IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-3042
[2018] NZHC 1164

BETWEEN	KIWIRAIL LIMITED Plaintiff
AND	OCEANIC PALMS LIMITED Defendant

Hearing: 15 May 2018

Appearances: M L Campbell and S J Thomson for the Plaintiff
No appearance for the Defendant
H Haynes and P B H Hubbard, directors of the Defendant, in Person

Judgment: 22 May 2018

JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] Mr Haynes and Mr Hubbard are directors of the defendant (Oceanic Palms).

[2] On 19 December 2017, the plaintiff (KiwiRail) applied for an order putting Oceanic Palms into liquidation. Mr Haynes and Mr Hubbard filed a notice of opposition to the liquidation claim. They contended that Oceanic Palms is solvent, and they disputed KiwiRail's claim for the back rent on which its liquidation claim is substantially based.

[3] The liquidation claim came before Associate Judge Bell on 22 February 2018. His Honour directed that Mr Haynes and Mr Hubbard could defend the liquidation claim in their capacity as directors, and he ordered them to file a statement of defence.

[4] Mr Haynes and Mr Hubbard filed their statement of defence on 15 March 2018, essentially pleading the same defence they had set out in their notice of opposition.

[5] On 3 May 2018, Mr Haynes and Mr Hubbard also filed an application to stay the liquidation claim, pending the hearing and determination of an application they have filed in February 2018 for judicial review of certain decisions allegedly made by KiwiRail (the judicial review proceeding). KiwiRail filed a memorandum opposing the stay application, on 3 May 2018.

[6] On 4 May 2018 Associate Judge Bell directed that the stay application was to be called on 15 May 2018 with KiwiRail's liquidation claim.

[7] I heard argument on the stay application and the judicial review claim on 15 May 2018. I now give judgment on those proceedings.

Preliminary issue – do Mr Haynes and Mr Hubbard have standing to oppose the liquidation claim?

[8] In a previous proceeding between the parties, in which Oceanic sought relief against forfeiture of the relevant lease between KiwiRail and itself, Messrs Haynes and Hubbard were permitted to represent Oceanic Palms, notwithstanding that neither is a qualified lawyer. That was originally also the position in the judicial review proceeding, although in a judgment given on 18 April 2018 on an application for interim relief in the judicial review proceeding Jagose J referred to the well-established rule that a company has no right to be represented in Court by other than a practising lawyer.[1] While the Court does retain a residual discretion to permit non-lawyers to appear on behalf of companies in emergency or exceptional circumstances, Jagose J did not consider the judicial review proceeding fell into either of those categories.[2] He directed that if Oceanic Palms wished to continue to be represented by its directors it would need to make formal application for such representation.

[9] I do not consider that any such formal application was required in the present proceeding, however, because Messrs Hubbard and Haynes are not representing

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1 *Oceanic Palms Ltd v KiwiRail Ltd* [2018] NZHC 679 at [23].
2 At [24] and [25].

Oceanic Palms in this proceeding. They are acting in their personal capacities, pursuant to the directions given by Associate Judge Bell on 22 February 2018. While the Associate Judge allowed them to file a statement of defence in their capacities as "directors" of Oceanic Palms, both gentlemen confirmed to me at the hearing that they are also shareholders of Oceanic Palms. A shareholder of a defendant in a liquidation claim has an absolute right to file a defence to the claim, under r 31.16 (2) of the High Court Rules.

Background

[10] The following summary of the material facts is taken primarily from the judgment of Jagose J in the judicial review proceeding.

[11] Oceanic Palms operated a business growing and transplanting mature palm trees. It did so from premises in Onehunga (the premises) that it had leased from KiwiRail since 1 March 2010, initially at an annual rent of $34,000 per annum. That rent was known to be at a level that was considered by KiwiRail to be well below market, and it was understood that if Oceanic Palms elected to renew the lease after the initial five year term, the renewed lease would be at a market-based rent fixed in accordance with the rent review provisions contained in the lease. The lease was renewed from 1 March 2015, and KiwiRail initiated the rent review process, nominating a rent of $123,200 per annum from 1 March 2015. Under cl 2.2(c) of the lease, Oceanic Palms was required to pay rent at that figure until a new rent figure was either agreed or fixed by arbitration in accordance with the lease.

[12] Oceanic Palms did not agree with KiwiRail's figure, and both parties appointed valuers. The valuer retained for Oceanic Palms advised that an appropriate rent for the premises would be $75,000 per annum. The valuers then conferred, and they came up with a joint recommendation of $100,000 per annum for the rent.

[13] Oceanic Palms rejected the joint valuers' recommendation, and it continued to occupy the premises, paying rent at the rate of $34,000 per annum. Although KiwiRail had contended for a higher rent figure, and no agreement was reached on the $100,000 per annum recommended by the valuers, for the period after 1 March 2015 KiwiRail

invoiced Oceanic Palms on the basis of the valuers' recommended figure of $100,000 per annum.

