IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CIV 2018-012-000111
[2018] NZDC 26384

BETWEEN	NORMAN JAMES WOOD and COOK ALLAN GIBSON TRUSTEE COMPANY LIMITED as Trustees of the INTERNATIONAL BIOTECHNOLOGY INVESTMENT TRUST Plaintiff
AND	J S AUTOMOTIVE DUNEDIN LIMITED First Defendant
	PETER JOHN STADYNK and JULIE ANNE STADYNK Second Defendant

Hearing: 5 December 2018

Appearances: S Currie for the Plaintiff
AW Belcher for the Defendants

Judgment: 19 December 2018

RESERVED JUDGMENT OF JUDGE A P CHRISTIANSEN

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[1] The plaintiffs have applied for summary judgment against the defendants upon the plaintiffs' claim to recover arrears of rent totalling $29,644.57 including legal costs and interest of $6,392.07.

[2] The second defendants have been sued upon their guarantee of the first defendant lease obligations.

Background

[3] The parties' lease commenced on 15 April 2016. It is pleaded no rent has been paid since 8 September 2017. A statement of defence has been submitted in opposition to the summary judgment filed on behalf of the first defendant. It claims that Clause 10.1 of the agreement provides that payment of rent was contingent upon the plaintiffs' having completed certain works, namely:

1. The finishing of an alarm system to operational level; and
2. The painting of demarcation lines of tenant parking spaces.

[4] By way of counterclaim/set off, the first defendant pleads the plaintiffs' failure to do those works has caused stress and inconvenience, disruption of the first defendant's business, the voiding of the first defendant's insurance policy and the frequent inability to use car parks in the leased building leading to disruption and business loss.

[5] It is also pleaded that in the course of pre-contract negotiations, assurances were sought that the leased premises were water-tight; that those premises were not water-tight and losses have occurred.

[6] The defendants plead that during periods of rain the roof leaked and a drain outside the building backed up resulting in, inter alia, a slippery surface and a danger to power tool usage.

[7] It is also pleaded that these failures caused a loss of customers, and ill health to the second defendants due to them being unable to carry-out the first defendant's business.

[8] Evidence in support of the defendants defence and opposition to summary judgment was provided by the first named second defendant, Mr Stadynk.

[9] Mr Stadynk deposes that when he first viewed the leased premises he sought an assurance from Mr Wood (the first named plaintiff) "in relation to water-tightness" and was informed that while the building had water and leaking issues previously, that

tens of thousands of dollars had been spent and there was since no problem with water ingress. Mr Stadynk says he made it "absolutely clear to Mr Wood that this assurance was very important due to the nature of the business" and that the first defendant would be operating from the leased premises – that the intended client base included persons who owned classic and collectable cars and motorbikes.

[10] Mr Stadynk has provided a copy of an email from Mr Senior, the letting agent which notes, in response to an email from Mr Stadynk:

> My recollections are getting rather faint now as it was some time ago.
>
> But I do recall the question being asked as to any water ingress to the premises.
>
> But no more detail about that question.

[11] In another email from Mr Senior, he notes:

> The only note I had about the premises is just detailing work needed as follows:
>
> Need the wall built, all walls finished painted, floor painted, kitchen bench installed, 3 phase, and carpet in middle office. They will do up the front office.

[12] Mr Stadynk says the premises were not water-tight; that the first defendant moved into the premises in April 2016 and rent was paid monthly until November – December 2016 when a "massive flood occurred".

[13] Mr Stadynk deposes that having received an assurance that the flooding would be fixed, monthly rental was paid until the February – March 2017 period, when there was another "massive flood".

[14] Mr Stadynk says that following further assurances, rental payments were recommenced until another flooding occurred. Following this, there was a meeting with Mr Wood when a rent decrease was requested.

[15] Mr Stadynk then provides details of the damage caused by the water ingress. That included references to the premises becoming damp and affected by mould, which in turn affected Mr Stadynk's health, and created an element of concern due to the slippery floor surface. He deposed, having spent more time clearing rain water than he was able to spend working.

[16] The issues were pursued by email correspondence in August 2017. Those claim Mr Wood having contacted an alarm company to ignore any alerts over certain days affecting certain parts of the building including that occupied by the first defendant; and that it affected the first defendant's occupation insurance cover.

[17] Reference is made to correspondence between Mr Wood and Mr Stadynk which referred to the possibility of the parties meeting to resolve their issues.

[18] As earlier noted, the defendants filed a counterclaim/set off. The plaintiff's counsel comments that it is unclear whether a defence has been filed by the second defendants. The first defendants statement of defence pleads that the payment of rent was contingent on the plaintiff having completed certain land works, i.e. finishing of alarm system to operational level and painting parking space demarcation lines.

[19] It is pleaded that due to these failures, there was no obligation of the first defendant to pay rent.

