IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2009-406-190

UNDER	the Property Law Act 2007
IN THE MATTER OF	an originating application for relief against refusal to renew a licence
BETWEEN	JANICE ELSIE BREWER Plaintiff
AND	MARLBOROUGH AIRPORT LIMITED Defendant

Hearing: 5 October 2009

Counsel: D J Clark for plaintiff
P J Radich and L Radich for defendant

Judgment: 8 October 2009

RESERVED JUDGMENT OF DOBSON J

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[1] In these proceedings, the plaintiff (Mrs Brewer) seeks relief against the defendant's refusal to renew a licence for a café in the terminal building at Blenheim Airport.

[2] Mrs Brewer trades as the operator of the café in her own name, with the assistance of her partner and her daughter. The defendant (the airport company) is the entity that operates a licence from the Crown for the conduct of civil aviation services at Blenheim Airport. The airport is also the location of an Air Force facility, namely the Woodbourne Air Force Base.

[3] The sublicence for the café premises was entered into between a predecessor of Mrs Brewer's and the airport company for a term of three years from 9 May 2006.

Mrs Brewer took an assignment from 20 July 2007 and since then there have been variations including the addition of a second right of renewal for three years, and an amendment to the definition of the premises from April 2008 which afforded an entry to the rear of the café premises.

[4] The terms of the licence required Mrs Brewer as licensee to give notice to the licensor at least three months before the expiration of the licence, namely by 9 February 2009, but that did not occur so that on its terms, the licence would have expired on 8 May 2009. Thereafter the licence ran on, on a monthly basis.

[5] On 10 July 2009, the airport company gave Mrs Brewer a notice to terminate. Mrs Brewer requested a renewal of the licence out of time on 17 July 2009. On 20 July 2009 the airport company rejected the request for renewal and purported to enter into a replacement licence with another operator.

[6] The initial notice had stipulated four weeks' notice instead of one month, but that error, whether material or not, was corrected by the airport company issuing a further notice on 5 August 2009 requiring the premises to be vacated by 7 September 2009.

[7] Faced with the pending expiry of the notice to terminate, Mrs Brewer sought an interim injunction to prevent the airport company acting on its notice to terminate, which application was heard in Wellington and granted on 2 September 2008.

[8] Sections 261 to 264 of the Property Law Act 2007 (the Act) give the Court wide powers to grant relief from forfeiture of leases. Decisions under the equivalent provisions in s 120 of the Property Law Act 1952 are still considered of helpful guidance.

[9] Although at an earlier stage of the proceedings the airport company asserted that the provisions for relief available to lessees did not extend to licences, that is not the position under the 2007 Act with s 206(3) extending a range of the other provisions including the relevant sections invoked here, to licences as if they were

leases. Similarly, no point was taken that the contract in issue is a sublicence, rather than a licence.

[10] Mrs Brewer filed a relatively lengthy affidavit in reply as late as the afternoon of the last working day before the hearing. The initial reaction on behalf of the airport company was to serve notice requiring her for cross-examination. However, at the outset of the hearing Mr Radich indicated that that was not being pursued. He nonetheless signalled in firm terms that certain passages of the affidavit in reply were not accepted.

[11] Ultimately, Mrs Brewer has filed three affidavits (dated 17 and 28 August 2009, and then the reply affidavit dated 2 October 2009). These affidavits include expressions of support from customers of the café that are complimentary about the service she provides.

[12] For the airport company, a substantial affidavit was filed from Ms Adye who manages the operational affairs of the airport company and is the person who has primary responsibility for dealing with Mrs Brewer. There have also been affidavits from a Mr Gee, a member of the Defence Force who holds a contracted position as manager of "Air Side Operations" at the airport. His reference to "air side" relates to the physical part of Blenheim Airport that is closed off to the general public and where access is restricted, principally because of safety and security issues associated with the operation of aviation services. There is also an affidavit from Mr Mullin who is a contractor to Air New Zealand Limited with responsibility for loading and unloading all Air New Zealand planes and vehicles. Lastly, there is an affidavit from Ms Lee who is employed by Eagle Airways Limited, an Air New Zealand subsidiary, as its manager at Blenheim Airport. I will comment on the content of these affidavits, to the extent they become relevant, in the course of evaluating the various factors claimed by the parties to influence the Court's discretion.