[14] Oceanic Palms was not prepared to engage in arbitration under the lease (as it was entitled to do), apparently because it doubted that the process would result in a rent that would be acceptable to it. Its directors apparently held the view that arbitrations tended to benefit the landlord, and that was likely to be particularly the case with a large property-owning company such as KiwiRail, who was known to be a substantial consumer of valuation services.[3]

[15] In late 2015, KiwiRail gave notice of its intention to cancel the lease unless Oceanic Palms paid the outstanding rent. Oceanic Palms sought relief against forfeiture of its lease, but that was refused by Fogarty J in a judgment given in this Court on 20 May 2016.[4] However, His Honour did allow Oceanic Palms one month from the date of the judgment to pay the arrears of rental at the new rate. If that did not occur, KiwiRail could then cancel the lease. Alternatively, His Honour allowed Oceanic Palms one month to formally dispute the rent, "so that the dispute be then submitted to arbitration" under cl 2.2(b) of the lease.[5]

[16] Oceanic Palms took neither of those courses. It did not pay the rent at the new rate, and nor did it initiate an arbitration under the lease. It remained in occupation of the premises, paying rent at the original rate, and it appealed to the Court of Appeal.

[17] The appeal proceeded on an expanded basis, with Oceanic Palms contending that there existed grounds to judicially review KiwiRail's relevant decisions. It contended, inter alia, that KiwiRail had acted in bad faith and unreasonably in reviewing the rent to market rates.

[18] The appeal was dismissed on 4 July 2017.[6]

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3 At the hearing, it became clear that there were other considerations. I was told by Mr Hubbard that Oceanic Palms was shocked by what would be close to a threefold increase in the rent, and that it could not afford to pay both rent at the increased figure and the costs of an arbitration.

4 *Hubbard v KiwiRail Ltd* [2016] NZHC 1061.

5 At [65].

6 *Hubbard v KiwiRail Ltd* [2017] NZCA 282 at [29].

[19] On 28 August 2017, the Court of Appeal declined Oceanic Palms' application for a stay pending further appeal to the Supreme Court, expressing the view that the application for leave to appeal lacked any merit, and that Oceanic Palms had failed to take reasonable steps to preserve its position in the interim.[7]

[20] On 6 October 2017 the Supreme Court dismissed Oceanic Palms' applications to stay the High Court judgment and for leave to appeal to the Supreme Court.[8]

[21] This Court subsequently made an enforcement order granting possession of the leased premises to KiwiRail. An application by Oceanic Palms to stay that order was made too late, as the order had already been executed. In declining the application to stay that order on 20 December 2017, Hinton J noted that nothing in Oceanic Palms' circumstances approached the "substantial miscarriage of justice" threshold for such a stay. Her Honour noted that Oceanic Palms had already had months to relocate since the Court of Appeal's ruling, and it had reached "the end of the road"[9].

[22] Oceanic Palms made a further application to stay the enforcement order, by way of appeal against the decision of Hinton J. That application was declined by Van Bohemen J on 19 February 2018.[10]

[23] A case management conference was convened in the judicial review proceeding on 18 March 2018, and Fitzgerald J recorded KiwiRail's offer of further holding arrangements. Her Honour encouraged Oceanic Palms to engage with KiwiRail to make suitable arrangements in that respect. However, no resolution appears to have been achieved from any discussions that may then have taken place.

[24] The judicial review proceeding came before Jagose J on an application by Mr Haynes and Mr Hubbard for interim orders under s 15 of the Judicial Review Procedure Act 2016. Mr Haynes and Mr Hubbard argued that KiwiRail had acted unreasonably in various respects, including in deciding to set the rent at $100,000 per annum (ratifying the joint valuers' recommendation). The Judge noted that the Court

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7 *Hubbard v KiwiRail Ltd* [2017] NZCA 375 at [12]-[13].
8 *Hubbard v KiwiRail Ltd* [2017] NZSC 153.
9 *Hubbard v KiwiRail Ltd* CIV-2015-404-003145, December 2017 (Minute of the Court).
10 *Hubbard v KiwiRail Ltd* CIV-2015-404-003145, February 2018 (Minute of the Court).

of Appeal had held that KiwiRail had not acted unreasonably in relying on that recommendation in setting the rent. However, Mr Hubbard and Mr Haynes argued that new information is now available which shows that the Court of Appeal's conclusion on that point was either wrong or at least open to serious challenge. They referred to new leases offered by KiwiRail in late 2017 to Oceanic Palms' former sub-lessees on the leased premises, at the same per square metre rate KiwiRail had been billing Oceanic Palms. Mr Haynes and Mr Hubbard contended that the market rental value of the much larger parcel of land Oceanic Palms had been occupying at the premises was significantly lower than that applicable to the smaller parcels of land occupied by the sub-lessees, and that the difference supported their position that KiwiRail had acted unreasonably in demanding and continuing to demand the full $100,000 per annum from Oceanic Palms when it knew that amount was well above market. They suggested that ulterior motives might be involved (whether or not there were would not be known until KiwiRail produced documents showing the policies behind "these inconsistent decisions").