[20] The counterclaim/set off claim asserts losses occurred which were due to the aforesaid failures and should be available in opposition to the plaintiff's claim.

[21] It is also claimed that during the course of pre-contract negotiations, that, inter alia, the leased premises were water-tight.

[22] In response, there was, on behalf of the plaintiff an application filed objecting to the jurisdiction of the Court to hear and determine the matters raised by way of set off/counterclaim. The objection was based on clause 43.2 of the Deed of Lease which provides:

> Unless any disputed difference resolved by mediation or other agreement within 30 days the dispute or difference arising, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 or any other statutory provision then relating to arbitration.

[23] The primary focus of the summary judgment application is about whether set off or counterclaim is arguable upon the plaintiff's summary judgment application. To consider that position the Court will review the terms of the parties' contract.

The contract

[24] An agreement to lease was signed on 6 April 2016. It provides, inter alia:

> 4.1 The tenant shall enter into a formal lease with the landlord to be prepared by the landlord's lawyer …
>
> 4.2 Unless otherwise set out in the third schedule, it is agreed that the Landlord's fixtures, fittings and chattels contained in the premises as more particularly described in the Forth Schedule are in a good state of repair.
>
> 4.3 Notwithstanding that the Lease may not have been executed, the parties shall be bound by the terms, covenants and provisions contained in this agreement and in the Lease, as if the Lease had been duly executed.
>
> …
>
> **10. Landlord Works**
>
> 10.1 The Landlord agrees to undertake the works outlined in Clause 10.2 below ("Landlord Works"). The Landlord Works shall be completed at the landlord's sole cost and the landlord expects to have completed the Landlord Works by the Commencement Date of this Lease. However, if the Landlord Works have not been completed by the Commencement Date of this Lease then the tenant shall not be required to pay rent until the Landlord Works are completed. Notwithstanding that the tenant shall not be required to pay rent until the Landlord Works are completed, the tenant shall continue to be bound by the terms of this Lease including the requirement to pay the deposit and outgoings.
>
> 10.2 The Landlord agrees to undertake the following work:
>
> a) Complete the end tenancy wall;
>
> b) Install sink bench beside toilet room;
>
> c) Paint the interior walls white;
>
> d) Paint the floor (with the assistance of labour provided at no cost by the tenant):
>
> e) Supply 3-Phase power to workshop wall;
>
> f) Ensure adequate lighting to the workshop;
>
> g) Finish alarm system to operational level;
>
> h) Install carpet in the switchboard room;
>
> i) Paint boundary lines on the yard areas to demarcate what parking/yard is available to the tenant;
>
> j) Install new handle and lock on the exterior of the store;

k) Install heat pump which shall be provided by the tenant.

[25] In response to pre-proceeding claims of misrepresentation, the plaintiffs' solicitor wrote to the defendants rejecting claims of misrepresentation of the condition of the building prior to the lease. It was asserted Mr Wood did everything he could to help the defendants make a good start to their business, offering generous concessions on rent and agreeing to carry out the various works – all of which were completed. As the solicitor noted, the building was an old one and that it could not have been beyond the defendants' comprehension or foresight that maintenance issues could and would arise from time to time. Claims of "dishonest actions" and "unlawful entry" were rejected, as were claims that the security alarms had been disarmed. As the solicitor noted, had the tenant considered a landlord had breached obligations in any way, then a right of dispute arises, but that first mediation must be initiated – a possibility that then remained open to the defendants.

[26] Noting that the rent was in arrears, the solicitor said, none of the complaints provided a right to withhold or reduce the rent – the obligation to pay rent was independent of any other covenant in the lease.

[27] Evidence was provided on behalf of the plaintiffs, including from a manager who said she did not recall any approach with complaints about lines not being painted on the tar seal; at no time did the tenants cars block access to other units. Evidence from a security specialist referred to a security system being installed at the leased premises in 2016 which had been tested and was fully operational on 28 April 2016; that during August 2017 there had been a number of false alarms and alerts at random times that required technicians to attend on various occasions but that no other problems had occurred.

Considerations

[28] Issues for defence concern legal liability to pay. They do not concern the plaintiffs' calculation of the sum of $18,747.85 of outstanding rent. The balance of the claim includes interest and legal costs.

[29] Relevant summary judgment principles are well understood. The summary judgment process does not attempt to resolve genuine issues of fact, nor does it determine issues of credibility without good reason. Rather the process considers whether this is a case that can be determined and judgment can be granted notwithstanding argument to the contrary, including by set off and/or counterclaim.

[30] The parties agree they are bound by the terms of the written agreement/lease. The defendants argue that rent is not payable at all because the Clause 10 Landlord Works obligations had not been completed. Further, it is argued the first defendant had an equitable set off on account of misrepresentations and/or breaches by the landlord.

[31] The plaintiffs' position is that the Clause 10 defence must fail as a matter of law because it is not supported by the facts. Further, there is no plausible claim of a set off.

