

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-006096

BETWEEN

CHOI SOON OK LIMITED
Plaintiff

AND

**MUHAREM MUHAREMI AND
LUMNIJE ZEKA AND GELLERT
IVANSON TRUSTEE LIMITED AS
TRUSTEES OF THE FOUNTAIN
BUILDING TRUST**
Defendant

Hearing: 7 October 2009

Counsel: D F Dugdale for Plaintiff
M I S Phillips for Defendant

Judgment: 7 October 2009

ORAL JUDGMENT OF RANDERSON J

Solicitors: Song Jae Hon Lawyers, PO Box 33359, Takapuna, Auckland
Gellert Ivanson, PO Box 25239, St Heliers, Auckland 1071
Counsel: D F Dugdale, PO Box 46281, Herne Bay, Auckland 1147
M I S Phillips, PO Box 3320, Auckland 1140

[1] In this proceeding the plaintiff company seeks interim relief in the form of an order restraining the defendant landlords from interfering with the plaintiff's quiet enjoyment of the premises leased by the plaintiff from the defendants at 55 Tamaki Drive, Mission Bay, Auckland in which the plaintiff has been carrying on the business of an icecream parlour.

[2] The plaintiff company went into liquidation for a short period in early 2009 but apparently that state of affairs no longer continues. The rent was overdue when on 29 July 2009 the landlords re-entered. Subsequently the director of the plaintiff company signed an unconditional surrender of the lease of the premises by signing it on its last page. That occurred on 21 August 2009 in the context of a meeting between the plaintiff's director (Ms Park) and representatives of the defendant landlord.

[3] The rent for September was paid on the first day of that month but there is no evidence before the Court as to what has been done with that money. In the meantime, the defendants have entered a new lease of the premises with other tenants on 17 September 2009. There was some delay in the institution of this proceeding after the re-entry. Proceedings were not filed until 21 September.

[4] The new tenants are in possession of the premises and I have been told from the bar they are engaged in fitting out the premises for the new lease. The new tenants have not been served with this proceeding and are not before the court today.

[5] Mr Dugdale submits that an interim injunction should be granted in the terms sought. He relies on three factors. First, the plaintiff's director Ms Park has sworn an affidavit in which she states that her English is poor and that she misunderstood the effect of the surrender she signed. She says that her understanding was that the surrender was simply a step in a process which would result in the grant of a new lease to the plaintiff on varied terms.

[6] The second point Mr Dugdale relies upon is an allegation that there was no notice of re-entry given by the landlords under the Property Law Act 2007. There is no evidence at this stage on this point since I directed, when this matter came before

the Duty Judge on the last occasion, that the defendants were required at that stage simply to swear an affidavit in relation to the surrender.

[7] The third ground Mr Dugdale relies upon is the payment of rent on 1 September which he submits has effectively been accepted for that month.

[8] Mr Phillips submits that the delay in the application is a significant factor. The status quo has changed, he submits, because the new tenant is now in possession and has a lease for a substantial term. He is not yet in a position to respond to the grounds relied upon by Mr Dugdale as already set out in this decision.

[9] In response to an observation made by the court, there appears to be no evidence filed by or on behalf of the plaintiff that it is in a position to meet ongoing rent. In view of the difficulties the plaintiff has experienced in the past, one would have expected evidence of that kind since it is relevant to the exercise of the court's discretion.

[10] Mr Dugdale submitted that the landlord should not be able to take advantage of its wrongful act in granting the new lease if its re-entry was invalid.

[11] Standing back and viewing this matter overall, it may be that there is an arguable case but it is relatively weak. A plea of *non est factum* is always difficult to establish and the terms of the surrender were clear and unequivocal. It is possible there may be a ground relating to the absence of notice in the re-entry but that has yet to be established on the evidence. Similarly with the payment of rent.

[12] Even assuming an arguable case, the balance of convenience is strongly against the grant of interim relief. The delay by the plaintiff has been significant and in the period of that delay prior to the issue of proceedings, the landlords have (with substantial justification given the surrender of the lease), entered into a new lease. The detriment to the landlords and to the new tenants if interim relief is granted is likely to be substantial. In the circumstances the application for interim relief will be declined.

[13] The plaintiff should be left to any remedy as to damages. In that respect, Mr Dugdale has indicated he will file an amended statement of claim. That is to be filed and served by 21 October 2009. The defendants are to file and serve a statement of defence by 4 November 2009. The matter is to be called again in the Duty Judge List on 11 November 2009 at 10 am.

[14] Costs are reserved.

A P Randerson J
Chief High Court Judge