[25] Jagose J noted that there could "scarcely be a more ordinary commercial transaction than a landlord cancelling a lease in circumstances in which a tenant refuses to pay the contracted rent, and making arrangements for the tenant's exit". His Honour noted that the Court of Appeal had already remarked on KiwiRail's "considerable patience" in seeking resolution with Oceanic Palms.

[26] Jagose J found that Oceanic Palms had no plausible allegations that KiwiRail's impugned decisions were unlawful, and he dismissed the application by Mr Haynes and Mr Hubbard for the interim orders they sought to preserve Oceanic Palms' position pending the hearing of the substantive judicial review proceeding. His Honour also considered that, because the lease had terminated, Oceanic Palms had no right to keep its property (principally, a fairly large number of palm trees that had not been removed) on the premises, or to obtain access to the premises to maintain its property. His Honour considered that any stay of the liquidation proceeding should be determined in the liquidation proceeding.

The claims by KiwiRail

[27] KiwiRail served a statutory demand on Oceanic Palms on 21 November 2017. Oceanic Palms did not pay the amount demanded, and nor did it apply to the Court to set aside the statutory demand within 10 working days of service of the demand, under s 290 of the Companies Act 1993 (the Act). KiwiRail then commenced this proceeding.

[28] In its statement of claim, KiwiRail pleaded that, as at 21 November 2017, the total amount owed to it by Oceanic Palms was $232,833.68, made up of:

(a) $171,869.72 plus GST for rent arrears; and

(b) $35,183.50 in costs awards made in respect of the proceedings in this Court, and in the Court of Appeal and the Supreme Court.

[29] In their written submissions in support of the liquidation claim, Mr Campbell and Ms Thomson calculated the total amount now owing at $252,560.57, made up of outstanding rent to 31 January 2018 (total $213,222.91), less rental income received from other tenants from 1 December 2017 to 31 January 2018 ($5,120.58), plus $44,458.24 for costs. KiwiRail also says that it is entitled to interest on the amounts owing.

[30] KiwiRail says that there is no arguable dispute over Oceanic Palms' liability for that amount, and that Oceanic Palms is clearly insolvent.

Submissions for Mr Haynes and Mr Hubbard

[31] In his submissions, Mr Hubbard noted that the stay application will depend on whether the Court is satisfied that Mr Haynes and Mr Hubbard have a good enough case in the judicial review proceeding to justify a stay.

[32] He referred to the events back in early 2015 when KiwiRail demanded the new rent figure, and expressed the concern of himself and Mr Haynes that they were not

properly listened to by KiwiRail from that point on: as he put it, they did not have the opportunity to say their piece.

[33] Mr Hubbard referred to KiwiRail's obligations as a state-owned enterprise under the State-Owned Enterprises Act 1986, referring to s 4(1) of that Act, and in particular to the requirement that a state-owned enterprise is not merely required to operate as a successful business, but is also required to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates, and by endeavouring to accommodate or encourage these when able to do so.[11] He submitted that the obligation to exhibit a sense of social responsibility to the community includes a responsibility to the state-owned enterprise's tenants.

[34] Mr Hubbard submitted that KiwiRail owed a duty under the State-Owned Enterprises Act, going beyond its strict rights and obligations under the lease of the premises, to "see that everything was worked through in a fair way". He submitted that, in breach of that obligation, KiwiRail refused to meaningfully engage with Oceanic Palms until the rent was paid at the new rate it had demanded.

[35] Mr Hubbard referred to the decision by KiwiRail to enter into new leases with Oceanic Palms' former sub-lessees on the leased premises, at the same rate ($20 per square metre) it had demanded of Oceanic Palms, submitting that (subject to a reduced per square metre rent to reflect the larger area Oceanic Palms had occupied): "If KiwiRail was giving the sub-tenants a good deal, why wouldn't we get the same?"

[36] On the question of why Oceanic Palms never referred the rent issue to arbitration, Mr Hubbard submitted that the issues raised under the State-Owned Enterprises Act would have been beyond the jurisdiction of an arbitrator.

[37] Mr Hubbard referred to the judgment of Fogarty J on Oceanic Palms' application for relief against forfeiture of the lease, noting that the Judge had raised an issue over whether the valuation reports strictly followed the rent review provisions in the lease.

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[11] State-Owned Enterprises Act 1986, s 4(1)(c).