[32] Clause 10 required certain works to be completed prior to the lease term commencing. The first defendant now claims that issues, including whether or not unpainted car park lines, provided a right not to pay rent. It seems in fact that aspect was first raised only upon the defence filed in this proceeding.

[33] The first defendant began paying rent from 9 May 2016. The Court agrees with the plaintiffs' position that the operative effect of the rent rebate scheme in Clause 10 had then run its course. Therefore, that Clause could not be interpreted as allowing a tenant the right to retro-respectively revisit whether rent was payable, after it had started paying. Therefore, the first defendant effectively waived its rights and accepted the rental credit that had been provided to 9 May.

[34] The Court notes that the first defendant only raised the issue of liability under Clause 10.1 for the first time when it filed the statement of defence on 6 July 2018 and by then the lease had long since come to an end.

[35] Primary issues alleging contractual failure, include:

(a) The Clause 10.2(g) requirement that the landlord "finish [the] alarm system to operational level"; and

(b) The Clause 10.2(i) requirement to paint a boundary line around the yard area to demarcate what parking/yard was available to the tenant.

[36] Regarding the alarm system and as earlier noted, the contractor in question engaged confirmed the system had been installed and was tested and was fully operational as at 28 April 2016. Claims on behalf of the defendants appear to relate only to the quality of the system. Also, it is claimed, no issue was ever raised by the defendants about the alarm until August 2017, i.e. 15 months after the lease payments began.

[37] Regarding the complaints about unpainted boundary lines to demarcate car parking space, it is claimed by Mr Wood that the lines were not painted because the parties themselves decided that was unnecessary. There is no record of any defendant concern raised until service of the set off claim.

[38] The defendants raised counterclaim issues by way of opposition. The plaintiff objected, citing Clause 43.2 of the Deed of Lease, which provides –

> … Unless any dispute or differences resolved by mediation or other agreement within 30 days of the dispute or difference arising, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996, or any other statutory provision in relating to arbitration.

[39] As plaintiffs' counsel notes, there has been no referral to arbitration. Also, this does not preclude the right of the plaintiffs to continue with its claim for rent and outgoing, for Clause 43.4 provides –

> … The procedures prescribed in this Clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable under this lease which remain unpaid or from exercising the rights and remedies in the event of the default prescribed in sub Clause 28.1.

[40] It is clear that the Court has jurisdiction to hear and determine the summary judgement claim without dealing with the matters raised by way of defence, or by any set off or counterclaim. Further, there is no basis for a set off or counterclaim because of the express terms of the lease; that the purpose of the proviso in Clause 43.4 is to ensure that, in the event of a dispute, an independent claim for payment amounts can still be made.

[41] Counsel for the plaintiff submits the lease precludes an equitable set off claim. Regardless, counsel submits those set off claims cannot/should not persuade this Court to grant summary judgment.

[42] The Court accepts that submission. The first of the set off claims relating to a claim of a breach of Clause 10, is of a trivial nature, i.e. relating to the non-painting of car park spaces. The second claim addressed the adequacy of the alarm system that had been installed. Those claims are supported by submissions that the first defendant has suffered unquantified losses due to stress, the voiding of an insurance policy and the inability to use the car park. As counsel for the plaintiff notes, there is no evidence provided in support of those claims. Such is required in defence of a summary judgment proceeding.

[43] It is also pleaded by way of set off that the plaintiff misrepresented the weather tightness of the building.

[44] Mr Stadynk pleads reference to "massive floods" having occurred. Clearly, those claims relate to a period about 6 months after the first defendant had assumed occupation. It seems to fall far short of supporting a claim that the condition of the building had been misrepresented at the time the lease was entered into. Also, the defendants face difficulties in dealing with Clause 38.1 of the Deed of Lease which provides:

> No warranty of representation expressed or implied has been, or is made by the Landlord that the premises are suitable or will remain suitable or adequate for use by the tenant or that any use of the premises by the tenant will comply with the by-laws, ordinances or other requirements of any authority having jurisdiction.

Conclusions

[45] Any issues arising upon the defence/set off or counterclaim of the defendant do not persuade the Court from entering judgment for arrears of rent and for interest upon those arrears. Judgment will be entered against the first and second defendants accordingly.

[46] The Court does have concern regarding the claim for legal costs by reference to an invoice dated 31 July 2018. In that, reference to professional services as provided is vague and remote. Those costs appear to relate to matters which were the subject of these Court proceedings. If not then that position needs to be clarified.

[47] Presently the Court is of the view that costs should be fixed on a 2B basis.

[48] Further submissions from Counsel is invited in this regard.

Judgment

[49] Judgment will be granted against both the first and second defendants for outstanding rent and out-goings of the lease to the date of judgment.

[50] Interest on those lease arrears shall be paid at the contract rate of 14% per annum, to the date of judgment.

A P Christiansen
District Court Judge