the event of a change in circumstances adequately addresses this uncertainty in assessing the quantum of future damages.

[38] In the alternative, before me counsel for RJH sought summary judgment as to liability with respect to these future damages pursuant to r 12.3 High Court Rules. In my view, that is appropriate here. A direction to this effect is to follow.

Mitigation

[39] By way of further defence to the present claim, NCIL contends that RJH has failed to properly mitigate the loss it alleges it has suffered pursuant to NCIL's repudiation. Counsel for NCIL submits that there is a clear factual dispute with regard to this question of mitigation of loss which needs to go to trial.

[40] RJH's position in response is that the duty to mitigate requires only reasonable efforts in the circumstances: *Benjamin v Wareham Associates (NZ) Ltd* (1990) 1 NZ ConvC 190,638. McGechan J in that case cited from *Banco de Portugal v Waterloo* [1932] AC 452, 506, where the Court held that "the standard of reasonable is not high in view of the fact that the defendant is an admitted wrongdoer". He also cited the following passage from *Boyer v Warbey* [1952] 1 All ER 269 relating to the position of landlords and tenants in particular:

> "A tenant who goes out of possession without giving due notice has no right to dictate to his landlord how he shall deal with his property, and why the landlords here should have disposed of the flat in a manner disadvantageous to themselves merely in order to save the tenant from the full consequences of his wrongful act, I am a loss to conceive."

To my mind, this passage is directly relevant to the position which prevails in the present case.

[41] Evidence of RJH's efforts to mitigate their loss here, by finding another tenant, is outlined in the affidavits of Mr. Rankin and Mr Chas William Keogh ("Mr. Keogh") of CBRE. Mr. Rankin deposes that within a few days of 25 August 2008 he took steps to re-let the premises. He states that he contacted leading commercial real estate agencies to list the premises and he continues to deal with these agents. He says further that he has shown several prospective tenants through Level 12 and engaged in negotiations with them. Examples of correspondence with these agents and prospective tenants are attached to his affidavit. Mr. Rankin notes that the difficulty in obtaining a new tenant is unsurprising given the drop-off in tenant demand for commercial premises in the Auckland CBD. Mr. Keogh is one of the real estate agents engaged by Mr Rankin. In his affidavit he outlines his efforts towards finding a tenant for Level 12 and the carparks, and the difficulties of doing so in the present market. With regard to the car parks in particular, Mr Keogh notes that in his experience the vacancy level for car parks in commercial buildings in Auckland is higher than that for office space, as recently tenants have come to view car parks as an unnecessary expense and a way of reducing overheads.

[42] Counsel for NCIL submits that a significant factual dispute arises as to this matter, pointing to the affidavits of Mr Bell and Mr Bryers. Mr Bryers states (with regard to sub-letting of the car parks) that "carparks in the CBD are valuable and in demand". Mr. Bell deposes that he is "surprised" that no progress has been made in leasing the premises and car parks. He outlines his belief that a reasonable approach would be to market most of the car parks separately, and that he is not aware of any active marketing of the car parks on a standalone basis. In particular, he deposes at para 19 of his first affidavit:

> "Given the high demand and high value of car parks in the middle of the CBD in Auckland, I cannot understand why none of the car parks have apparently been re-let in the 10 months since that time and my conclusion is that RJH is not seriously trying to remarket these car parks."

[43] Counsel for NCIL suggested that, looking at this matter from NCIL's point of view, it is difficult to understand why the car parks in particular have remained unused for so long. He contended that there was no reason why, in the interim, the parks could not be let on a casual basis or at a greatly reduced price to mitigate RJH's losses.

[44] As I see the position, however, there is little substance in this failure to mitigate argument advanced for NCIL here. The evidence of Mr. Bryers and Mr. Bell, insofar as it relates to RJH's mitigation efforts, is opinion evidence which attempts to contradict the evidence of Mr. Keogh and Mr. Rankin. Neither Mr. Bryers nor Mr. Bell is a commercial real estate agent (unlike Mr. Keogh). Neither could be said to have any particular expertise in this area and in my view no weight can be attached to their unsubstantiated assertions made on behalf of NCIL. Contrary to counsel's characterisation of this issue as giving rise to a dispute of fact, the claims by both Mr. Bryers and Mr. Bell on this matter as I see it do not prevent the Court from granting summary judgment to RJH here: *Eng Mee Yong v Letchumanan.*

[45] In my view, RJH has presented clear evidence of what I see as reasonable efforts it has taken to lease Level 12 and the car parks. The suggestions made on behalf of NCIL – that RJH should make more of an effort to market the car parks separately, on a casual basis, or at a cheaper price – in my view go beyond what can reasonably be expected of RJH: *Boyer v Warbey*. RJH is entitled to pursue a marketing strategy which maintains the value and reputation of the Qantas Building as a whole. I reject this defence advanced here for NCIL.