[38] On the effect of the Court of Appeal decision, in which the Court did consider judicial review arguments advanced for Oceanic Palms, Mr Hubbard submitted that the Court of Appeal decision came before relevant new information came to hand. That information was said to be the decision by KiwiRail to charge the same rate for smaller holdings at the premises (a reference to the rent charged by KiwiRail in 2017 to Oceanic Palms' former sub-lessees on the premises) as it had demanded from Oceanic Palms, notwithstanding Oceanic Palms holding was much bigger than the individual holdings of the former sub-lessees.

[39] Mr Hubbard also referred to an issue over what he suggested was an inappropriate use of a property in Church Street, Onehunga for comparison purposes, by the valuer instructed by KiwiRail in the March 2015 rent review process. Mr Hubbard said that was a "clear trigger" for him that there was something wrong with the valuations. He described the reference to the Church Street property back in 2015, and the late 2017 decisions by KiwiRail to rent the smaller parcels of land on the premises for the same per square metre rent as that charged to Oceanic Palms, as two examples of bad faith on the part of KiwiRail.

[40] In his oral submissions, Mr Haynes said that he was initially shocked at KiwiRail's initial demand to Oceanic Palms to "pay $3,000 per week or get out". He submitted that the statement was incompatible with KiwiRail's obligations under the State-Owned Enterprises Act. He too challenged the valuation report obtained by KiwiRail back in 2015, alleging generally that KiwiRail procures valuation reports that produce excessive rents. However, he acknowledged that he also rejected the rent of $75,000 per annum that was initially proposed by Oceanic Palms' own valuer.

[41] Mr Haynes referred to the worthwhile activities Oceanic Palms carried out on the premises, which he said could have been to the greater benefit of Auckland. Oceanic Palms referred various possible projects for the planting of Nikau palms in the city to KiwiRail, but KiwiRail was not interested in its ideas. It simply wanted the highest possible rent.

[42] Mr Haynes also submitted that it was unconscionable for KiwiRail to move to evict Oceanic Palms from the premises only five days before Christmas, and that it

failed to comply with an agreement made at the hearing on 20 December 2018, under which Oceanic Palms was to have until 31 January 2018 to remove all its property from the premises.

[43] Mr Haynes said that he would like to see some reconciliation reached with KiwiRail, and that the liquidation claim should be stayed for a period of time to allow that to happen. If no reconciliation could be reached with KiwiRail within, say, a period of two months, the stay should continue at least until the judicial review claim has been heard and determined.

[44] Both Mr Hubbard and Mr Haynes referred at the hearing to the possibility that, if KiwiRail were prepared to accept rent at the lower rate of $75,000 per annum for the period since 1 March 2015, Oceanic Palms could borrow the money and settle on that basis. Mr Hubbard and Mr Haynes had the opportunity to discuss that with counsel for KiwiRail over the morning adjournment, but in the event there was no settlement. Mr Campbell's position was that any such proposal could have and should have been made much earlier.

The claims in the judicial review proceeding

[45] The judicial review proceeding has only reached the point where pleadings (statement of claim and statement of defence) have been filed. No affidavits have yet been filed, and Mr Campbell told me that there may be an application by Oceanic Palms for discovery of documents held by KiwiRail.

[46] In its statement of claim in the judicial review proceeding, Oceanic Palms refers to KiwiRail obtaining a Court order for the eviction of Oceanic Palms from the premises on 20 December 2017, subject to an arrangement between the parties allowing Oceanic Palms until 31 January 2018 to remove as many of its possessions from the premises as possible. The statement of claim pleads that, at that date, KiwiRail would assess the amount of progress made to see if continued access would be made available.

[47] The statement of claim goes on to allege that KiwiRail inspected the premises on 25 January 2018, without prior notice to Oceanic Palms, and decided not to allow continued access. That decision is said to have been unreasonable.

[48] Oceanic Palms then pleads the following further specific grounds for judicial review:

> a. KiwiRail expected us to find new accommodation five days before Christmas and make significant progress removing our property having absolutely no idea what was involved in scheduling trucks, loading and unloading palms and ensuring conditions are in place for the palms' on-going survival. The number of palms and the magnitude of the task are more thoroughly explained in the affidavits accompanying this application. The earliest possible date for us to start working was 7 January 2018, and in fact most businesses were not operating at full strength until mid-January.
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> b. On Thursday 25 January 2018, the Defendants visited the premises to assess progress when the Applicants were out delivering palms. KiwiRail made their assessment six days prior to the end of the month, thereby arbitrarily shortening by nearly a week the agreed time for making progress. They have now decided not to allow the Appellants any further time to remove our possessions. KiwiRail did not give us the opportunity to explain what had been done.
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> c. The eviction five days before Christmas is not about gaining the property back and re-letting it at a market rent, it is about punishment for challenging the assessed market rent and the good intentions of KiwiRail's property management.

[49] Oceanic Palms goes on in the statement of claim to say that it is in the process of removing its property, including large palms and other plants, from the premises.

