IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-8
[2013] NZHC 1067

	BETWEEN	THE CORNWALL PARK TRUST BOARD INC Plaintiff
	AND	YONG XIN CHEN Defendant

Hearing: 2 and 7 May 2013

Counsel: JGH Hannan and LBC Simpson for plaintiff
JA Wickes for defendant

Judgment: 13 May 2013

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

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Introduction

[1] This case involves the termination of a lease which is perpetually renewable and which is part of the endowment lands held by the plaintiff charitable trust.

[2] The plaintiff is a charitable trust that was incorporated under the Charitable Trusts Act 1957. It acquired the properties of earlier trusts.

[3] The historical position relating to the plaintiff's land owning was briefly summarised by the Supreme Court as follows:[1]

> [24] In 1901, Cornwall Park in Auckland was gifted by Sir John Logan Campbell to the Cornwall Park Trust Board. With a view to providing endowment income for the Trust Board, Sir John later transferred an additional 58 hectares of adjoining land to the Board. This land was subdivided and, between 1910 and 1923, the Board leased (for perpetually renewable terms of 21 years) 115 residential sections to individual lessees at agreed ground rentals. In due course the lessees constructed homes on, and made associated improvements to, the sections. The leases provide a formula for calculating the rent on renewal.

[4] The nature of these leases was also summarised by the Supreme Court as follows:

> [25] Long-term ground leases (usually of 14 or 21 years) renewable in perpetuity with rent calculated either by an assessment of fair or market rent (or some similar concept) or, as in this case, as a percentage of a sum established pursuant to stipulated valuation exercises, are referred to as Glasgow leases. They were mainly put in place in the 19th and early 20th centuries. A Glasgow lease is, in economic substance, a bond which is revalorised every 14 or 21 years and secured against the demised land. The income generated, while usually a modest return on the value of the land, is very secure and can be expected to increase over time, at each renewal date, as land increases in value. For these reasons, Glasgow leases were seen as providing secure endowment income for charities (such as schools) and public bodies (such as harbour boards). They also facilitated development, enabling those who wished to develop land (and were willing to take the associated risks) to do so without incurring the capital costs of land acquisition.
>
> [26] Glasgow leases proceed on the basis that:
>
> (a) increases in the value of the land due to extrinsic factors are for the lessor's benefit; but

[1] *Cornwall Park Trust Board v Mandic* [2011] NZSC 135, [2012] 2 NZLR 194.

(b) the rent should not be fixed in relation to value due to improvements made by the lessee.

[27] The administration of Glasgow leases, particularly at times when leases fall for renewal, has generated much litigation and has also been the subject of a number of official reports. As will become apparent, we consider that the leading case is *Cox v Public Trustee*. That case was decided in relation to leases issued under the West Coast Settlement Reserves Act 1892. The history and operation of the leases under that legislation were reviewed by a Royal Commission of Inquiry chaired by Sir Michael Myers which reported on 8 March 1948 and by the Waitangi Tribunal, which also addressed separately a similar leasing scheme operating on the West Coast of the South Island. As well, there is the report of Mr Anthony Lusk QC who was appointed in 1992 by the Government to inquire into Glasgow leases of residential land granted in the eastern suburbs of Auckland
(footnotes omitted)

[5] The Supreme Court briefly set out the relevant provisions of cl 13 of the Cornwall Park Memorandum of Leases, which I will refer to later in this judgment. The Supreme Court added that:

> The leases provide for what is to happen should a lease not renew [in which case the lessor is required to offer at auction a new lease, containing the same key terms at the upset rental as calculated according to cl 13 with the cost of the auction borne by the lessee. Any new purchaser must pay the value of the buildings and improvements as calculated to the lessor who holds that sum in trust for the lessee payable on demand, less outstanding rent and other payments] and also for the possibility of forfeiture [should no purchaser take the lease at auction for a rent greater than or equal to the upset rent the land leased with all buildings and improvements absolutely reverts to the lessor. If this happens, the lessor is free from any payment or compensation at all and with no obligation to grant a new lease.] These contingencies have not occurred in the history of the Cornwall Park leases … save for a brief comment later in these reasons, we do not propose to discuss them.

[6] That brief comment appears at [79]a) where the Court said:

> The lease, however, also contemplates the possibility that there may be no purchaser at the upset rental – a recognition that the upset rental may not meet the market. More importantly, it is clear – indeed acknowledged on all sides – that the rent-fixing process was not intended to provide a fair rental formula allowing for the existence and terms of the lease.

[7] This case involves the forfeiture of the lease and may well be the first instance of such forfeiture in relation to the Cornwall Park leases. The forfeiture arises in this case by virtue of the fact that after the arbitration process was completed the defendant elected not to renew the lease.

[8] The case before the Supreme Court involved appellants representing themselves:

> And a significant number of other lessees, challenged the way in which the Trust Board seeks to assess the rent for the new terms which have recently commenced or about to commence. They have been unsuccessful (at least in substance) in both the High Court before Courtney J and the Court of Appeal.

The judgment before Courtney J followed a hearing of 22 and 23 April 2009 and was delivered on 20 November 2009.

[9] Although I do not have the precise date of filing for the High Court proceedings it is apparent that the effect of proposed rent increases had been in the public domain for some time. In an article published in the *New Zealand Herald* on 26 October 2005, the following is provided:

> Proposed rent increases of up to 750 per cent for land around Cornwall Park have left some residents distraught.
>
> The Cornwall Park Trust Board is reviewing leasehold ground rents on 27 of its 119 properties around the Campbell Rd and Maungakiekie Ave area which backs on to the park.
>
> The board has been unable to review rents on many of its residential sections for a long time because they are on 21-year leases.
>
> After years of frozen rents, residents are horrified at the revised rents being demanded.