[13] In one of a number of decisions on such applications by Asher J, namely *Ponsonby Mall Trust Ltd & Anor v New Zealand Food Industries Ltd* HC AK CIV-2005-404-3631 5 December 2005, His Honour suggested seven criteria that

might usually be considered as guiding the Court's discretion on such applications. Helpfully, counsel for both parties addressed their arguments by reference to these seven considerations which can be summarised as follows:

a) Reasons for the failure to give notice, eg whether the failure to renew was inadvertent;

b) Whether the cause of the default was due to any action of the landlord;

c) The lessee's conduct, in particular whether it has complied with all conditions and covenants and has been a good tenant;

d) The prejudice to the lessee if the relief is not granted;

e) The prejudice to the lessor if the relief is granted;

f) The lessor's motivation for the refusal to renew and understanding of the lessee's intentions;

g) The interests of third parties and how they may be affected by any order.

Reasons for failure to give notice to renew

[14] The absence of notice from Mrs Brewer in the present case was simply inadvertent. In those circumstances, I do not treat the reason for failure to give notice as significant in the evaluation. Mr Radich was inclined to submit, as part of more general criticisms of the conduct of Mrs Brewer, that the explanations in her affidavits and in the submissions on her behalf sought to attribute blame for her failure to give notice to the airport company. This was because the high level of contact between the parties gave rise to an expectation on Mrs Brewer's part that, when notice was needed, the airport company would prompt her on the topic. Obviously that would be an unrealistic expectation, but I do not discern either

Mrs Brewer's explanation for her conduct or the submissions on her behalf to go as far as seeking to exonerate her own omission by blaming the airport company.

Whether the cause of the default was due to any action of the landlord

[15] This is likely to be relevant only in relatively unusual circumstances, and certainly there was nothing in the present case to suggest that the airport company gave any suggestion by words or conduct that the giving of notice in the ordinary way was unnecessary.

Licensee's conduct

[16] Both parties accepted that the conduct of the licensee, in particular the extent to which Mrs Brewer had not complied with all conditions and covenants and whether she has been a good licensee, was the critical consideration in determining the outcome in the present case. In the dealings between the parties about renewal of the licence, some four concerns at Mrs Brewer's conduct have been raised on behalf of the airport company. Two of these remain as serious concerns in the perception of the airport company and are advanced as justifying a refusal to grant a renewal.

[17] The first matter causing concern to the airport company is unauthorised car parking by Mrs Brewer and her co-workers. After the premises occupied by her were extended in 2008, the enlarged space afforded access at the back of the terminal and Mrs Brewer was able to arrange informally for vehicular access to that entry, to load and unload supplies and materials. This involves her being given access through a secure gate, needing the use of a swipe card at the controlled entry point. That affords access to what the airport company describes as the "air side" part of the airport where heightened safety and security considerations prevail. The airport company authorised Mrs Brewer or one of her co-workers to drive to the back of the terminal and unload supplies, on the basis that they would then remove the vehicle to one of two car parks specifically allocated to the café business, in an area of parking some 100 metres from the terminal. Instead, one, and sometimes more, vehicles were parked for lengthy periods at the back of the terminal in this "air side" area.

[18] From the airport company's perspective, Ms Adye first broached the subject by way of a "gentle" request or warning that such conduct was unacceptable. After a period of continued activity inconsistent with the airport company's permission to her, it sought a formal meeting involving solicitors for the parties, to discuss what had become a worrying issue of non-compliance for the airport company. It characterises Mrs Brewer as reluctant to attend such a meeting in the first instance, and that when confronted with the issue she at first denied that vehicles were parking there until shown security camera footage. The camera footage was treated by the airport company as establishing a pattern of parking at the rear entrance to the café premises. That meeting was in February 2009. Ms Adye's observation was that some improvement was noted for a period after the meeting, but since April 2009 Mrs Brewer and her staff had been parking directly behind the terminal every day in direct contravention of the agreement. Ms Adye's affidavit recording these criticisms was served on 28 August 2009 and in Mr Mullin's affidavit of 11 September 2009 he deposed that he had noticed the café vehicles having stopped parking in the air side area in the preceding couple of weeks. Mr Radich's submissions attributed the change in behaviour to Mrs Brewer being made aware of the content of Ms Adye's affidavit.

