IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-003579

BETWEEN	AUCKLAND INTERNATIONAL AIRPORT LIMITED Plaintiff
AND	ALEXANDER ROBERT BEMELMAN Defendant

Hearing: 29 July 2009

Appearances: M R Crotty/ L A MacFarlane for Plaintiff
No appearance for First Defendant
G D Stringer for Second Defendant

Judgment: 16 December 2009 at 11.30

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 16 December 2009 at 11.30 am,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Russell McVeagh, PO Box 8, Auckland
Inder Lynch, PO Box 72045, Papakura, Auckland

[1] The plaintiff applies for summary judgment against the second defendant as guarantor of the lease of premises at 4 Percival Gull Place to the first defendant, Kiwibond Limited now in liquidation for the following amounts:

a) The sum of $562,834.87 being the amount outstanding under the lease in respect of rent and other charges (excluding interest) as at the date the Kiwibond vacated the premises on 17 July 2008.

b) The sum of $354,160.13 being the cost of making good the interior and exterior of the premises to a clean order repair and condition pursuant to s 7.1 schedule 3 of the lease.

c) Loss of bargain damages in respect of the premises comprising of:

i) The sum of $61,522.74 being the loss accrued by the plaintiff AIAL from after the premises were vacated by Kiwibond until the release of the premises on 29 August 2008.

ii) The sum of $275,647.01 being the difference between the rent received from the short term – partial release of the premises and that which would have been received under the lease from 30 August 2008 until 24 July 2009.

iii) The difference between the rent received from the release of the premises and that which would have been received under the lease from 19 November 2008 until the final expiry of the lease term being 18 April 2015.

iv) Interest pursuant to the lease at the default interest rate specified in the lease to the date of judgment.

v) Indemnity costs agreed to by the parties in terms of the lease.

Background Facts

[2] Prior to 2003 Kiwibond carried on business on premises it leased at 163 Montgomery Road, Airport Oaks, Mangere, Auckland. In October/November 2002 Mr Paul Alexander contacted Mr Bemelman, the second defendant who was the sole director and shareholder of Kiwibond. Mr Alexander was a property developer who was developing land owned by AIAL. Mr Alexander told Mr Bemelman he was working for AIAL which was developing property off George Bolt Drive and that AIAL was looking for tenants for their development. At that time Kiwibond was carrying on business in handling freight, providing transitional storage and processing services to international freight forwarders, shipping companies and independent importers and exporters. Its business was growing rapidly and it required more space. Mr Bemelman found the proposal to move to purpose built premises closer to the airport very attractive.

[3] On 24 January 2003 Kiwibond with Mr Bemelman as guarantor entered into a development agreement with AIAL and Mr Alexander's company Compark Properties Limited for the construction of premises at the Percival Gull development. That agreement recorded that the land was owned by AIAL. The developer Compark Properties Limited was to construct a warehouse and office building which it would sell to AIAL which in turn AIAL would lease to Kiwibond. Mr Bemelman covenanted with AIAL to guarantee Kiwibond's obligations under the agreement and proposed lease.

[4] The lease was to be for a term of twelve years commencing from the practical completion date defined in the agreement as "the date on which practical completion is certified by the architect". Kiwibond moved into the premises when construction was completed on 19 April 2003 having executed a formal deed of lease on 17 April 2003. Shortly after moving into the premises the asphalt yard began to deteriorate. According to Kiwibond the yard would not handle the weight and movement of containers being stored by it on the premises. Kiwibond entered into further negotiations with AIAL.

[5] On 30 July 2004 the parties entered into a further agreement to lease. Pursuant to that agreement:

a) The existing lease executed by the parties on 17 April 2003 was surrendered.

b) The commencement date of the lease was to be on and from the practical completion date. That date was defined as "the date practical completion is certified by the architect".

c) The lease was to expire on 18 April 2015.

d) The rent was to be $464,428.98 per annum plus GST, that rent to be reviewed on 19 April 2006 and every three years thereafter.

e) AIAL agreed to undertake certain work to the premises referred to in the agreement as the lessors work. Lessors work was as follows:

> Means the alternations and additions to the building and related structures and services to be constructed by, and at the cost of, AIAL in accordance with this agreement and more particularly being and approximately 253 square metre canopy, approximately 177.4 square metre drive way and approximately 3995 square metre hard stand (additional yard) as specified in the outlined plans and specifications.