The article then describes in greater detail the reasons for the rent increases and the position taken by the Trust Board and the concerns of the lessees. I mention this article because it appeared in the *New Zealand Herald* two months before the defendant purchased the leasehold interest which is the subject of this proceeding.

The application

[10] The plaintiff applies for summary judgment. Its claim relies on the termination or forfeiture of a lease in which the plaintiff was lessee and the defendant was lessor.

The causes of action

[11] There are three separate causes of action.

[12] Under the first cause of action, the plaintiff seeks judgment for $173,323.64. That sum represents the rent allegedly due for the period 30 March 2009 to 16 November 2011. The figure is what is described in the lease as "the upset rental sum due". It is the rent fixed by arbitration at the expiry of the lease and in respect of a new period commencing on the expiry of the old term and while the defendant remained in possession of the property. The plaintiff relies on cl 13(t) of the lease in respect of this cause of action.

[13] Under the second cause of action, the plaintiff seeks judgment for $7,557.63 being the costs of marketing and auctioning a property, and $11,184.25 being the legal costs associated with preparing the property for auction. It claims that these costs were incurred as a result of the defendant notifying its intention not to take a renewal of the lease based on the new rental fixed at arbitration. The plaintiff relies on cl 13(k) of the lease.

[14] Under the third cause of action, the plaintiff seeks judgment for $167,404.00 for the estimated cost of repairs to reinstate the property and the costs of the report obtained for this purpose. The plaintiff relies on cl 5 and 7 of the lease.

The grounds pleaded in opposition

[15] In respect of the claim made in the first cause of action, the defendant raised two grounds in opposition.

[16] First, the defendant alleges that the defendant was misled or deceived by the plaintiff because the plaintiff represented by the issue of rent invoices that the rent payable for the period 30 March 2009 to 16 November 2011 was $4,150.00 per six-months. The defendant paid rent at that rate and remained in occupation of the property. The defendant relies on ss 9 and 43 of the Fair Trading Act 1986.

[17] Secondly, the defendant alleges that the plaintiff is estopped from its claim for the additional rent for the period 30 March 2009 to 16 November 2011. It relies on the decision *Central London Property Trust Ltd v High Trees House Ltd.*[2]

[18] In respect of the claim made in the second cause of action, the defendant asserts that there is no obligation in the lease to pay marketing and auction costs where the auction is not conducted in the terms of the time frame specified in the lease. Further, and independently, the defendant alleges that there is no obligation in the lease to pay the legal costs of the auction.

[19] In respect of the claim made in the third cause of action, the defence is substantially a factual one. The defendant denies that there was any breach of the obligation to maintain, and therefore no obligation to reinstate, the property.

Background

[20] The plaintiff trust board owns the freehold title to a property at 21 Maungakiekie Avenue, Epsom, Auckland (the property). The property was, at material times, subject to a 21-year perpetually renewable ground lease.

[21] The lease is essentially of the land only. Clause 4 provides a right for a lessee to construct one dwelling house and associated building on the property. The lease, which is the subject of this proceeding, commenced on 30 March 1988.

[22] The defendant purchased the lease from the original lessee in December 2005. The defendant paid $450,000 for the leasehold interest. The plaintiff consented to that sale. The plaintiff required the defendant to sign a statement as follows:

> I confirm that I have a copy of the ground lease. I understand the terms and contents of the ground lease.

That statement was in fact signed by the defendant and returned by her solicitors to the plaintiff's solicitors.

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[2] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

[23] The plaintiff issued two letters – one dated 5 December 2008 and another dated 25 March 2009. The defendant says that she did not receive these letters. The first letter made reference to the increase in value of the properties over the last few years and that it would impact on the reviewed rent. It referred to the procedure that is to be followed involving valuations and how the new rent was then fixed. It advised the defendant of the name of the Board's valuer. There was no response to it and a second letter, of 25 March, was forwarded covering the same matters. As I have mentioned the defendant denies receiving these letters, although they were addressed to the same place as her other correspondence including the rent invoices, namely to the subject property.

[24] The lease terminated on 29 March 2009.

[25] The rent review process did not immediately advance. The reason for this is referred to by the plaintiff's property manager as being because of the proceedings taken by the other leaseholders and which led ultimately to the decision of the Supreme Court. The plaintiff's property manager advised that by 11 January 2010 the defendant had still not appointed her valuer arbitrator. Correspondence flowed and the defendant appointed an arbitrator and gave notice of that position of 29 January 2010. There were further delays which the plaintiff says arose because of the position adopted by the defendant's arbitrator concerning who was an appropriate umpire. The result was that the appointment of an umpire was not made until 6 September 2010.

[26] The arbitrators issued a decision on an agreed basis. It gave the gross value of the fee simple at $1,850,000 excluding chattels. It valued the substantial improvements at $375,000. It then applied the lease formula for rent for the renewed period of the lease, being five per cent of the gross value less substantial improvements at $73,750. The decision of the arbitrators was formally completed by 17 December 2010. While this process was being undertaken, the defendant remained in occupation of the property.