[50] The statement of claim also refers to an affidavit in the relief against forfeiture proceeding, filed by Mr Hubbard in the judicial review proceeding on 2 February 2018. That affidavit confirmed that, as at 2 February 2018, Oceanic Palms still had 137 large palm specimens in containers on the premises and two dozen in the ground to shift, as well as its equipment and two medium-sized buildings. Mr Hubbard stated that, by 25 January 2018 when access to the premises was terminated by KiwiRail, Mr Hubbard and Mr Haynes had done as much as they could to free up usable land on the premises, but they needed extended hours of access to the premises to get all of Oceanic Palm's property removed.

To what extent did the Court of Appeal deal with Oceanic Palms' judicial review claims?

[51] The appeal began as an appeal against the decision of Fogarty J to decline Oceanic Palms' application for relief under Part 4, subpart 6, of the Property Law Act (the PLA). That subpart of the PLA is concerned with remedies and relief which may be available on the cancellation of a lease. On 28 April 2017, Mr Hubbard and Mr Haynes applied to the Court of Appeal to add further grounds of appeal, in which they sought judicial review of KiwiRail's decision to charge the increased rent. They contended that KiwiRail's decision was unreasonable and made in bad faith.

[52] In support of the submission that KiwiRail's decision was unreasonable, Mr Hubbard and Mr Haynes asserted the following facts:

(a) If the lease is cancelled, a new tenant will be able to establish a small business utilising improvements and basic amenities provided, and largely paid for, by Oceanic Palms.

(b) The use to which the land can be put is limited by Council regulations.

(c) Horticulture is not the highest and best use of the land.

(d) The land has been tailored to Oceanic Palms' specific usage.

(e) No other tenant has ever taken up significant occupancy on the land.

(f) Only a dedicated and capable group of people would be prepared to take the steps required to establish a business on the land.

(g) Oceanic Palms makes a worthwhile contribution to the community.

[53] In support of their contention that KiwiRail had acted in bad faith in setting the new rental, Mr Hubbard and Mr Haynes asserted the following propositions:

(a) KiwiRail encouraged Oceanic Palms to take up occupation of the land and then made it impossible for it to continue as a tenant.

(b) KiwiRail acted in bad faith in demanding a full market rent in the circumstances.

(c) KiwiRail used "legal trickery" by making "spurious demands" under s 244 of the Property Law Act to exact payment when other, simpler, means are available to achieve the desired result.

(d) KiwiRail failed to take account of Oceanic Palms' financial position in setting the rent.

(e) KiwiRail seeks to take advantage of the fact that most tenants would rather pay an artificially inflated rent than meet the costs of relocating.

[54] In its judgment, the Court of Appeal expressed grave doubts that KiwiRail's decision to increase the rent had the requisite public character to be amenable to judicial review, but it proceeded to deal with Mr Hubbard's and Mr Haynes' contentions on the assumption that it did. It then rejected the contentions that KiwiRail acted unreasonably or in bad faith.

[55] The Court of Appeal considered that the evidence showed that KiwiRail had accommodated Oceanic Palms in many ways throughout the tenancy, including in connection with the rent review process. It had not sought to take advantage of Oceanic Palms' failure to dispute the proposed new rent within 28 days (as was required under the lease if Oceanic Palms was to avoid deemed acceptance of the new rent), and nor did it attempt to enforce its right to payment of the rent at the amount stated in its trigger notice – it has claimed only the reduced amount jointly recommended by the valuers. The Court considered that KiwiRail had demonstrated considerable patience in allowing Oceanic Palms to continue in occupation for many months, despite non-payment of any increased rent from 1 March 2015, and in giving notice of its intention to cancel the lease only when it became clear that Oceanic Palms would neither pay the increase nor engage in arbitration.[12]

[56] The Court of Appeal noted that KiwiRail had advised Oceanic Palms that the rent agreed for the initial five-year term was at a concessionary rate. KiwiRail had also made it clear, as the lease recorded, that the rent would be reviewed to a market rent at the expiration of the initial lease term in the event that Oceanic Palms exercised its right to renew for a further five-year term. Oceanic Palms took occupation of the premises on that basis, and it exercised its right of renewal with full knowledge that KiwiRail had the right to insist on a full market rent from the rent review date. The Court considered it was simply not arguable that KiwiRail acted in bad faith in exercising its right to review the rent to market rent in accordance with the lease.[13]

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12 *Hubbard & Ors v KiwiRail Ltd*, above n 6, at [25].
13 At [26].

[57] On the question of KiwiRail acting unreasonably, the Court noted the obligation of every state-owned enterprise to operate as a successful business, and to be as profitable and efficient as comparable businesses that are not owned by the Crown.[14] KiwiRail was not obliged to subsidise Oceanic Palms' business, whether or not it made a worthwhile contribution to the community. And KiwiRail's decision to seek a market rent for the premises in accordance with the lease could not be challenged as unreasonable, particularly having regard to the fact that the amount demanded was jointly recommended by the parties' respective independent valuers. The lease directed that the market rent was to be assessed based on the highest and best use of the land at the rent review date, and that use must inevitably have taken into account any restrictions imposed by the Council.