[19] However, Mr Mullin's affidavit continued that instead of parking in the air side area at the rear of the terminal, the vehicles associated with those working at the café had instead been parking for long periods in a restricted 15 minute parking area in front of the terminal. This was in breach of the signage indicating the short term nature of parking permitted in an area that is obviously important to be kept free for those dropping off passengers and other visitors to the airport.

[20] As to the relative significance of parking in the "air side" area, Mr Gee's affidavit expresses the view that his concerns about parking cannot be dismissed as trivial because security at all airports is now an important matter, requiring respect for the rules about operation of all secure areas by everybody involved in them. Mr Gee and the submissions by Mr Radich also raised the combined civil and military use of the airport as a further feature justifying the requirement that all users respect the arrangements made for safety and security at the airport.

[21] Mrs Brewer disputes that Blenheim Airport is run with the relevant areas being protected as "secure". Mr Clark's submissions suggest the apparent concerns of the airport company substantially overstate any security concerns that might arise, and in effect suggest that more is made of the difficulties the airport company perceives with the parking conduct than is warranted.

[22] Further, Mr Clark argued in reply that concerns over parking could not be anywhere near sufficiently serious to justify the licensor's refusal to renew the licence. He suggested that the airport company would need to have formalised the arrangements to enable vehicular access to the rear of the terminal building in the secure area, and identified precisely the limits on that use and sanctions for breach of it, before it could claim the seriousness the airport company now attributes to it. That is an unattractive submission. It is clear on the affidavits that the arrangement was arrived at as a sensible concession in Mrs Brewer's favour, with adequately defined limits on the use to be made of access to the rear of the building for her to appreciate from the outset that she was not being given permission to park a vehicle or vehicles at the rear of the terminal. The concession having been made, she has been reluctant to acknowledge and abide by the limitations on it, and the airport company can readily make out her wilful disobedience of the relevant arrangements.

[23] Mr Clark made two further points. First, that the arrangement was made for mutual benefit because the access for delivery at the rear of the café obviated the need for deliveries to be made through the front entrance of the terminal and across the width of it to the front of the café premises. Secondly, that the criticisms of this behaviour should not carry any significant weight when they related to an arrangement that was not governed by the terms of the licence.

[24] It may well be that proper compliance with the scope of the concession arranged with Mrs Brewer did have incidental benefits for the airport company. That does not justify unauthorised extension of the activity in question. Nor does the fact that access to the rear of the building is not regulated by the licence render breach of a concession reasonably arranged something that should be disregarded when the nature of the licensee's conduct is evaluated in the present context. Ultimately, Mr Clark made the point that if the concession was being abused, it was within the

power of the airport company to withdraw the concession, rather than using that abuse of it as a ground for not granting renewal of the licence itself. In the narrowest sense, there may be some validity in that point. However, the authorities make it clear that a breakdown in a relationship that needs to work constructively on a prospective basis is a matter that may affect the Court's discretion and it is one that I will return to.

[25] The second matter of concern to the airport company is the hours of opening of Mrs Brewer's café. The licence requires the café to be open Monday to Friday from 6.20am to 5.30pm, on Saturday from 6.30am to 3pm and on Sunday from 9.30am to 5pm. As operator of the airport, the airport company has an obvious interest in all visitors to the airport, and in particular travellers, being able to access food and drink whilst waiting to meet or travel on aircraft. More specifically, there is evidence that airlines using the airport depend on the café as the source of refreshments for air crew whose terms of engagement include being provided with refreshments whilst on the ground in Blenheim.

[26] Mr Radich supported the reasonableness of the airport company treating hours of opening as a serious matter by analogy with lessors of premises such as retail malls, where the lessors will want the shops to be open to stimulate interest and achieve cross-fertilisation of retail activity. The relative importance in that different situation does not provide a close analogy with the present situation. However, viewed within its own circumstances, the importance of having an operator of the café that remains open for the hours stipulated is readily apparent. Material or on-going breaches of that obligation cannot be dismissed as immaterial.