[6] This work was to be done at AIAL's costs. AIAL agreed as follows:

> 3.1 Standards
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> AIAL will undertake and complete the lessor's work:
>
> a) With all reasonable speed;
>
> b) In a proper and workmanlike manner;
>
> c) Substantially in accordance with the final plans and specifications;
>
> d) In accordance with the proper requirements of all relevant authorities.

[7] The terms of the agreement to lease dated 30 July 2004 were varied by deed of variation of lease executed by the parties on 16 November 2004. That variation

replaced the form of lease to be executed, adjusted the rent and other payments to be made by Kiwibond and replaced some of the specifications. The parties did not execute the formal deed of lease referred to in the agreement to lease. However, the agreement to lease provides:

> 6.2 Execution
>
> The lease will be in the form annexed as schedule 3 with all necessary modifications so as to currently incorporate and record the terms and conditions of this agreement. The lessee shall execute the lease and return the same to AIAL as soon as possible after it has been delivered to the lessee and in any event not later than thirty days after that date.
>
> 6.3 Parties Bound
>
> Until the lease has been duly executed and delivered by the lessee and guarantor to AIAL, AIAL, the guarantor and the lessee will be bound by the terms and conditions contained in the lease as if the same had been duly executed and delivered.

[8] The deed of lease to be executed by the parties provides for rent to be paid "without set-off or deduction".

[9] According to AIAL the sum of $520,733.80 including GST was due and owing by Kiwibond for rent and other charges as at 12 June 2008. That sum did not take into account a rent review which was to occur on 19 April 2006. On 15 May 2008 AIAL served on Kiwibond a notice of intention to cancel the lease if Kiwibond did not pay arrears of rent and rates, insurances and other payments in terms of the lease amounting to $484,217.67 within ten days. Because Kiwibond failed to pay the arrears of rent and other outgoings AIAL re-entered and cancelled the lease on 3 June 2008. However, Kiwibond did not vacate the premises until 17 July 2008.

[10] Kiwibond has now been placed into liquidation. Consequently, AIAL does not seek summary judgment against Kiwibond and proceeds with its application for summary judgment against Mr Bemelman.

Defence to application for summary judgment

[11] According to counsel for Mr Bemelman when the parties negotiated the proposed development Kiwibond emphasised that it required a yard for heavy container handling. Mr Bemelman stressed at that time that based on his knowledge of the industry tar seal would not be strong enough for the storage and loading of heavy containers. He says Mr Paul Alexander assured him that there were several grades of tar seal and that the construction would be built to suit Kiwibond's requirements.

[12] However, Mr Bemelman claims that within three weeks of Kiwibond moving in and commencing operations the asphalt yard began to break up. Following discussions with Mr Ryan Carter from AIAL Mr Bemelman says he was informed that to get the yard fixed and concreted AIAL required Kiwibond to enter into a variation of the lease which would involve AIAL constructing and leasing to Kiwibond an additional area to give Kiwibond space to store containers whilst AIAL could carry out repairs to the existing yard.

[13] Mr Bemelman says Kiwibond did not need an extension to the yard but decided to enter into the variation on assurances by Mr Ryan Carter on behalf of AIAL that the work to be undertaken by AIAL in terms of the proposed variation would solve all problems and result in Kiwibond having a top of the line yard that would put Kiwibond ahead of its competitors. Consequently, and on the basis of those assurances, Kiwibond duly entered into the variation of lease on 30 July 2004 which was subsequently varied on 16 November 2004.

[14] Mr Bemelman claims that when the original yard was dug up in January 2005 he realised how poor the initial construction of the yard had been. He says that despite instructions given to the contrary crushed concrete had been used as a base and the compaction was as inadequate as the layer of asphalt on top. He claims it was completely obvious that the yard was completely inadequate for its intended use from the outset. He brought these concerns immediately to the attention of AIAL.