[58] The Court concluded that Oceanic Palms' belated attempt to broaden the scope of the appeal by adding judicial review as a ground did not assist its case. The appeal was dismissed.

[59] The Court of Appeal also held that KiwiRail's notice stipulating the new rent was clearly valid. Their Honours said:[15]

> [35] Oceanic Palms' focus on the size of the increase is a distraction. The evidence shows that the initial rental was concessionary and below market. It is not the correct reference point for gauging whether the assessed rental is a market rental as at the rent review date, five years later.

[60] Their Honours concluded that mere valuation errors, even if they led to a gross overvalue, would not have invalidated the trigger notice. Something more fundamental was required, such as the wrong land being valued, or improvements being taken into account when the lease required that they be disregarded. The rent sought by KiwiRail, based as it was on the valuers' joint recommendation, could not be dismissed as falling outside the terms of the lease.

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14 State-Owned Enterprises Act 1986, s 4(1)(a).
15 *Hubbard v KiwiRail Ltd*, above n 6, at [35].

Relevant legal principles

[61] One of the grounds on which the Court may appoint a liquidator on the application of a creditor of a company, is that the company is unable to pay its debts.[16] One of the means frequently used by creditors to show that a defendant company is unable to pay its debts, is to serve a statutory demand on the company under s 289 of the Act. If a defendant does not pay the amount demanded within 15 working days of service of the demand, or apply to the Court to set aside the demand within 10 working days, the company's failure is deemed to provide prima facie evidence that the company is unable to pay its debts.[17] However, a creditor will not be entitled to rely on failure to comply with a statutory demand as evidence of the company's inability to pay its debts, unless a liquidation claim is filed within 30 working days of the expiration of the 15 working day period allowed for payment on the statutory demand.[18]

[62] The test for insolvency is whether the defendant company is able to meet its current financial demands. A temporary lack of liquidity may not equate to insolvency. And where there is a genuine and substantial dispute over the existence of a debt, the Court has an inherent jurisdiction to stay the liquidation proceeding. Where (as here) a company has not applied to set aside a statutory demand served on it by the creditor, the onus is on the company to establish a genuine dispute on substantial grounds, or show that there are clear and persuasive grounds for a stay. Cogent evidence will be required.[19]

[63] Applications for orders staying liquidation claims are dealt with in r 31.11 of the High Court Rules. That rule materially provides:

> **31.11 Power to stay liquidation proceedings**
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> (1) If an application for putting a company into liquidation is made under rule 31.3, the defendant company, or, with the leave of the court, any creditor or shareholder of that company or the Registrar of Companies, may, within 5 working days after the date of the service of the statement of claim on the defendant company, apply to the court—

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16 Companies Act 1993, s 241(4)(a).
17 Companies Act 1993, s 288.
18 Companies Act 1993, s 288(1).
19 *Yan v Mainzeal Property and Construction Ltd* [2014] NZCA 190 at [61] – [63].

…

(b) for an order staying any further proceedings in relation to the liquidation.

(2) The court must treat an application under subclause (1) as if it were an application for an interim injunction and, if it makes the order sought, it may do so on whatever terms the court thinks just.

(3) The inherent jurisdiction of the court is not limited by this rule.

[64] As r 31.11(3) suggests, the Court also retains an inherent jurisdiction to stay a liquidation claim in an appropriate case. The authorities show that a defendant seeking a stay carries a "heavy"[20] onus, of establishing that there is a strong prima facie case of the existence of a genuine dispute, on substantial grounds.[21] The defendant must show "something more" than that the balance of convenience favours the stay.[22] A "genuine" dispute is one that is "real and not fanciful or insubstantial".[23] The grounds of the dispute must be "clear and persuasive".[24]

[65] The Courts have been prepared to entertain an application for a stay, even though a subsisting statutory demand has not been challenged. However, good reasons must be advanced to justify a challenge to the debt under r 31.11 when no application was made under s 290 of the Act to set aside the statutory demand. While each case is to be considered on its particular facts, a defendant who failed to apply to set aside a statutory demand on the ground that the debt is disputed needs to show some exceptional factor to justify its failure to make a setting aside application (that being a factor likely to reflect the existence of a genuine dispute).[25]

Discussion and conclusions

[66] In this case, I am satisfied that there is jurisdiction to make the liquidation order sought. Oceanic Palms failed to comply with the statutory demand served on it, and

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20 *Signs Advertising Limited v CPC New Zealand Limited* [2017] NZHC 461 (HC) at [24].

21 *Nemesis Holdings Limited v North Harbour Industrial Holdings Limited* (1989) 1 PRNZ 379 at 385.