[27] Here, Ms Adye has monitored the opening hours during certain periods and her affidavit includes a schedule of the extent of non-compliance on the days that were monitored. On two days, the Monday of Queen's Birthday weekend in 2009 and on Sunday, 21 June 2009, the café was closed all day without any prior advice to the airport company. On another Monday, it was observed as closing at 2.30pm, three hours early. Many of the 63 observed early closings are by periods of less than 30 minutes, but a substantial number are for periods longer than that.

[28] The inconvenience caused to air crew was addressed in Ms Lee's affidavit. She describes particular difficulties on the days when the café did not open at all. On one such occasion she had to lend air crew her own vehicle so they could go in to Blenheim to find something to eat in the one hour they had between arriving and leaving Blenheim again. Her observation from working at the airport is that "on most week days the café closes at about 4.30pm". This is notwithstanding the fact that the period between 4.30pm and 5.30pm is, in her view, one of the busiest times of the day in the terminal.

[29] Mr Clark's response to these concerns is to indicate that:

- Mrs Brewer had difficulty with staff illness on both the days she did not open at all;
- early closing in the afternoons was a judgement she made because of the lack of custom, but she now acknowledges it was a liberty she was not entitled to; and
- since late August Mrs Brewer has complied completely with the requirements of the licence as to opening hours.

[30] As to the relative seriousness of not opening, Mr Clark again submits that the airport company is seeking to make more of it now than it did at the time. He instances correspondence, after the two days on which the café did not open, in which that is noted on behalf of the airport company, but in terms acknowledging that they would not make the deduction of $250 per day from a sum that is paid by way of relief wages to the licensee under the terms of the licence. Mr Clark was inclined to characterise this as a "penalty" that the airport company could impose, and the fact it had not done so was, he inferred, to be seen as accepting the failure to open on those occasions. He submitted this reduces the relative importance of the breach of required opening hours to below the seriousness that would be required before a refusal to grant relief would be justified. It is not in fact a penalty. The licence provides for payments by the airport company described as "Relief Wages",

subject to reducing the extent of such payments by $250 for any day on which the café is closed.

[31] A consistent pattern of not remaining open for the hours required by the licence over a period of many months, with the inference that similarly short hours had occurred previously but were not monitored, is a matter that the licensor is entitled to take seriously, and to treat as a material deficiency by the licensee. This is made more serious by the two instances on which Mrs Brewer unilaterally decided not to open at all.

[32] Each New Zealand regional airport might be treated as a monopoly in many competition contexts. However, the present commercial environment urges operating companies to provide good quality services, and the terms of the licence here clearly reflect the licensor having an interest in the quality of services provided, as well as the adequacy of the times during which the services are offered.

[33] Mr Radich placed considerable emphasis on the nature of the relationship between the licensor and the licensee, and the context in which they had to deal with each other. He characterised the licensor's obligations as having a significant element of public interest, in the sense that the airport company "has the responsibility for the safe, efficient and helpful operation of an airport". Mr Radich observed that the relationships between lessors and licensors on the one hand, and lessees and licensees on the other, are many and varied. He contrasted a very "hands off" relationship, where a lessor simply leases the interior shell of an unlined industrial building on "bare" terms, with the licence granted by the overall operator of a hospital to a team of medical personnel contracted to provide, say, an accident and emergency service within the hospital. Mr Radich sought to place the present relationship towards the latter end of a continuum between these two extremes of the types of relationship that exist.

[34] Mr Radich did not suggest that the character and context of the particular contractual relationship might be elevated to a further factor alongside those proposed in *Ponsonby Mall*. However, I do accept that there are situations, including the present, in which the extent of mutuality of obligations reflected in a lease or

licence, and therefore the relative degree of interaction required between the parties on an ongoing basis, may assume relevance when considering the relative materiality of complaints by the lessor/licensor of deficiencies in the conduct by the lessee/licensee.