[15] After the concrete had been laid Mr Bemelman noticed that it was so slippery when wet that it was like operating on ice. When the yard was finished in March 2005 AIAL, according to Mr Bemelman, was attempting to sandblast the yard in order to rough up the surface. Mr Bemelman also claims that because of delays in completion of the construction of the yard Kiwibond suffered a loss in that customers generating significant revenue went to other contractors.

[16] It is further claimed by Mr Bemelman that AIAL was continuing to work on the yard as late as October 2005 when at that time efforts were made to rough up the surface with a high pressure sand blaster.

[17] There were disputes as to the date for the commencement of the lease. AIAL contended that the lease should commence on 15 March 2005. However, Mr Bemelman contends that the work by AIAL had not been completed by that date.

[18] In a letter to AIAL of 21 March 2006 Kiwibond disputed a claim for back rent of $56,510.88.

[19] Kiwibond has obtained a report from Maunsell Limited. That report was prepared by Mr Craig Ridgley, a civil engineer who is Maunsell's lead technical verifier for all heavy duty pavement designs for both airport and port applications for all Aecom projects in the Australasia region and for all pavement engineering projects undertaken by Maunsell Aecom New Zealand. Following his inspection of the site he comes to the following conclusions:

> **Conclusions**
>
> 11. The original asphaltic pavements were clearly inadequate for there intended use. The majority of these failed within months of occupancy of the site. The remaining asphaltic areas to the south of the site are exhibiting clear visual indications of surfacing fatigue and have received limited use due to mismatched levels and the undulating surface profile not being safe for forklift operations.
>
> 12. The canopy area concrete slab pavements on both sides of the warehouse are inadequate for the container handling loadings occurring and should have been upgraded to the same overall pavement profile and concrete surfacing depth as the adjacent replacement pavements. The extensive cracking of the northern

canopy pavement has been exacerbated as a result of poor construction detailing.

13. The observable pavement distress in the reconstructed pavement areas is due to a lack of suitable construction detailing. The slot drain layout as constructed is fatally flawed; failure as has occurred was an inevitable outcome.

14. Overall the original and replacement pavements implemented would appear to have been constructed to a relatively low quality standard to minimise costs, which in turn has resulted in the extensive defects and failures now observable.

[20] Clause 17.2 of the agreement to lease contains the following provision:

> **Entire Agreement**
>
> The obligations of the parties are exclusively set forth in this agreement and the lessee enters into this agreement entirely in reliance on its own judgment and not in reliance upon any statement, representation or warranty made by AIAL or any agent of AIAL.

Counsel for Mr Bemelman points out that this provision must be subject to s 4 Contractual Remedies Act 1979. That section provides:

> **4. Statements during negotiations for a contract** (1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question-
>
> (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
>
> (b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or
>
> (c) Whether, if it was a representation, it was relied on – the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.
>
> (2) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question whether, in respect of any statement, promise, or undertaking made or given by any person, that person had the actual or ostensible authority of a party to make or give it, the Court shall not, in any proceedings in relation to the contract,

be precluded by that provision from inquiring into and determining that question.

(3) Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908, this section shall apply to contracts for the sale of goods.

(4) In any proceedings properly before a Disputes Tribunal, this section shall not limit the powers of the Tribunal under section 18(7) of the Disputes Tribunals Act 1988.

[21] It is submitted that in the circumstances of this case it is not fair and reasonable that the provisions of the agreement should be conclusive between the parties because:

a) The representations as to the standard of workmanship and the loading capacity of the yard being constructed by AIAL and subsequently repaired by AIAL had serious consequences to Kiwibond.

b) The failure of the yard was disastrous to Kiwibond given the nature of its business as a bonded cargo operator. In particular the catastrophic failure of firstly the asphalt yard and then the repaired yard and extension caused serious disruption and losses to Kiwibond.

c) The rental is for a significant sum and calculated having regard to the extra expense in constructing premises for Kiwibond's requirements.

[22] Consequently, it is submitted on behalf of Mr Bemelman that Kiwibond has a defence and a viable counter claim and set-off based on the representations that induced Kiwibond to enter into the contract which have been proved to be false.