22 At 379.

23 *Signs Advertising Limited v CPC New Zealand Limited*, above n 18, at [17], *AAI Ltd v 92 Lichfield Street Ltd (In Rec & Liq)* [2015] NZCA 559, confirming *Industrial Group Ltd v Bakker* [2011] NZCA 142, 20 PRNZ 413 at [24]-[25].

24 *Nemesis Holdings Limited v North Harbour Industrial Holdings Limited*, above n 19, at 385.

25 *Aditude Advertising Ltd (in liq) v Techday Ltd* [2012] NZHC 1884 at [11].

the liquidation claim was commenced by KiwiRail within the period of 30 working days following the expiration of the demand.

[67] Mr Hubbard and Mr Haynes have asserted that Oceanic Palms is in fact solvent, but they have put forward no evidence to displace the presumption, created by the failure to comply with the statutory demand, that that is not the position. And at the hearing both Mr Hubbard and Mr Haynes acknowledged that, if it were liable for the full figure of approximately $252,000 plus interest now said to be owing to KiwiRail, Oceanic Palms would not be able to pay that sum and also meet its other debts as they fall due for payment. The real issues, then, are whether Mr Haynes and Mr Hubbard have shown that there is a genuine and substantial dispute that the debt is owing, and/or whether the liquidation proceeding should be adjourned or stayed to allow them to progress the judicial review proceeding to a conclusion.

[68] The only possible bases in the evidence for a "genuine and substantial dispute" must lie in the contention that KiwiRail has acted in breach of its obligations under the State-Owned Enterprises Act 1986, and that the breach or breaches do or may sufficiently impugn KiwiRail's claim that a liquidation order should not be made.

[69] I do not consider there can be anything arising out of KiwiRail's decision to demand the rent at the new rate from 1 March 2015 that could be regarded as unlawful or in bad faith. Those issues were all dealt with by the Court of Appeal on the appeal by Messrs Hubbard and Haynes from the judgment of Fogarty J, and the Court of Appeal clearly concluded that there was no unreasonableness or bad faith. The Court of Appeal included in its assessment a consideration of KiwiRail's obligations under the State-Owned Enterprise Act 1986, including the duties owed under s 4 of that Act. The duties owed by KiwiRail under that Act did not require it to subsidise the rent payable for the premises by Oceanic Palms, and there is no basis on which this Court could or should purport to reconsider the Court of Appeal's conclusions in this proceeding.

[70] Mr Hubbard placed some reliance on the further information that he said came to his notice after the Court of Appeal decision, relating to the rents at which KiwiRail has been prepared to lease smaller parcels of land on the premises to Oceanic Palms'

former sub-lessees. I cannot see how that "new information" could possibly have affected the validity of KiwiRail's trigger notice issued back in 2015, or the subsequent steps taken at that time, including the appointment of valuers and the valuers' joint recommendation on a rent figure of $100,000 per annum for the premises. What arrangements KiwiRail may have been prepared to accept in late 2017, possibly for reasons of pure convenience associated with the fact that the sub-lessees were presumably already occupying parts of the land, would appear to have little or no potential bearing on what the market rental value of the premises was or was not back on 1 March 2015. Mr Hubbard and Mr Haynes seek to use this "new information" as some sort of evidence supporting their apparent belief that KiwiRail was acting in bad faith back in 2015, but there is no basis for me to conclude that the new arrangements reached with the sub-lessees in late 2017 evidence bad faith or unreasonableness by KiwiRail in 2015.

[71] The reality of the situation seems to be that Mr Hubbard and Mr Haynes were caught by surprise in March 2015 when they found that the rent for the premises was going to be very much greater than they had anticipated, and much greater than Oceanic Palms was then able to afford. Any challenges they had to KiwiRail's trigger notice nominating the new rent figure, and any concerns they had over the valuation reports, could have and should have been referred to arbitration under the lease. Any questions over whether the valuers used appropriate comparison properties, or properly applied the provisions of the lease to their exercise, could have and should have been considered in the arbitration.

[72] The Court of Appeal decision is clear in its conclusion that, even assuming the issue was amenable to judicial review, any "public law" obligations to act reasonably and in good faith owed by KiwiRail, whether under the State-Owned Enterprises Act or otherwise, were sufficiently discharged. No further evidence has been produced that might call that conclusion into question.

[73] With the judicial review grounds having been rejected by the Court of Appeal, (and Oceanic Palms having declined the invitation in the judgment of Fogarty J to refer the rent issue to arbitration), liability for rent under the lease was no longer open

to challenge – under cl 2.2(c) and (d), Oceanic Palms was obliged to continue to pay at the rate of $100,000 per annum demanded by KiwiRail.

[74] Quite apart from the claim for unpaid rent, there are now unpaid costs in this Court, the Court of Appeal, and the Supreme Court, totalling $44,458.24. Oceanic Palms has not obtained any order staying execution on those costs orders, and in those circumstances there is no valid excuse for non-payment.