[35] Here, there is a relatively strong aspect of mutual dependence. As operator of the airport, the airport company depends on the operator of the café to be open at appropriate times, and to provide a range of services that meets the reasonable needs of visitors to the airport, as one aspect of the services perceived as desirable or appropriate at a New Zealand regional airport. This relatively unusual extent of interdependence is illustrated by the rent to be paid by the licensee for use of the premises being almost matched by the subsidy on operating expenses paid to the licensee by the airport company. I was informed by counsel that Mrs Brewer pays an annual licence fee of $7,500 in monthly instalments, whereas the airport company pays her $2,500 each six months as a contribution to her wages expenses. Accordingly, the net cost of renting the space is just $2,500 per annum.

[36] The licence also requires Mrs Brewer to advise the airport company "…as soon as practicable in the extraordinary event that they are unable to open". Again, that suggests a measure of interdependence between the parties.

[37] These aspects requiring interaction between the parties and positive performance by the licensee do justify a greater expectation on the part of the licensor for on-going trust and a constructive working relationship between the licensor and the licensee. The airport company should be entitled to trust Mrs Brewer to stay open all the hours she is contractually required to, without being monitored, and similarly to respect the rules on matters such as parking without being monitored on a regular basis. However, as Mr Radich described it, there has been a gradual erosion of the airport company's faith in Mrs Brewer's ability to perform adequately, in the period since the meeting in February 2009. That has led to a gradual hardening of attitude about the relative undesirability of having to deal with her in the future, leading to the airport company negotiating with an alternative provider of the services, and its determination to defend the present proceedings.

[38] Mr Radich relied on the following observation from Asher J's decision in *Sibrad Company Ltd v Kanters & ors* (2008) NZCPR 356:

> [20] Thus it has been held that the lessee's conduct, in particular whether it is compliant with covenants and conditions and has been a good tenant, can be relevant: *Woottons Auto Accessories Ltd v Epsom Dry Cleaners Ltd* (1982) 1 NZCPR 504, 507. Breaches of lease by the lessee, and prejudice to the lessor if the relief is granted are clearly relevant matters. It is not sufficient for an applicant to simply explain the failure to renew as innocent and inadvertent, and then to expect relief. If that were the position, the Act would say so. Rather there is a broad discretion, and where there are breaches of lease by the lessee, the extent to which they affect the lessor can be considered. So can bad behaviour by a lessee and consequent bad feeling between landlord and tenant, as these can give rise to real prejudice to a lessor if a renewal is forced.

[39] On the other hand, Mr Clark, seeking to distinguish the relative seriousness of the lessee's defaults in *Sibrad*, submitted that all of the criticisms of Mrs Brewer in the present case could not possibly justify Asher J's conclusion in respect of the conduct of the lessee in the *Sibrad* case, which were described in the following terms:

> [72] I consider that the breaches of lease are sufficiently serious, and the breakdown of relations caused by Sibrad's conduct so severe, that the discretion to grant relief against forfeiture should not be exercised. To grant such relief would be to tie these two parties together for another year-and-a-half when they need to communicate on the issue of area, but they are not communicating and are hostile, and the lessee is committing ongoing serious breaches of the lease, and does not remedy those breaches.

[40] In the same way, Mr Radich sought to draw a relevant analogy, and Mr Clark sought to distinguish, the findings in respect of the lessee's conduct in another of Asher J's decisions, *Bedford Investments Ltd v Alder & Co Ltd* HC AK CIV-2006-404-1567 17 May 2006, which included the obiter observation:

> [40] I would not in my discretion grant relief against forfeiture in this case. I regard the conduct of the Lessee as beyond that which is commercially acceptable, and by a considerable margin. No Landlord should be required by a Court to accept a chronically and inexcusably defaulting tenant. On any reasonable forward prognosis it could be expected that the Lessee will perform in the [future] as it has in the [past]. It would be entirely unreasonable to require the Lessor to accept that level of performance.

[41] Mr Clark submits that the criticisms of Mrs Brewer could never be labelled chronic or inexcusable. Rather, she accepts her responsibilities in respect of hours of

opening, and has not, on Mr Clark's analysis, been guilty of any conduct that warrants serious criticism on parking matters.