Counter-Claim

[46] Lastly, counsel submits that NCIL has an arguable set-off against the amount claimed by RJH, relating to actions concerning Level 20 of Qantas House ("Level 20"). In turn, counsel for RJH replies by contending that NCIL's alleged counterclaim does not amount to a set-off, and that in any event, it has no factual basis.

[47] The distinction between counterclaim and set-off was concisely stated by the Court of Appeal in *Hamilton Ice Arena Ltd v Perry Developments Ltd* [2002] NZLR 309, para 3:

> "A set-off is different from a counterclaim which, if established, gives the defendant a right to an independent judgment against the plaintiff, but no ability to reduce or extinguish the plaintiff's claim against the defendant."

[48] As discussed in *M L Paynter v Ben Candy Investments Ltd* [1987] 1 NZLR 257, 259, an arguable set-off will defeat a claim for summary judgment, but a counterclaim will not:

> "… where there is a counterclaim which cannot be categorised as a set-off either legal or equitable, it will not provide a defence to summary judgment where the other criteria can be satisfied. This approach is consistent with the categorisation of equitable set-off. If the defendant's claim is closely bound up with the rights relied upon by the plaintiff, then the whole should be dealt with together. If it is a genuinely independent claim, it can well be dealt with separately and unfair consequences of non-contemporaneous decisions met with by stay of execution."

[49] Turning now to the facts of this alleged set-off, the lessee of Level 20 was Blue Chip New Zealand Ltd ("Blue Chip"), a company associated with NCIL. When Blue Chip went into liquidation, RJH re-entered Level 20 and arranged for a commercial removal company, Allied Pickfords, to package up all of the contents of the floor and to place them in secure storage in the basement of Qantas House. This apparently included some records belonging to NCIL.

[50] Mr. Bell in his affidavit for NCIL states that Blue Chip and its liquidator were in the process of moving records from Level 20 when RJH re-entered and took control of the documents. Subsequently, RJH apparently agreed to provide access to those documents and equipment stored in the Qantas House basement if Allied Pickford's moving costs of approximately $10,000 were paid. NCIL then paid this amount to RJH and was granted access. Mr Bell goes on to state, however, that because of the large volume of boxes and records there, he was not able to retrieve all of NCIL's records. Ross Eric Haywood ("Mr. Haywood") NCIL's in-house financial accountant has provided an affidavit which claims that access to the NCIL documents "was denied", and that this led to delays and extra cost in relation to the audit of NCIL's financial statements. He deposes that NCIL complained to RJH many times about the difficulties non-access to the records was causing. Mr Haywood estimates that these difficulties added approximately $170,000 to the cost of the NCIL audit, the total cost of which was $249,000. He says that also as a result of this, NCIL went into default under the Companies Act 1993 and the Financial Reporting Act 1993 for its failure to file its 2008 accounts in the Companies Office. As a result, he deposes that, winding up proceedings were issued against NCIL,

proceedings which were ultimately dismissed, but it is alleged that defence costs in excess of $120,000 were incurred.

[51] Mr. Haywood goes on to state that he is not able to assemble details of all losses relating to seizure of the NCIL documents on Level 20, because he has been unable to have access to those documents. However, he estimates that these losses would not be less than $400,000.

[52] As a result, counsel for NCIL submits the evidence of Mr. Bell and Mr. Haywood gives rise to at least four causes of action against RJH:

- Breach of the agreement to provide access to the documents in exchange for $10,000;
- Conversion by RJH of NCIL's records and other chattels;
- Negligence by RJH;
- Breach of the Fair Trading Act 1986.