[27] Correspondence and communications then passed between the plaintiff and the defendant, which will be referred to later in this judgment. Of some importance

to the defendant's case, however, is a letter received from the plaintiff trust board, dated 7 February 2011. It referred to the invoice for $4,150 being ground rent for six months commencing 30 March 2011 and added:

> Please note that this invoice is not in conflict with recent correspondence concerning the Trust Board's offer of a new lease at a ground rent of $73,750 per annum. Your lease expired on 29 March 2009, and the lease agreement requires the lessee to continue to pay the old ground rent until the new ground rent has been determined and accepted by the lessee.

[28] It is now accepted that the advice in this letter did not correctly describe the obligations on the parties concerning payment of rent in the period following the termination of the lease on 29 March 2009. In short, there is no provision in the lease agreement requiring the lessee to continue to pay the old ground rent until the new ground rent has been determined and accepted by the lessee.

[29] By letter dated 1 April 2011, the plaintiff's solicitors advised the defendant that as the defendant had not exercised the right to renew the lease the plaintiff would proceed to sell the right to a new lease by way of a public auction in accordance with cl 13 of the lease. The letter advised that the defendant would be advised of the auction date once a real estate agent had been appointed. The letter sought the defendant's co-operation in the auction process. It also advised that it was prepared to defer taking action until 11 April 2011 should the defendant reconsider and decide to accept a renewal of the lease.

[30] The defendant received invoices for six month's rent at $4,150 and paid them following the expiry of the lease. The invoices for rent for the period after termination of the lease are similar in form. The invoice dated 30 March 2011, for example, names the defendant, refers to a tenant number, a street for the property and then provides:

> Six months ground rent from 30 March 2011 to 29 September 2011
> $4,150
>
> Payment due 30 March 2011 $4,150.

[31] The plaintiff's solicitors wrote to the defendant and copied her solicitors a letter dated 1 April 2011. It has an important statement that bears on the estoppel argument that is raised. The letter contains the following:

> If you continue to remain in possession until the date by which you are required by our client to vacate you must pay the ground [sic rent] of $73,750 per annum as provided for in the lease.

The letter advised that it had been instructed to give the defendant one further opportunity to renew the lease at a rent of $73,750 per annum.

[32] The defendant says there was a meeting in August 2011 with the administration manager for the plaintiff board in which three things were discussed, namely, the possible freeholding of the property; whether the plaintiff would reduce the ground rent it was seeking for a new lease; and practicalities of the auction process if the defendant did not renew the lease. The defendant says she was told at the meeting that there would be no freeholding. She further says, however, that she was told that the administration manager would seek instructions concerning a compromise on the ground rent level. Shortly thereafter she was advised that there would be no compromise on the ground rent level, which resulted in the defendant advising that she would not renew the lease at a ground rent of $73,750 per annum.

[33] The property was then advertised and put up for auction on 28 September 2011. No sale of the leasehold interest resulted. The defendant next received a letter, dated 6 October 2011, from the plaintiff's solicitors which confirmed that the auction process had been unsuccessful. It advised that the improvements reverted to the plaintiff without compensation and without any obligation on the plaintiff to grant a new lease to the defendant. It advised the defendant that she must deliver vacant possession of the property. It also advised that the lease required the defendant to pay the increased rent from the expiry of the lease until the date on which the defendant vacated the property. It calculated the figure owing at $200,500. It also sought the expenses of the auction. The defendant vacated the property on 16 November 2011.

[34] The defendant complains about the delay in the completion of the valuation process. She says that if she had been aware that the plaintiff expected her to pay the

ground rent of $73,750 from March 2009, she would have vacated the property much earlier. She said that she would also have attempted to ensure that the setting of the new rental was determined before the end of the lease in March 2009 and not in December 2010. She said in that way she would have known before the lease ended what the plaintiff's requirements were and could have decided then whether to take a new lease or whether to quit the property. She claimed that it made no sense to continue to live in the property as other accommodation options were available to her when there was an effective rental of $1,400 per week while negotiations over the new lease were underway.

Outline of lease terms

[35] The lease was for a term of 21 years commencing on 30 March 1988 with perpetual rights of renewal. It expired on 29 March 2009.

[36] The lease required the lessee to:

(a) Pay an annual rental of $8,300 by equal half-yearly payments in advance on the 30th days of March and September;

(b) Get the lessor's prior consent regarding plans to build on the land;

(c) Keep the land, all buildings, hedges, fences, gates, drains and sewers in good, clean and substantial order, condition and repair by virtue of cl 5. In particular cl 5 of the lease provides:

> 5. THE Lessee will during the said term keep and maintain and at the end or sooner determination thereof yield and deliver up the said land and all buildings fences hedges gates drains and sewers now or hereafter erected constructed or being upon bounding or under the same in good clean and substantial order condition and repair.

(d) Paint the exterior and paint, paper, varnish and colour the interior every five years by cl 7. Clause 7 of the lease provides:

> 7. THE Lessee will once in every fifth year of the said term in a proper and workmanlike manner paint all the

outside wood and iron work of such buildings as aforesaid with two coats of good and suitable oil and lead colours and will also once in every fifth year of the said term in like manner paint paper varnish and colour all such parts of the inside of the said buildings as are usually painted papered varnished or coloured respectively.

[37] Clause 13 deals with the position on the expiry of the lease. It provides as follows:

13.(a) On the expiration by effuxion of time of the term hereby granted and thereafter at the expiration of each succeeding term to be granted to the Lessee or to the purchaser at any auction under the provisions hereinafter contained the outgoing Lessee shall have the right to obtain in accordance with the provisions hereinafter contained a new lease of the land hereby leased at a rent to be determined upon the basis of the valuation to be made in accordance with the said provisions for the term of twenty-one years computed from the expiration of the expiring term and subject to the same covenants and provisions as this lease as may be applicable to such new lease.