[42] I do not rank the criticisms made out of Mrs Brewer's conduct as being relatively as serious as that of the lessee in either *Sibrad* or *Bedford Investments*. However, nor could I be satisfied that she has turned over a new leaf and that she would remove the basis for the airport company's concern if given the reprieve that relief against forfeiture represents. I would treat the prospects of a recurrence of difficulties for the airport company in the same way that Asher J did: the pattern of her behaviour in the past is the best indication of how she would conduct herself in the future. Given the extent of on-going interaction that is necessary, and the licensor's dependence on her level of performance, there is force in the argument that the airport company should not be required to deal with her for a further three year term, or possibly two such terms.

Prejudice to licensee if relief not granted

[43] Mrs Brewer deposes to her fear that, if the licence is not renewed, the goodwill she has invested in the business will be lost and she will have to sell the chattels of the business at a secondhand auction, rather than as part of a going concern, so there would be significant losses of the amount invested. She also is concerned that if she and her partner lose their source of income, she would not be able to maintain the mortgage on her house which might lead to her having to sell that as well. In July 2007, the agreement for her purchase of the business records her paying $25,000 for the goodwill ("intangible assets"), $20,000 for the tangible assets, plus the stock-in-trade at valuation.

[44] The airport company is sufficiently concerned to resolve the matter without having to accept Mrs Brewer as a licensee for a further three years that it has made an open offer to address this financial prejudice. In the event the renewal is not granted and on her relinquishing possession of the premises the airport company would pay Mrs Brewer $25,000 for goodwill, together with the fair value of stock and plant as agreed, or in default of agreement to be determined by two valuers, one

appointed by each party with the pre-appointed umpire of those valuers to make a binding determination in the event that the primary valuers cannot reach agreement.

[45] Mr Clark was critical of this offer as verging on improper, and denied that it made any material difference to the on-going prejudice that would result from Mrs Brewer not obtaining a renewal. Certainly, the airport company's offer does not address the loss of Mrs Brewer's present source of income. It does, however, substantially restore her capital commitment, with the exception of any increase in the goodwill she might be able to charge if she sold after being granted a renewal. Without producing any financial statements, Mr Clark claims that the business is doing better now than when Mrs Brewer acquired it in the middle of 2007, leading presumptively to an increase in the value of goodwill. There is no reasoned basis on which to recognise any material increase in the goodwill for which the business might sell at some point in the next three or six years. If she sought to realise her investment, that would bring the present source of income for her and the others to an end. It would be unrealistic to disregard the airport company's proposal to limit the nature of the financial prejudice that could be claimed by Mrs Brewer, and I am not prepared to do so in evaluating the overall position of the parties.

Prejudice to licensor if relief granted

[46] I did not understand Mr Radich to advance anything beyond the various aspects of concerns for the airport company if it were forced against its wishes to continue dealing with Mrs Brewer, notwithstanding the unsatisfactory aspects of her performance and the absence of any assurance acceptable to the airport company that she has indeed "turned over a new leaf".

Licensor's motivation for declining renewal

[47] The next factor is the lessor's/licensor's motivation in declining a belated request for renewal. This may be a material factor affecting the exercise of the Court's discretion if, for example, a lessor is motivated by a desire to re-let at a

higher rent, or to make some other commercial or financial advantage out of the omission by an otherwise acceptable lessee to provide notice within time.

[48] Mr Clark's arguments did not establish any relevant criticism of the basis on which the licensor has both declined to grant a renewal when the request was out of time, and to deal with a replacement licensee for the café. In the circumstances of the present case, I accept that those steps are appropriate, and ought not to result in negative consequences for the licensor in the evaluation I have to undertake.

Interests of third parties

[49] Here, after Mrs Brewer had belatedly requested a renewal, the airport company and a new licensee completed contractual arrangements in anticipation of the airport company being able to grant possession in or around September 2009. Both the airport company and the new licensee were aware that Mrs Brewer had sought a renewal. The terms of that contract have not been disclosed. Whatever its terms, the parties to it should be taken to have contracted assuming the risk that Mrs Brewer's initiatives might frustrate it.

