IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-000707

BETWEEN	JOHN BOYD MULHOLLAND JAMES DESMOND WALL PETER DONALD SMITH JAMES DESMOND WALL KNOWN AS THE WESTWOOD INVESTMENT PARTNERSHIP Plaintiff
AND	WAIMARIE INDUSTRIES LIMITED Defendant

Hearing: 15 May 2009

Appearances: B M Nathan for Plaintiff
A N Riches for Defendant

Judgment: 15 May 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

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[1] The landlord in this proceeding, Westhaven Investment Partnership (Westhaven), seeks an order under s251 of the Property Law Act 2007 for possession of leased premises on the grounds of non-payment of rent. The tenant, Waimarie Industries Limited (Waimarie), concedes the rental is in arrears but applies for relief against cancellation of the lease under s253 of the Property Law Act 2007.

Factual background

[2] Westhaven is the owner of premises situated at unit B, 11 Parkhouse Road. Waimarie leases the premises, where it carries on the business of manufacturing

packaging and warehousing health and food products. The lease is pursuant to a deed of lease dated 22 April 2005.

[3] The lease is in standard ADLS terms (4th ed). It commenced on 13 December 2004 for a term of six years, with two rights of renewal for terms of three years each. Under the deed of lease, the annual rental is $55,200 (plus GST).

[4] On 22 April 2005, the parties entered into a separate but identical lease on an adjacent unit, unit 11C.

[5] By its own admission, Waimarie was over committed and struggled to keep up with its rental payments. In 2008, the lease on Unit 11C was cancelled and a new tenant found.

[6] On 26 January 2009, Westhaven served Waimarie with a notice of cancellation and re-entry pursuant to s245 of the Property Law Act 2007. The notice required payment of the sum of $16,072.81 calculated as being the rental arrears inclusive of GST from January 2007 until January 2009.

[7] Between 20 February 2009 and 16 March 2009, payments totalling $12,300 were made. There have however been no payments made since then.

[8] Peaceable re-entry proved not possible and accordingly on 7 April 2009 Westhaven filed an originating application in the High Court seeking an order for possession of the premises pursuant to s245 of the Property Law Act 2007.

[9] On the day the application first came before the Court, Mr Lee, who is a director and shareholder of Waimarie, appeared on behalf of the company. He presented a letter which Fogarty J was prepared to accept as constituting an application for relief against cancellation under s 253 of the Property Law Act.

[10] The letter stated:

> Late on Friday the 24th of April we received a conditional general agreement offer with regards to the sale of our Company and it's [sic] assets as a going concern, one condition being sight of facilities and assets on Saturday 2nd

> May 2009. It is imperative that the company continues to operate from the current compliant factory. We are working towards a fast settlement to favour the landlords and this has been verbally agreed to for a settlement on the 5th of May 2009. Although the settlement of some funds is on 5th May it is anticipated that the set-up and structure will be completed as of the 1st June 2009.
>
> This sale will allow for a substantial arrears payment towards unit B and will also provide regular rent payments from the 5th May 2009.

[11] The matter was then adjourned for a conference call before me on Monday 4 May. During the conference call, Mr Lee told me a group of prospective buyers were arriving in Christchurch that day and that he anticipated receiving an unconditional offer from them "very shortly".

[12] Following the conference call, the parties filed further affidavits and a fixture was obtained

[13] There is now owed the sum of $28,617.93 (excluding interest) together with solicitor/client costs of approximately $6000.

[14] Applications for possession are governed by s254.

[15] It is common ground the s254 pre-requisites are satisfied and that accordingly unless the application for relief is granted, Westhaven is entitled to an order for possession

[16] Waimarie is not able to pay the outstanding rental immediately, but says it will be able to do so in three weeks time via either one of two ways

(i) it has an offer subject to due diligence from a Mr McHerron to purchase and restructure the assets of the company

(ii) or failing this (and only as a last resort if absolutely necessary) Waimarie has an offer of finance from a finance company which it is said will enable it to restructure, pay rental arrears and continue trading.