[53] The circumstances in which a counterclaim will amount to a set-off are summarised at page 13 of *Grant v NZMC Ltd* [1989] NZLR 8 as follows:

> "The principle is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiffs' claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent, judgment on one cannot fairly be given without regard to the other, the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract."

[54] *Hamilton Ice Arena Ltd v Perry Developments Ltd* noted above was a case involving an alleged set-off against rent owed pursuant to a lease. A tenant company had failed to pay rent to the landlord for the lease of an ice-skating arena, and the landlord in turn had failed to pay wages alleged to be owing to the director/shareholders of the company for work done in relation to the landlord's ten-pin bowling alley. The arrangements with regard to both the arena and the alley were part of an overall plan between the parties, although they were addressed in separate contracts. Aside from the fact that the lessee of the arena was a company, not the individuals to whom the wages were owed, the Court found that the claim for

rent and the claim for wages were not sufficiently connected for the claim for wages to amount to a set-off. The Court stated at 319:

> "While, as was said in *Grant*, the fact that the claims arise out of different contracts is not decisive, if that is so there must be such a link between the different contracts as to justify their effectively being treated as one. In *Grant's* case that was so because the contract represented by the lease was induced by the contract concerning supply of business to the company which was going to take the lease.
> The two contracts here – the lease and the refurbishment contract – concerned different premises in different cities. One involved rent, the other wages. They really have no practical or conceptual linkage at all. The fact that the money due to the Speirs brothers was intended by them to be used to discharge Hamilton Ice's obligations under the lease is by no means sufficient for equitable set-off."

[55] Counsel for RJH argued that in the present case there was no connection between NCIL's claim and RJH's action here to justify categorising it as a set-off. The alleged claim arises from matters surrounding the re-entry under a lease by the landlord of Level 20, with regard to which NCIL was not the tenant and would not have standing to sue. The claim concerns a different company, a different lease, and different premises. It was also noted that at the time that re-entry of Level 20 occurred, the lessee was in liquidation, and according to RJH, the lessee, the liquidators, and the Serious Fraud Office were all seeking access to documents.

[56] Counsel for NCIL in response endeavoured to argue that all of the alleged dealings concerned RJH in its position as lessor of Qantas House. It is alleged that RJH knew that documents seized included documents belonging to NCIL, and that Blue Chip as the lessee of Level 20 was a subsidiary of NCIL. Counsel contends that both claims concern the same relationships, and the same factual and temporal setting.

[57] In my view, however, the present case is similar to the situation which prevailed in *Hamilton Ice Arena Ltd v Perry Developments Ltd* . The connection counsel for NCIL attempted to draw between the two claims is illusory. Although the fact that the two claims arise out of different contracts is not fatal, there is nothing here to connect the claim with regard to the Lease and the claim involving the documents from Level 20. That the same parties were involved is not sufficient: *Hamilton Ice Arena Ltd v Perry Developments Ltd*. The relevant relationship of landlord/tenant which is central to RJH's present claim is different to the relationship between the parties which arises from the seizure of documents from Level 20. I fail

to see how the fact that the events in question occurred in the same building is of any relevance, as each claim revolves around different leases with different parties. Each claim has a distinct and separate factual matrix.

[58] In any event, even if NCIL's counterclaim did amount to a set-off, I would be inclined to take a robust approach here and reject the defence on the grounds that it lacks sufficient credibility, even in the context of summary judgment: *Eng Mee Yong v Letchumanan; Bilbie Dymock Corp Ltd v Patel*.

[59] NCIL's claim is based entirely on the allegation that RJH did not provide sufficient access to the documents they removed from Level 20. Mr. Haywood purports to confirm the allegations made by Mr. Bell that access was denied. However Mr. Bell in his affidavit admits that access was granted, but says that he was unable to retrieve all of NCIL's documents because of the large volume of material. The claim that loss was caused to NCIL comes entirely from the affidavit of Mr Haywood, and this affidavit appears to be put forward on the basis that NCIL had no access at all which was not the case. Mr Haywood further states that NCIL complained repeatedly to RJH about getting access and the trouble this was causing, but fails to exhibit any correspondence illustrating such communications.