(b) Within twelve calendar months previous to the expiration by effluxion of time of the term hereby granted or such succeeding term as aforesaid two separate valuations shall be made namely a valuation of the then gross value of the fee simple of the land then included in the lease and also a valuation of all substantial improvements of a permanent character made or acquired by the Lessee and then in existence on the land.

(c) The said valuation shall be made by two indifferent persons as arbitrators one of them shall be appointed by the Lessors and the other by the Lessee and such arbitrators shall before commencing to make the valuations together appoint a third person who shall be an umpire as between them.

(d) The decisions of the two arbitrators if they agree or of the umpire if the arbitrators do not agree or in such respects as they do not agree shall be binding on all parties.

…

(h) Before the expiration by effluxion of time of such term as aforesaid or if the valuation be not completed at an earlier period than two months before such expiration of the said term then within two calendar months of the decision of the arbitrators or umpire as the case may be and the giving of notice thereof to the Lessee the Lessee shall give notice in writing signed by them or their agent duly authorised in that behalf and delivered to the Lessors stating whether they desire to have a renewed lease of the said land at an annual rental equal to five pounds per centum on the gross value of the land after deducting therefrom the value of the substantial improvements of a permanent character as fixed by the respective valuations as foresaid.

(i) Any such notice may be given by the Lessee within the time aforesaid although the term hereby granted has already expired through effluxion of time and although the said valuation has not been made or notice thereof has not been given to the Lessee until after the expiration of the said term by the effluxion of time unless before the giving of such notice by the Lessee they have given up the possession of the land hereby leased or they have been duly ejected therefrom in pursuance of the judgment or order of any Court of competent jurisdiction or the land has been re-entered upon by the Lessors as hereinafter provided.

…

(k) If the Lessee fail within the time aforesaid to give any notice whether they desire a renewed lease or not or if they give notice in writing signed by them or their agent duly authorised in that behalf that they do not desire a renewed lease then within two months of the expiry of the time within which such notice may be given or within such further or other time as may be agreed on between the Lessors and the Lessee the right to a lease for a further period of twenty-one years containing such covenants and provisions contained in this lease as are applicable to such new lease including the provisions herein contained for valuations and for the right to a new lease at a rental determined upon the basis aforesaid or the offer of a new lease for sale by auction and all clauses auxiliary or in relation thereto shall be offered by the Lessors by public auction at the upset rental of the said land as ascertained and determined upon the basis of the valuations of the arbitrators or the umpire as aforesaid subject to the payment by the purchaser other than the outgoing Lessee of the value of the said buildings and improvements as so determined by the said arbitrators or their umpire provided always that in case any of the said improvements shall be destroyed or appreciably damaged by fire at any time between the date when the valuation thereof shall be made and the date when the new lease aforesaid shall be offered for sale at auction then such an abatement and deduction shall be made from the sum payable by the incoming tenant on account of the improvements as may be agreed upon between the Lessors and Lessee or failing such agreement as may be settled by arbitration in manner hereinbefore expressed. The costs and expenses of such auction shall be borne and paid by the Lessee.

(l) If any person other than the outgoing Lessee become the purchaser at the said auction of the said right to a lease that person shall within two calendar months from the date of the auction pay in cash to the Lessors in trust for the Lessee the amount of the value of the buildings and improvements so determined as aforesaid and accept and execute a new lease of the said land for the said further term at the annual ground rent at which the right to the said lease has been so purchased by him provided always that the purchaser at such auction shall not be let into possession of the said premises until he shall have so paid in cash the sum aforesaid but the Lessors shall not be further or otherwise bound to see to the payment of the said sum.

(m) The Lessors shall on demand (all rent and outgoings payable by the Lessee having previously been paid) pay over to the outgoing Lessee

the amount of the value of the said buildings and improvements paid to them by the said purchaser without any deductions whatever except rent or other payments provided for in the lease in arrear (if any) and the costs and expenses of the auction as aforesaid.

(n) Nothing in these presents contained shall be deemed to render the Lessors liable to pay to the Lessee any part of the value of any buildings or improvements save after the Lessors have received the amount thereof as aforesaid.

…

(q) If owing to delay on the part of the arbitrators or the umpire or otherwise the right to a new lease is not offered by auction before the expiration of the term hereby granted or if owing to the purchaser other than the outgoing Lessee at any auction refusing or neglecting to complete his purchase according to the terms and conditions thereof the purchase is not completed then and in any such case the right to a new lease shall be offered at auction at the Lessee's expense as soon as conveniently can be after the expiration of the term hereby granted or (as the case may be) after such refusal or neglect as aforesaid notwithstanding that the term hereby granted has expired.

…

(t) The Lessee shall whilst and so long after the expiration of the term hereby granted as they retain possession of the said land pending the granting of a new lease as aforesaid pay to the Lessors for the period during which retain such possession a rental calculated upon the basis of the upset rent as valued and fixed in manner aforesaid.

…

(w) If at any auction no person shall become the purchaser at a rental equal to or greater than the upset rent as ascertained and determined in manner aforesaid then at or (as the case may be) as from the expiration of the then expiring term the land hereby leased with all buildings and improvements thereon shall absolutely revert to the Lessors free from any payment or compensation whatever and from any obligation to grant a new lease.