[17] According to an affidavit filed by Mr Lee, the terms of the agreement with Mr McHerron are that Mr McHerron is to establish a new company with a 60% shareholding held by himself personally, and 40% shareholding held by the current shareholders of Waimarie. Under the proposal, Mr McHerron will advance $160,000 in exchange for 60% of the shares. The capital injection will be used to settle the current bank security over the company assets, pay all rental arrears to the plaintiffs, and secure a new lease for the company. In addition to Mr McHerron, Waimarie says there is another second prospective purchaser who has expressed strong interest although these negotiations are said to be still in an early stage.

[18] Originally, the application for relief also relied on what Waimarie contended was a genuine dispute about the level of the rental and outgoings. However, in light of further information supplied by Westhaven in its reply affidavit, counsel for Waimarie, Mr Riches, accepted the issue was no longer being pursued as part of the application for relief.

[19] Waimarie contends that if it is forced to vacate the premises, the purchase of the company assets is highly unlikely to proceed and as a result the rental arrears will not be able to be paid. The granting of relief is the only viable option to both prevent the collapse of Waimarie as a functioning enterprise operating from unit 11B, and ensure the plaintiffs have their rental arrears repaid. It is argued that granting relief will thus be to the benefit of both parties.

[20] Mr Lee's affidavit concludes by saying the arrangement entered into with investors finance companies and potential purchasers will provide the plaintiffs with security for the payment of their arrears and prevent the plaintiffs suffering financial loss.

[21] Waimarie seeks an order that relief is granted conditional on it paying all outstanding rental and outgoings within a period of three weeks from the date of the order.

[22] For its part, Westhaven strongly opposes the application for relief against forfeiture on the following grounds:

1. There has been a history of default, with Waimarie consistently in arrears throughout the term of the lease.

2. There is no certainty as to eventual payment, only vague potential.

3. There is real uncertainty as to Waimarie's ability to meet its ongoing liability, and it would be unfair for Westhaven to have Waimarie inflicted on it as a tenant on an ongoing basis.

Relevant legal principles

[23] The principles relating to applications for relief against forfeiture (or cancellation, as it is now called) are well established and can be summarised as follows:

1. Where the breach consists solely of a failure to pay rent, there is a presumptive right to relief on payment of the arrears and costs. It is only in exceptional circumstances that relief is to be denied if the debt is paid in full (*Gill & Anor v Lewis & Anor* [1956] 2 QB 1; *Yoo v Dominion Income Property Fund Limited* HC Auckland CIV-2005-404-003239, 13 July 2005, Venning J; *Eason*; *Treka Developments Limited v Leeman Jackson Limited* HC Auckland CP13871/88, Thorpe J).

2. This is because it is inequitable that the benefit of the lease should be lost to a tenant who has restored to the landlord all that the landlord is entitled to under the lease. The ability to forfeit the lease and take possession is regarded by the Court as security for payment (*Endeavour Lodge Motel Limited v Langford & Gavin* HC Auckland CP3/98, 24 August 1998, Elias J).

3. Where, however, it is clear the tenant is hopelessly insolvent, the Court will not grant relief as a general rule (*Inner City Businessmen's Club Limited v James Kirkpatrick Limited* [1975] 2 NZLR 636).

4. Mere suspicion of insolvency is not enough to outweigh the presumptive right to relief on payment of rental and costs (*Guardsman Restaurant (Christchurch) Limited v Victoria Square Estates Limited & Another* HC Christchurch M399/87, 11 December 1987, Tipping J).

[24] In many of the cases, the Court can be seen to be balancing the two principles first that relief will normally be given if arrears and costs are paid and secondly that an insolvent tenant should not be foisted onto a landlord.

[25] In this case, the tenant comes seeking relief without having paid the arrears.

[26] The tenant also comes without disclosing to the Court that another of its creditors has applied for it to be put into liquidation and that the notice of liquidation has been advertised in the newspaper. This was only discovered this morning by Westhaven's counsel, Mr Nathan. Mr Riches advises from the bar that his instructions are the creditor in question has agreed to hold its hand pending the proposed company restructuring.