[60] In contrast, correspondence has been exhibited before the Court on behalf of RJH indicating that time was given for Blue Chip to have its possessions removed. There are two notices of intention to cancel that lease, dated 5 March 2008 and 2 April 2008. On 1 April 2008, Mr. Loveridge wrote to Blue Chip referring to an agreement between the parties that Blue Chip would vacate the premises by 5 March 2008 so that RJH could undertake its make good. Mr. Loveridge states that Mr. Bell would be given access to move items for Blue Chip the next day, after which RJH would begin to undertake its make good. In another letter dated 3 April 2008, Mr. Loveridge states that he had granted Mr. Bell an extension of time to move the items out, but that "by yesterday, it was obvious that the move would not be undertaken in time."

[61] From all the evidence before the Court, it is clear in my view that Mr. Bell was given time to access the documents in question before RJH had them removed,

an action for which Blue Chip received sufficient warning. It is also apparent from NCIL's own evidence that they had access to the documents after RJH had moved them, although every potential cause of action listed here by counsel for NCIL relies on RJH's failure to provide such access. There is no detail before the Court as to any further problems with access. Mr. Bell simply states that he didn't manage to get everything, without describing how much access he was given or if it was cut off at some point. Mr. Haywood contends that numerous complaints were made to RJH about getting access, but as I have noted there is no detail or evidence of these complaints, which might otherwise be expected. Mr Haywood's affidavit, which is the only evidence of any loss on the part of NCIL arising from these matters as noted above, seems to proceed on the basis that NCIL had no access to the documents at all. This is clearly incorrect.

[62] In conclusion for the reasons outlined above, I find here that NCIL's counterclaim does not amount to a set-off, and so does not provide a defence for the purposes of the present summary judgment application. If I am wrong as to this, however, it is apparent in my view that this counterclaim or set-off in fact lacks credibility entirely, such that it should not prevent an award of summary judgment.

Second Cause of Action – Breach of Lease

[63] In addition to the claim for rent which would have been payable pursuant to the Lease, RJH also seeks damages for a number of other alleged breaches of the Lease. These claims by RJH are that NCIL breached the Lease by:

- Leaving the premises in an unclean state (cl 6.4.1 and 6.5 of the Lease);
- Leaving the premises in a state of disrepair (cl 6.1 and 6.4.3 of the Lease);
- Failing to redecorate and replace floor coverings (cl 6.3 of the Lease);
- Failing to "make good" the premises (cls 6.3 and 6.8.2 of the Lease).

[64] RJH says also that it is entitled to solicitor/client costs on NCIL's default pursuant to cl 12.1.2 of the Lease, and that these amount to $11,754.00. Cleaning costs for Level 12 of $2,126.25 have been incurred and are claimed, and the "make-good" costs noted above are estimated at $26,942.00.

[65] RJH also seeks interest on the damages award at the rate of 20% per annum in accordance with the Lease. As an alternative, if the 20% interest sought is disallowed, RJH seeks interest pursuant to the Judicature Act 1908 rate.

Legal Costs

[66] Turning first to the legal costs sought, counsel for NCIL opposed an award of costs at this level and argued that these costs are not adequately particularised here. A similar default clause and claim for solicitor/client costs applied in *Crown Money Corporation Ltd v Grasmere Estate Trustco and Peters* HC AK CIV-2008-404-3801 21 November 2008. There, Faire AJ on a similar costs claim found that, although a detailed narrative of the steps taken by the parties had been provided, there was no breakdown in terms of the hours spent, or the hourly rate charged.

[67] It is clear that a party is entitled to stipulate for solicitor/client costs in a contract: *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556. The costs claimed, however, must be objectively reasonable: *Frater Williams & Company Ltd v Australian Guarantee Corporation (NZ) Ltd* (1994) 2 NZ ConvC 191,873. In the present case, it is difficult to assess whether the costs claimed are reasonable, as in my view they are not adequately particularised. Counsel for NCIL raised concerns about duplication between counsel and solicitors, hourly rates, time records, and the application of GST. In addition, as the Court noted in *Crown Money Corporation Ltd v Grasmere Estate Trustco and Peters,* if the plaintiff is a GST registered person, the GST charged to it would be off-set by an input credit, and so GST charged must be excluded from the legal costs recoverable from a defendant. Faire AJ there said that to fail to so exclude GST in these circumstances would lead to a double recovery by the plaintiff.