…

(y) In the event of the term hereby created being determined by forfeiture or otherwise than by effluxion of time the Lessee shall not be entitled to any compensation for buildings or improvements.

The court's approach to a summary judgment application

[38] Part 12 of the High Court Rules deals with applications for summary judgment.

[39] Rule 12.2 of the High Court Rules requires that a plaintiff satisfy the Court that a defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action. The obligations imposed by the rule have been examined by a number of authorities.

[40] The correct approach to an application for summary judgment by a plaintiff was recently summarised in *Krukziener v Hanover Finance Ltd* where the Court said:[3]

> The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[41] In *Pemberton v Chappell* the Court also commented on the position where a defence is not evident on a plaintiff's pleading and said:[4]

> If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

[42] That position was further reinforced in *Australian Guarantee Corporation (New Zealand) Ltd v McBeth* where the Court said:[5]

> Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.

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3 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307187 at [26].
4 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3.
5 *Australian Guarantee Corporation (New Zealand) Ltd v McBeth* [1992] 3 NZLR 54 (CA) at 59.

[43] Hypothetical possibilities in vague terms, unsupported by any positive assertion or corroborative documents will not frustrate the obligation on a plaintiff to discharge the onus of proof: *SH Lock (NZ) Ltd v Oremland.*[6]

[44] In *Middleditch v New Zealand Hotel Investments Ltd*, the Court raised a caution and said:[7]

> The courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[45] A court is not required to accept uncritically any or every disputed fact: *Eng Mee Yong v Letchumanan.*[8] However, the Court will not reject even dubious affidavit evidence, even if there is suspicion as to the good faith of the deponent, if there is an essential core of complaint that supports a defence. In essence, the inquiry is whether or not the person's assertion passes the threshold of credibility: *Pemberton v Chappell*;[9] *Orrell v Midas Interior Design Group Ltd.*[10]

[46] In *Tilialo v Contractors Bonding Ltd* it was observed:[11]

> Drawing the line between mere assertions of possible defences and material which sufficiently raises an arguable defence so that the defendant should not be denied the opportunity to employ interlocutory procedures and have a trial is a matter of judgment. Views may well differ.

The first cause of action

[47] The plaintiff seeks judgment for $173,323.64. It relies on cl 13(t) of the deed of lease. Pursuant to that clause it is entitled to the upset rent as defined in the lease from the date of termination of the lease, namely 29 March 2009. The amount claimed is the amount that has been fixed by arbitration. Accordingly, what must be

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6 *SH Lock (NZ) Ltd v Oremland* HC Auckland CP641/86, 19 August 1986.
7 *Middleditch v New Zealand Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA) at 395.
8 *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC).
9 *Pemberton v Chappell*, above n 4.
10 *Orrell v Midas Interior Design Group Ltd* (1991) 4 PRNZ 608 (CA) at 613.
11 *Tilialo v Contractors Bonding Ltd* CA50/93, 15 April 1994 at 6.

considered are the defences raised by the defendant and, in particular, whether there is some evidential foundation for those defences.

[48] I deal firstly with the estoppel defence. The defendant claims that the plaintiff is estopped from claiming back rent for the upset rental because it issued a series of invoices to the defendant after the expiry of the lease. Those invoices required payment at the pre-expiry rental rate. In addition, reliance is placed on the letter already mentioned of 7 February 2011, and possibly even the letter of 1 April 2011 from the plaintiff's solicitors to the defendant's solicitors and the defendant.

[49] Both counsel referred me to the Court of Appeal decision *Gold Star Insurance Co Ltd v Gaunt*.[12] The current position relating to equitable estoppel is referred to in Butler's *Equity and Trusts in New Zealand* as follows:[13]

> Although the modern approach is "to depart from strict criteria and to direct attention to overall unconscionable behaviour" it is nevertheless clear that the party alleging an estoppel must show that:
>
> (a) A belief or expectation has been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
>
> (b) The belief or expectation has been reasonably relied on by the party alleging the estoppel;
>
> (c) Detriment will be suffered if the belief or expectation is departed from; and
>
> (d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[50] The House of Lords has reviewed the position in relation to proprietary estoppel in two decisions.[14] In commenting on the first of the elements, Lord Walker in *Thorner v Major* said:[15]

> I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant

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12 *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA).

13 James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 613–614.

14 *Cobb v Yeoman's Row Management Ltd* [2008] 1 WLR 172 (HL); *Thorner v Major* [2009] 1 WLR 776 (HL).

15 At [56].

> assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context.

[51] The authors of *Equity and Trusts in New Zealand* wrote:

> No particular form of conduct is required, but some causally related "action, or representation, or omission to act" must be shown.
>
> The degree to which the representor was involved in the creation or encouragement of the belief or expectation will be an important factor in the determination of the unconscionability.

[52] The expectation arises, the defendant says, from the invoices received prior to her vacating the property. Ms Wickes submitted that it was reasonable, where a party received an invoice without any reservation and paid same, for that party to consider that it had satisfied its legal liability in respect of the subject matter of the invoice by making payment. She submitted that the belief or expectation in this case was reinforced by the letters that were issued by the Board.