[23] It is also submitted that AIAL's failure to provide a yard suitable for Kiwibond's purposes resulted in a substantial breach by AIAL resulting in a derogation of grant justifying a claim by Kiwibond for damages.

[24] It is also submitted that the no set-off clause should not apply in this case where there has been such a blatant breach by AIAL of its obligations to provide Kiwibond with suitable premises. In this respect references are made to a report

produced by AIAL from Alexander & Co as to building defects in the construction of the premises. That report was prepared following an inspection on 21 February 2007 and identifies a number of building defects which are classified as construction issue. Building defects falling within that classification are:

a) Cracks in various concrete panels forming hard standing (north, south and east sides), concrete chipped – cracking next to control joints – north side.

b) No drainage provision from motorised gate channel northwest entrance.

c) Motorised gates inoperative, northwest and southwest entrance.

d) PVC downpipes from roof gutters damaged at base (gap at base of steel protection shields) north and south sides.

e) The concrete filled steel bollards next to bay doors are set in line with the door reveal thereby offering little protection to the door reveal liner.

f) Damage noticed to southwest door reveal liner.

g) Concrete broken away and cracked at drain sump next to northeast roller shutter door.

h) Hard-standing on east side and at the northeast side and at the northeast corner has rough surface finish reportedly created by water-blasting to form anti-strip surface originally tar seal installed but gravelled to leave very smooth surface which was a slip hazard.

There are a number of other construction issues listed in that report.

[25] Consequently, it is submitted that given the catastrophic failure of the yard to allow AIAL to rely on the no set-off clause is to allow it to avoid coming under any

contractual obligations at all. It seeks to proceed to demand rent and other outgoings without any recognition of its misrepresentations and fundamental failure to provide the premises as it had contracted for.

[26] Furthermore it is submitted that AIAL has in the circumstances of this case waived the no setoff clause. The circumstances justifying a conclusion that there has been waiver are as follows:

a) Intimations at meetings between Mr Bemelman and representatives of AIAL Limited in 2007.

b) The fact that AIAL did not take proceedings nor evict Kiwibond when the rent fell into arrears. They allowed the situation to carry on for almost two years from 2006 to 2008.

c) AIAL's conduct was such that it conveyed to Mr Bemelman that they accepted it was responsible for Kiwibond's loss of profits – damages which could be brought into account rather than AIAL seeking to strictly require payment.

d) The circumstances which include correspondence between the parties and reference to the report from Alexander & Co listing 58 construction defects result in a conclusion that AIAL by its conduct has accepted that the issues that Kiwibond had properly raised would be taken into account in any claim for rent.

[27] In summary, counsel for Mr Bemelman submits that AIAL has been in breach of the representations it made to induce Kiwibond to enter into the contract to lease the premises, has because of such breach waived the requirement for Kiwibond to pay rent, and because of its breaches of the arrangement AIAL has derogated from its grant to Kiwibond. It is therefore submitted that Kiwibond has a defence and also a set-off or counter claim that is equal to or greater than the rent and other outgoings being sought by AIAL. Mr Bemelman being a guarantor is entitled to rely upon the same defences as Kiwibond. It is further submitted that because of AIAL's breaches

of the lease AIAL cannot maintain an action for damages against Kiwibond and Mr Bemelman.

Case for Plaintiffs

[28] It is emphasised on behalf of the plaintiffs that the no setoff clause contained in the lease precludes Kiwibond and Mr Bemelman to raising a counter claim or set-off in defence of the application for summary judgment.

[29] It is also emphasised on behalf of AIAL that the entire agreement clause contained in paragraph 17.2 of the agreement precludes Kiwibond and Mr Bemelman from relying upon any representations that preceded the parties entering into the agreement.

[30] It is further argued on behalf of the plaintiff that the plaintiff has not derogated from the grant nor is there evidence that the plaintiff has waived its claim for rent.

[31] It is further submitted that because of Kiwibond's breach of the lease AIAL was entitled to forfeit the lease, re-enter the premises and to maintain its action for damages against Kiwibond and Mr Bemelman for Kiwibond's breach of lease. Those damages include the cost of making good damage caused to the premises by Kiwibond and loss of profit suffered by AIAL because of its inability to obtain rentals at the same level as the rentals that would have been paid by Kiwibond.