[27] I must of course, be mindful of the consequences for Waimarie and its shareholders if relief is not granted. I am not without sympathy for Mr Lee. Nor do I doubt the sincerity and strength of his wish to remain in occupation of the leased premises.

[28] However, after careful consideration of all the evidence, and the submissions that have been made, I have decided the application for relief should not be granted.

[29] I have reached that conclusion for the following reasons:

i) In cases where the Court has granted relief, either the money has been paid or there is a high degree of certainty which is simply absent in this case.

ii) The documentary evidence before me suggests that Mr Lee is overstating the position as regards the McHerron proposal. A letter from Mr McHerron's accountant to Waimarie's bank says only that he is interested in buying:

> Mr Colin Lee has advised us you require written confirmation that our client Mr B S McHerron is considering investing in the business of Waimarie Industries Limited.
>
> We hereby confirm that our client is interested in the business. Obviously the Company will need to be restructured and if our client proceeds it will probably be necessary for a new Company to purchase the assts of Waimarie Industries Limited. Mr McHerron is unlikely to require any finance from your bank.
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> Mr McHerron will be in Australia next week, whilst the writer will be out of Christchurch for the first three days of the following week. Due diligence will not be able to be completed until after the writer returns. We expect to be able to confirm by 22 May whether Mr McHerron will be investing in the business.
>
> We trust you will not take any action in the mean time. The writer should be pleased to discuss any issues with you.

Mr Riches submitted that I should view this letter as a letter from an accountant being overly cautious. I am not prepared to do that. I consider it much more likely that this is a situation of an accountant trying to be accurate and not mislead a bank, while also trying to be helpful to Waimarie.

iii) I consider there was the same element of overstatement in Mr Lee's letter to the Court where he talked about the existence of an agreement and settlement on 5 May.

iv) There is an offer of finance, a copy of which has been provided to the Court. However, I accept Mr Nathan's submission that if Waimarie had been serious or realistic in its endeavours to repay the plaintiff, then refinancing would have been arranged months ago to enable this to occur. I also consider Mr Nathan was right to be critical of the lack of information provided as to the extent of the company's indebtedness.

v) There is more than a mere suspicion that this company is in a parlous financial state. It is clear from the letter written by Mr McHerron's accountant that the bank is contemplating taking action against the company, and of course there is the notice of liquidation.

[30] I accept that the mere fact a tenant has to borrow money to pay the arrears of rent is not in itself necessarily fatal or significant. The authority for that proposition is the decision of *Eason v McIntosh* HC Auckland A1642/85, 11 July 1986, Wylie J. However, the facts in that case are very different to the ones here. There, the tenant was able to provide the Court with a letter from the plaintiff's bank confirming that arrangements had been made for immediate payment of the full amount of the arrears as soon as the order for relief was granted. The Judge also noted in his decision there was no suggestion that the plaintiffs were in any way approaching insolvency.

[31] I also accept that a Court cannot be expected to protect a landlord against ordinary commercial risks of a tenant's future insolvency. However the facts of this case go beyond that.

[32] In my view, having regard to all the information that was put before me, I have come to the conclusion that it would inequitable for Westhaven to have Waimarie inflicted on it as a tenant on an ongoing basis.

[33] I am therefore not prepared to grant the application for relief. It is accordingly dismissed.

[34] It follows there will therefore be an order for possession.

Costs

[35] As regards costs, Mr Nathan advises that Westhaven's solicitor/client costs in these proceedings amount to $5374 plus GST, together with disbursements of $478.75.

[36] Mr Riches concedes that those are reasonable costs. I agree. Under the lease Westhaven is entitled to full solicitor/client costs, and accordingly I order that costs in the amount sought should be paid by Waimarie to Westhaven.

Solicitors:
White Fox & Jones, Christchurch
Saunders & Co, Christchurch