[53] Ms Wickes drew attention to the following:

(a) Following the arbitration decision the plaintiff wrote to the defendant on 15 December 2010 asking if the defendant wished to have a new lease at the level fixed in arbitration, effective from 30 September 2009. The letter made no reference as to whether the defendant was required to pay the new rent irrespective of whether she took up the lease;

(b) The plaintiff's letter dated 18 January 2011 enquires as to the defendant's intention regarding the lease. It makes no reference to the current rent payable;

(c) The plaintiff's letter dated 7 February 2011, which is referred to in [27] of this judgment incorrectly stated the obligations regarding payment of rent as set out in the lease. Of importance, however, it referred to an obligation to pay the old ground rent until the new ground rent had been determined and accepted by the lessee;

(d) The plaintiff's letter of 1 April 2011 states:

> If you continue to remain in possession until you are required by our client to vacate, you must pay the ground rent of $73,750 per annum as provided for in the lease.

(e) The defendant continued to receive statements from the plaintiff charging rent at the original level. The defendant claims that she believed the solicitors had made a mistake in their letter having regard to the invoices she was receiving;

(f) The defendant received an invoice on 4 October 2011, again for rent at the original level. It was not until the plaintiff's solicitors' letter of 6 October 2011 that the defendant realised that the plaintiff intended recovering back rent from March 2009 at the new level. She moved out of the premises in the following month.

[54] Mr Hannan submitted there was in fact no reasonable basis for the defendant to have a belief or expectation that the provisions of the lease would not be enforced against her in terms of the upset rent. He submitted that because of the fact that the defendant was required to sign, at the time of execution of the lease, that she had received and understood its terms she could not rely on any misunderstanding as to the contractual rights that were set out in the lease itself. Certainly, that is part of the position. The other part of the position is whether or not there was a basis for the belief that the plaintiff would not enforce the upset rent against the defendant whilst a decision was made as to whether to renew or not. Mr Hannan invited me to deal with this on a partial basis should I conclude that for some of the period of occupation after the conclusion of the lease, the estoppel might apply. I am hesitant to adopt his submission for reasons I shall expand upon in dealing with the second of the elements.

[55] When it comes to the second of the elements and, in particular whether the belief or expectation was reasonably relied upon, I am satisfied in this case that there is at least a foundation where that proposition could be argued. I am not unmindful of Lord Walker's warning that when considering the first and second of these elements, context is all important. In this case, the Board at the time was involved in

a substantial contest concerning the valuation and steps taken in relation to the renewal of the lease. It would clearly have been aware of the publicity given to the problem relating to leases of the endowment lands, or at least arguably it should have been. That may well not have been the case so far as the defendant is concerned. The impression I have is that the parties may well be assisted by discovery and other interlocutory steps in fine-tuning their specific positions in relation to the first two elements.

[56] When it comes to the third element it goes without saying that if the first two elements are found in favour of the defendant, what has happened here is a substantial monetary detriment if, in fact, she is required to pay

[57] The defendant has already suffered a significant financial loss as a result of her not renewing the lease resulting in all rights to improvements passing to the plaintiff. I do not lose sight of the fact that those improvements were purchased by her in 2005 at a cost of $450,000. I conclude the defendant should have the opportunity of presenting her defence at trial to the first cause of action.

[58] The alternative defence raised by the defendant to this cause of action asserts that by sending the invoices at the lower rate of rent and now insisting on performance of the terms of the lease, the plaintiff has acted in breach of s 9 of the Fair Trading Act 1986. The defendant claims that she is entitled to an order relieving her of the obligations to pay back the post-expiry rent pursuant to s 43(2) of that Act. The Supreme Court in *Red Eagle Corp v Ellis* described the approach under s 9 of the Fair Trading Act 1986 as:[16]

> [28] It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties.

[16] *Red Eagle Corporation v Ellis* [2010] NZSC 20.

> Richardson J in *Goldsboro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived a particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.
>
> [29] Then, with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. The language of s 43 has been said to require a "common law practical or common-sense concept of causation". The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause? Richardson J in *Goldsboro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.
> (footnotes omitted)

[59] Neither counsel addressed in any detail on this alternative ground. The reason for that is that it was accepted on both sides that if there was a foundation for the estoppel defence it would be arguable that s 9 also applied. That is a reasonable position to take having regard to the elements that need to proved in relation to a potential defence in reliance on s 9 of the Fair Trading Act 1986.

[60] The overall onus in a summary judgment application by the plaintiff remains with the plaintiff to show that the defendant has no defence. As the authorities I have referred to under the heading *The court's approach to summary judgment* in this

judgment show, when affirmative defences are raised the defendant does need to provide some evidential foundation for the defences. In addition I need to be alert to the possibility of injustice in cases where some material facts to establish a defence are not capable of proof without interlocutory procedures. I have referred to the fact that in analysing this cause of action context will be important. The plaintiff is engaged in major litigation which has a bearing on all its perpetually renewable leases in the endowment lands. Why there was not a little more care in the approach taken in the correspondence is not clear. Further, it is not clear why invoices were issued for amounts which clearly bore no resemblance to the legal obligations imposed in the lease itself. The lease imposed an obligation to pay upset rent after termination and while possession was held by the tenant. There was no obligation to pay at the former rate and on an on account basis.

[61] I was advised from the bar that the plaintiff had not entered into any new perpetual lease and that the property was simply tenanted. The precise basis for the tenancy was not advised to the court. This is an example of context that may well have a bearing on the determination of the defendant's defence to this cause.

[62] For these reasons I conclude that the first cause of action should not be disposed of by way of summary judgment and the defences should be tested at trial and following access to the full set of interlocutory procedures that available to litigants.