[50] Mr Clark submitted that I ought not to recognise any prejudice to the new licensee as a third party in these circumstances. Indeed, Mr Radich acknowledged that the existence of that contract, when entered into as it was, cannot avail the airport company as a factor adding to the justification for declining relief. It does not tell against a grant of relief.

[51] For her part, Mrs Brewer argues that her partner and daughter, who work in the business with her, should be treated as "third parties" who would be adversely affected by the loss of their jobs if a renewal is not ordered. The adverse consequences for employees rendered redundant by a loss of premises is a factor in favour of renewal. However, it is not the compelling factor it might be, in larger scale businesses or ones not run as family businesses where the employment arrangements tend to be more informal.

Overall evaluation

[52] The merits in this case are somewhat more finely balanced than in other cases cited by counsel. The defaults and misbehaviour by Mrs Brewer are not as striking as those identified in *Sibrad*, and nor is the pattern of default as compelling as it was in *Bedford Investments*. On the other hand, her position has little of the merits identified in favour of the tenant in *Ponsonby Mall*.

[53] The discretion is to be exercised reflecting all the factors in each particular case.

[54] Mr Radich acknowledged that a lesser standard of concern at the licensee's or lessee's conduct may be sufficient to establish grounds for withholding relief in circumstances such as the present than would be necessary to enforce termination of an on-going lease or licence for cause. See *Sibrad*, [15], [16].

[55] Mr Radich did submit that, had Mrs Brewer sought a renewal in a timely fashion, the airport company would still have declined renewal on the basis of the breaches of obligation and unsatisfactory conduct that are relied on in the present circumstances.

[56] A consequence of this distinction is that, if relief against forfeiture is granted on the present application, there is a risk that repetition of the unsatisfactory conduct might not be sufficient for the licensor to discharge the different onus for termination of an existing licence. However, Mr Radich submitted that the pattern of behaviour up to the present point ought to be more than enough to persuade the Court to withhold relief when the licensee failed to give timely notice of her intention to renew. Mr Radich emphasised that the airport company does not accept assurances that all the breaches likely to be considered material by the Court have been cured, and that there will be no repetition.

[57] The arguments advanced seeking to minimise the extent of any criticisms raised against Mrs Brewer included casting aspersions on the legitimacy of the licensor's grounds for concern. In light of those arguments, and on the basis of all of

the evidence, I am left with a very real concern that, if relief is granted by way of a renewal, there would be on-going difficulties created for the airport company by Mrs Brewer's unwillingness to conform in all respects to the behaviour requested of her. I find that the airport company's concerns in this regard are reasonable.

[58] Accordingly, looking backwards at the extent to which Mrs Brewer has been less than a good licensee, and looking forward to the prospect of some material extent of recurrence of those unsatisfactory aspects of her performance, I find that this is not an appropriate situation in which to exercise the discretion under s 264 of the Act.

[59] Were I to have decided the other way, and have granted relief, it would have been entirely inequitable to the airport company to have done so other than on terms that sought to rigorously enforce all terms of the licence, the concession granted in respect of parking at the rear of the terminal, and the reasonable expectations inherent in the relationship created by all the terms of the licence. I am not confident that such conditions on any renewal, however crafted, would adequately protect the airport company. The relationship between it as licensor and the operator of the café at the airport has an unusual extent of interdependence and that lowers the threshold of tolerance that should be expected of the airport company in forgiving breaches of the terms of the licence or other poor behaviour by the licensee.

[60] Accordingly, the application for relief is dismissed. Relief is declined on the condition that the airport company must honour the offer for compensation made as recorded in [44] above. It is not to demand vacant possession of the property in any less than 28 days from the date of this judgment, to afford Mrs Brewer an opportunity to wind down her stock if she sees fit, and otherwise to address the consequences of her failure to obtain a renewal of the licence.

Costs

[61] The airport company is entitled to costs on the substantive hearing, and the steps relating to preparation for it, in accordance with scale 2B. It is also entitled to any disbursements properly incurred in relation to the substantive hearing. Costs on

the interim injunction were ordered in Mrs Brewer's favour. That was a discrete matter and is not disturbed by this present order.

Dobson J

Solicitors:
Wisheart MacNab & Partners, Blenheim for plaintiff
Radich Law, Blenheim for defendant