Decision

[32] There is a complete conflict between the evidence of AIAL on the one part and the evidence of Kiwibond and Mr Bemelman on the other part as to the damage to the premises leased by AIAL to Kiwibond. AIAL maintains that the damage has been caused by Kiwibond's improper use of the premises and consequently Kiwibond must be liable for the cost of re-instatement. On the other hand Kiwibond

claims that the premises were not constructed to the required standard. If Kiwibond is correct then it cannot be liable for any damages to AIAL.

[33] In the circumstances of this case it would be completely inappropriate in summary judgment proceedings to attempt to determine whether clause 17 of the agreement to lease (the entire agreement clause) precludes Kiwibond from bringing proceedings against AIAL for misrepresentation. For that issue to be determined pursuant to s 4(1) (c) the Court has to consider whether it is fair and reasonable that clause 17.2 should be conclusive between the parties having regard to all the circumstances of the case including the subject matter and value of the transaction, the respective bargaining strengths of the parties and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

[34] In the circumstances of this case circumstances to be considered by the Court would include the fact that the agreement was entered into following the construction of the premises when the yard did suffer damage. In particular the Court would need to consider whether the initial damage was caused by improper construction and whether as claimed by Kiwibond and Mr Bemelman, Kiwibond was in a vulnerable position having moved its premises and needing urgent action to remedy the defects it claims were having a disastrous effect on its good will. Summary judgment proceedings are not appropriate to resolve such issues of fact.

[35] Consequently, Kiwibond and Mr Bemelman have a defence to AIAL's claim for rent, payment of other outgoings and damages for breach of the lease.

[36] In any event, there is evidence which if accepted establishes waiver of full rent by AIAL. In this respect it is significant that AIAL took no positive step to recover rent arrears for almost two years. Such conduct could be explained by AIAL's acknowledgement of fault in the construction of the yard and premises. However, that is a matter which can only be resolved after a hearing where the Court has the benefit of evidence with cross examination of witnesses.

[37] During the course of these proceedings counsel for Mr Bemelman put in issue whether a practical completion certificate had been issued. In an affidavit sworn on 27 July 2009 AIAL produced a copy of a practical completion certificate issued by the architect on 7 April 2003. Clearly that practical completion certificate was issued in respect of the lease executed by the parties on 17 April 2003. That lease was surrendered when the parties entered into the agreement on 30 July 2004. In terms of that agreement the area leased was changed and AIAL undertook to complete certain works. The practical completion certificate issued in respect of work completed in April 2003 can have no relevance to the arrangements the parties entered into on 30 July 2004. In terms of the agreement they entered into on that occasion AIAL was to complete certain work with all reasonable speed in a proper and workmanlike manner and substantially in accordance with final plans and specifications. The lease commences from the practical completion date. The practical completion date means the date practical completion is certified by the architect. No certificate of practical completion has been supplied in respect of the work to be undertaken by AIAL in terms of the agreement of 30 July 2004. Consequently, at this stage AIAL cannot even establish a date for the commencement of its lease to Kiwibond.

[38] The no set-off clause is clearly limited to claims for rent under the lease. AIAL must establish that the lease has commenced to recover that rental. The no set-off clause can have no application to claims for other outgoings or damages.

[39] In the circumstances I have outlined I cannot conclude that Mr Bemelman has no defence to AIAL's claim. Consequently, the application for summary judgment must be dismissed.

[40] Pursuant to *NZI Bank Limited v Philpott* [1990] 2 NZLR 403 unless there are some exceptional circumstances including some fault on the part of the plaintiff cost should be reserved on the dismissal of an application for summary judgment. There are no circumstances in these proceedings which would justify an order for costs against the plaintiff at this stage. Adopting the principle set forth in *NZI Bank Limited v Philpott* costs will therefore be reserved.

[41] The defendant will have 25 working days from delivery of this judgment to file his defence. The Registrar should arrange a judicial case management conference by telephone to consider further directions. The date and time of that conference being after the time fixed for the filing of the statement of defence.

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Associate Judge Robinson