The second cause of action

[63] The defendant raises two matters by way of defence. The first is that the auction of the lease was not held within two months following the setting of the new rent. Ms Wickes submitted therefore the auction did not take place in accordance with the requirements of cl 13(k). Mr Hannan, in my view, rightfully submitted first, that time is not of the essence in respect of this clause but that, in any event if there was a non-compliance at the very most the plaintiff's actions might amount to a breach which would result in a claim for damages. No suggestion is made that any damages flowed from the delay in running the auction.

[64] I conclude that there is, in fact, no defence to the claim for the auction and marketing costs in the sum of $7,557.63. Judgment will accordingly be entered against the defendant for that sum.

[65] The next matter raised by Ms Wickes is whether there is any entitlement to recover legal costs associated with the auction. Clause 13(k) specifically referred to the costs and expenses of such auction should be borne and paid by the lessee. The invoices issued appear to relate specifically to the preparation for, and ultimately the setting up of, the auction. In my view, they are expenses of the auction and, in fact, are covered by cl 13(k). For that reason I conclude that the plaintiff is entitled to judgment for the legal costs concerned of $11,184.25.

The third cause of action

[66] The plaintiff's case, seeking judgment for $167,404 relies on cl 5 and 7 of the lease. The amount sought was the estimated cost of repairs to reinstate the property. Although the plaintiff pleaded its case on the basis of an estimate of the cost of reinstatement of the property, the plaintiff's property manager in her affidavit of 13 February 2013 advised that the reinstatement works had been substantially completed.

[67] A number of affidavits have been filed in this case. Scant regard has been paid to the requirements of Part 12 of the High Court Rules in relation to the filing of affidavits by both sides to this proceeding. In particular, additional affidavits have been filed in support after the time for opposition affidavits and, likewise, additional opposition affidavits have been filed following the filing of reply affidavits. Leave to depart from the Rules was not sought.

[68] The plaintiff's case under this cause of action is supported by an affidavit of Mr MS Marshall, a building supervisor at Cove Kinloch Auckland Ltd. That company specialises in building consultancy, building surveying and building compliance and other matters, including architectural documentation and design. Mr Marshall was instructed by the plaintiff on or about 30 April 2012 to prepare a schedule of reinstatement report for the property. He inspected the property on 19 June 2012. He describes how far he was able to go in that inspection. As a result

of the inspection he prepared a report. He describes his findings. The report is attached to his affidavit.

[69] In the course of counsel for the plaintiff's submissions I raised my concern that the plaintiff had advanced this case based on an estimated cost to repair breaches of the maintenance covenants in the lease when, in fact, evidence was available as to the actual cost of same, having regard to the fact the plaintiff's property manager says that that work had been completed.

[70] Both counsel were in agreement that the law that must be applied is that which was approved by the Court of Appeal in *Maori Trustee v Rogross Farms Ltd*[17] which applied the rule in *Joyner v Weeks*[18], namely that where there is a covenant to leave the premises in repair at the end of the term and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repairs in which they ought to have been left. The rule is not an absolute rule but is a prima facie rule which would be applied.

[71] There was not sufficient time to conclude the hearing of this case on 2 May 2013. Arrangements were made for reply submissions to be presented on the following Tuesday, 7 May 2013. Prior to the hearing on 7 May 2013 Mr Hannan had arranged for an affidavit from Mr AJ Larsen, the finance and administration manager of the plaintiff to be filed and served. He sought leave on 7 May 2013 for it to be read in support of the plaintiff's application for summary judgment. He submitted that the report disclosed that the cost of repairs was greater than the estimates. The purpose of the affidavit was essentially to show that there had been no benefit to the plaintiff by advancing a case based on estimates as opposed to the actual cost of repair.

[72] Ms Wickes understandably objected to the late filing of this affidavit. She pointed to a number of inconsistencies between what was said to be the actual costs incurred and the estimates. She advised that she would, if the affidavit was read, require time to consider it further and to take instructions and possibly file an

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[17] *Maori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 (CA).
[18] *Joyner v Weeks* [1891] 2 QB 31 (CA).

affidavit in response. She drew attention to the fact that the contract to carry out the repair work had been entered into before the application for summary judgment was filed.

[73] I advised the parties at the time that I would not permit the filing of this affidavit. My reasons, in short, were these:

(a) It almost certainly would prevent the determination of the third cause of action at this hearing because fairness indicated that the defendant should have an opportunity to consider the affidavit and obtain any evidence in opposition to it;

(b) It appears that the evidence of actual costs may well have been available at the time the proceeding was filed because the contract to do the work, which is dated 13 November 2012, was actually executed before the filing of this proceeding on 12 December 2012;

(c) A refusal of summary judgment based on the need to consider further evidence arising from Mr Larsen's affidavit might conceivably mean that the resolution of the summary judgment application would be achieved not much earlier than the trial of the proceeding proper if time is allowed to the defendant to respond to Mr Larsen's affidavit.

[74] For those reasons, I determined that I should not allow the affidavit to be filed for the purposes of the summary judgment application. The result is that I am left with a series of allegations of breach and with an estimate of an amount to put the premises into the state of repair in which they ought to have been left.

[75] The defendant has responded to a number of the allegations of breach.