[68] With regard to the legal costs, counsel for NCIL also endeavoured to argue that cl 12.1.2 does not explicitly mention legal costs or solicitor/client costs, and that the clause should be read strictly and *contra proferentem*. I am satisfied, however, that the clause clearly provides for the lessee to indemnify the lessor in the way argued by RJH, and that there is nothing controversial about the right of RJH to claim these costs.

[69] As such, I find that NCIL is liable to RJH for RJH's reasonable legal costs incurred in consequence of NCIL's breach of the Lease. However, a hearing is required to determine the quantum of those costs.

"Make Good" Costs

[70] As to the 'make-good' costs claimed pursuant to cl 6.3 of the Lease, NCIL is clearly liable for any costs which RJH incurs in making good the premises. However, these costs have not yet been incurred and it is possible that they will not be incurred. And they are presently the subject of an estimate only by RJH at $26,942. As such, RJH is not entitled at this point to claim a quantum for these costs until they have been expended.

Cleaning Costs

[71] This leaves the claim to cleaning costs of $2,126.25 which are effectively unchallenged by NCIL and appear to me to be straightforward. NCIL is liable for these cleaning costs incurred by RJH as a result of NCIL's breach of cl 6 of the Lease. Summary Judgment for this $2,126.25 is to follow.

Interest

[72] Counsel for RJH requested that the Court apply penalty interest of 20% as set out in the Lease to the damages award, in that it was part of the bargain reached between RJH and NCIL in the Lease to which RJH is entitled. In my view, however, the penalty interest provision in the Lease cannot apply to rent lost as a result of repudiation of the Lease. The claim is not for money due under the Lease but for damages resulting from the losses following forfeiture of the Lease – *Culted Ltd v Wikely*.

[73] In the alternative, before me counsel for RJH submitted that interest at the rate fixed by the Judicature Act 1908 should be granted, following the approach in *Culted Ltd v Wikeley*. However, in that case, loss of bargain damages were claimed for rent which would have been payable in the period 1 June 2007 to 31 October

2007 when the premises were re-let. In those circumstances, Robinson AJ awarded Judicature Act interest on that sum from 1 November 2007 until the date of judgment. In this case, loss of bargain damages are claimed for continuing rent which would have been payable under the Lease as no re-letting of Level 12 has yet occurred. RJH is entitled to interest at the Judicature Act rate on the loss of bargain damages but the quantum of this interest is yet to be determined.

[74] RJH is also however entitled to interest at the prescribed rate of 8.4 per cent per annum on the sum of $2,126.25 granted pursuant to the second cause of action, from the date this amount was expended, 30 September 2008, until the date of this judgment. An order to this effect is to follow now.

Result

[75] The plaintiff's claim for summary judgment is wholly successful in part. An order is made granting summary judgment to RJH against NCIL both as to liability and quantum for the following amounts:

(i) $268,773.96 (being rental plus GST of $23,452.49 per month from 1 October 2008 to 14 September 2009), as monthly rental payable by NCIL pursuant to the Lease;

(ii) $14,056.95 (being rates plus GST of $4,790.65 per quarter from 20 December 2008 to 14 September 2009), as rates payable by NCIL pursuant to the Lease;

(iii) $2,126.25 in cleaning costs payable by NCIL under the Lease;

(iv) Interest on the sum of $2,126.25 at the rate of 8.4 per cent per annum from 30 September 2008 to the date of judgment.

[76] Summary judgment as to liability only is also granted to RJH against NCIL for the following matters, (with a hearing to be set down as soon as reasonably possible to determine quantum in each case):

(i) Legal costs and disbursements pursuant to clause 12.1.2 of the Lease;

(ii) Future damages from 14 September 2009 pursuant to NCIL's repudiation of the Lease;

(iii) "Make-good" redecoration and replacement of floor covering costs pursuant to clauses 6.3 and 6.8.2 of the Lease.

(iv) Interest at the Judicature Act rate on the amounts claimed and to be claimed by RJH on the loss of bargain from a date or dates to be determined.

[77] This matter is to be the subject of a directions telephone conference at 9.15 am on 20 October 2009 to time table a quantum hearing for the matters outlined at para. [76] above.

'Associate Judge D.I. Gendall'