[75] Turning to the stay application, I note that the stay application was filed well after the five working days allowed by r 31.11. However, that was not a point taken by KiwiRail, so I will not dismiss the application on that account. But even if the Court were to deal with the application in its inherent jurisdiction (and not under r 31.11), or if the Court were to extend the time for making the application under r 31.11, I can see little point in deferring matters to allow Mr Hubbard and Mr Haynes to pursue the judicial review proceeding in the name of Oceanic Palms, even if the Court gave them leave to represent Oceanic Palms (or Oceanic Palms elected to instruct a solicitor to run the case). If Oceanic Palms were to establish the grounds set out in its statement of claim in the judicial review proceeding, the breaches of duty alleged there would not affect Oceanic Palms' liability to pay the rent at the rate of $100,000 per annum under the lease, or its liability under the costs orders. And there is nothing that might suggest that the matters pleaded in the statement of claim in the judicial review proceeding would or might result in a set-off or counterclaim capable of extinguishing, or even substantially reducing, the $252,560.57 (plus interest) that is now owing under the lease and the costs orders.

[76] In his affidavit sworn in the judicial review proceeding on 2 February 2018, Mr Hubbard appeared to acknowledge that KiwiRail could decide at the end of January 2018 whether or not to allow Oceanic Palms further time to remove its property from the premises. That is consistent with the Minute of Hinton J issued on 20 December 2017, where Her Honour noted that allowing further time after 31 January 2018 would be for KiwiRail to decide in its discretion. It seems improbable from Mr Hubbard's affidavit that the fairly large number of plants and property remaining on the premises on 25 January 2018 could have been removed by 31 January 2018. I note also that Oceanic Palms' intention appears to have been to

donate the palms (or a substantial number of them) to public parks and gardens, and to that extent any wrongful failure by KiwiRail to allow access to the premises for removal purposes in the period between 25 and 31 January 2018 would appear not to have caused Oceanic Palms any financial loss. I take into account also KiwiRail's offer, recorded by Fitzgerald J in her Minute of the conference convened in the judicial review proceeding on 18 March 2018, to have the remaining palms removed to a place of Oceanic Palms' choosing, at its cost. Her Honour noted that that proposal appeared "entirely reasonable", and she encouraged Oceanic Palms to engage with KiwiRail on it.

[77] On any view of it, Oceanic Palms is insolvent, and there is no basis on which I could conclude that that state of affairs would be altered if Oceanic Palms pursued the judicial review proceeding to a conclusion.

[78] I conclude that the claims made in the judicial review proceeding do not raise a genuine and substantial dispute sufficient to justify an order staying the liquidation claim. Nor have any other bases been put forward that would justify the grant of a stay, or the exercise by the Court of its discretion to refrain from making a liquidation order.

[79] The suggestion by Mr Hubbard and Mr Haynes that they might be able to raise sufficient to pay KiwiRail at the rate of $75,000 per annum for the period since 1 March 2015 came far too late in the piece, and I think KiwiRail was fully entitled to reject it. Under cl 2.2(c) and (d) of the lease it was and remains entitled to rent at the rate of the $100,000 per annum it has demanded, and it cannot now be compelled by the Court to accept a lower figure. Also, it appeared clear from the submissions of Mr Hubbard and Mr Haynes that Oceanic Palms would have to borrow to make any such settlement with KiwiRail. I was not told the potential source of any loan, or the terms on which the loan might be granted, and it is possible that the effect of any such loan might simply be to substitute one creditor (the lender) for another (KiwiRail), leaving Oceanic Palms in its present insolvent state.

[80] The liquidation claim has been properly advertised, and Andrew John McKay and Andrew James Bethell, chartered accountants of BDO Auckland, have consented

to accept appointment jointly and severally to act as liquidators of Oceanic Palms. I make the following orders:

(a) Dismissing the stay application;

(b) Putting Oceanic Palms into liquidation;

(c) Appointing Andrew John McKay and Andrew James Bethell, jointly and severally, as liquidators of Oceanic Palms;

(d) Awarding costs to KiwiRail on a 2B basis, with disbursements to be fixed by the Registrar. Those costs are to be borne solely by Oceanic Palms up to 22 February 2018 (the date on which the Court directed Mr Hubbard and Mr Haynes to file a statement of defence). After 22 February 2018, those costs are to be met, jointly and severally as between them, by Oceanic Palms, Mr Hubbard and Mr Haynes. Leave is reserved to apply by memorandum if necessary to have costs fixed for each of the periods before and after 22 February 2018;

(e) Fixing the rates of remuneration of the liquidators and staff working under their supervision and control at the rates set out in the liquidators' consents dated 26 January 2018;

(f) Directing that the liquidators are to apply at the conclusion of the liquidation for approval of their overall remuneration.

[81] The foregoing orders are timed at 4.30 pm on 22 May 2018.

Associate Judge Smith

Solicitors: Russell McVeagh, Wellington for the Plaintiff