[76] A number of general propositions were also advanced in relation to this claim, namely:

(a) There was no evidence of the state of repair of the house at the end of the lease, 29 March 2009;

(b) The present case had some analogy to the facts situation in *Maori Trustee v Clark.*[19] The plaintiff in that case was entitled to recover damages for breach of the repair covenant but had to be given credit for compensation for improvements. There was in that case, unlike the present, a specific requirement to give compensation for improvements. Ms Wickes submitted that, in this case, as the improvements were until termination of the lease, the property of the lessee, it could be argued that there was no real loss. I do not accept that proposition;

(c) The defendant throughout refers to the position of the house at the time of purchase. Whilst that may not specifically help her position, because of course she purchased it with approximately three years and three months of the lease still to run, it does cause me some concern because of the provisions of s 223 of the Property Law Act 2007 and its predecessor, s 106 of the Property Law Act 1952. In respect of s 106 I presume that the proviso would not apply to this lease as it is not a lease of the dwelling house as such. Those provisions require a reference back to the condition of the premises at the commencement of the lease when the court is required to determine the state of repair in which the house should have been left;

(d) The amount claimed is a substantial amount when one considers the value fixed by the valuers for the improvements at $375,000. Even based on the total amount of the estimated costs of the repairs at $167,404, the claim represents almost 45 per cent of the value assessed for the improvements. Whether it is a question of repair or substantially improving the property is a question of degree. The proportion of the costs claimed for repair to the value of the whole premises can be a useful guide.[20] No evidence was advanced to me as to the precise age of the house. Photographs indicate that it would have been built at least prior to the Second World War and possibly a

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[19] *Maori Trustee v Clark* [1994] 1 NZLR 578 (CA).
[20] *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12 at 18.

good deal earlier. There was no suggestion that it was a new house at the time the current lease was entered into.

[77] Mr Hannan produced a carefully prepared schedule in his reply submissions which replaced an earlier schedule he had given to me, and which made reference to the various items that had been identified in, what is referred to in the papers as, *The Cove Kinloch Report*, the report prepared by Mr Marshall. His schedule listed a total of 22 items in respect of which a claim of $81,597 is made and in respect of which there was no direct evidence, he submitted, of dispute about the items concerned. That is perhaps an over-simplification. However, I simply identify them at this stage. He acknowledged that any claim for GST had to be excluded because the plaintiff was registered for GST purposes and recovery of that would amount to double recovery in the circumstances. His schedule identified another 16 items about which the defendant had raised a specific dispute, but he submitted should, nevertheless, be capable of resolution at a summary judgment stage and in respect of which the claim totalled $41,300. He acknowledged that the balance of the plaintiff's claim was not suitable for summary judgment and would have to go to trial.

[78] The defendant advanced various responses, including:

- a desire to have a building consultant review and report on a number of the items;

- the house in fact had been painted shortly before she took over in December 2005 and that therefore there had been a compliance with the covenant;

- she had installed a modern gas stove and range hood and replace the old one;

- in respect of a washing machine, there was none when she acquired the lease;

- the claims in respect of carpets were not correct because she had them professionally cleaned and, in any event, they were at least 25 years old;

- the roof was not leaking when she vacated, although it had been in a bad condition when she acquired the lease;

- she had in fact removed all loose items; and

- in respect of the question of varnishing the kitchen cupboards she had in fact installed a new kitchen.

There are a variety of other matters that are raised.

[79] The evidence suggests that this is an old house that was in poor condition. To what extent its age is the major contributing factor to its condition is not directly analysed in the evidence. The conclusion I have reached is that the plaintiff has not satisfied the onus that there is no defence to the breach alleged. I have resisted the temptation to deal with small parts of this claim, on the basis that perhaps they do not deserve further consideration. There is the further complicating factor, that there appears to have been no evidence of complaint by the plaintiff as to the condition of the premises at any time during the occupancy of the premises by the defendant. There is also a lack of any evidence as to the condition of the property at the commencement of the lease itself.

[80] For all of these reasons, I consider it appropriate that this cause of action proceed to trial and not be the subject of a summary judgment.

Orders

[81] I decline the plaintiff's application for summary judgment in respect of the first and third causes of action. I enter summary judgment for the plaintiff on the second cause of action and in the sum of $18,741.88.

[82] I order that a statement of defence to the statement of claim be filed and served within 10 working days after the date of issue of this judgment pursuant to r 12.13. Pursuant to r 12.12, and at the request of the parties, I allocate a case management conference at a date to be notified by the Registrar of this court and preferably approximately one calendar month after the issue of this judgment. That conference will consider:

(a) the issues requiring resolution at trial;

(b) the appropriate discovery orders;

(c) amendment to the pleadings, if required;

(d) any outstanding interlocutory order or direction sought;

(e) the forum to discuss settlement;

(f) trial duration, the fixing of the trial date and the making of any special trial directions that are required. In respect of these matters counsel should have available the number of witnesses to be called and the general scope of the evidence to be covered by them so that an accurate assessment can be made of trial duration. In addition, counsel should be in a position to indicate if any order should be made in relation to the experts pursuant to r 9.44.

Because the issues requiring resolution at trial will be considered at the conference, memoranda shall be filed on a sequential basis so that the defendant has the opportunity of commenting upon the plaintiffs' summary of the trial issues. To achieve this the plaintiffs' memorandum dealing with the above matters shall be filed and served six working days prior to the conference and the defendants' memorandum dealing with the above matters and, in particular, commenting upon, conceding or adding to the list of issues shall be filed and served three working days prior to the conference.

Costs

[83] Counsel were agreed that if I declined to enter summary judgment on the major causes of action the appropriate course in line with the decision in *NZI Bank Ltd v Philpott* is that costs in relation to the application be reserved.[21] I so order.

JA Faire
Associate Judge

[21] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).