IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-2374
[2021] NZHC 577

UNDER	the Companies Act 1993, section 290
IN THE MATTER OF	an application to set aside a statutory demand
BETWEEN	COFFEE CULTURE FRANCHISES LIMITED Applicant
AND	HOME STRAIGHT PARK TRUSTEES LIMITED Respondent

Hearing: 18 March 2021 at 2:15pm

Appearances: P A Cowey for the Applicant
W M Irving and N H Browne for the Respondent

Judgment: 18 March 2021

ORAL JUDGMENT OF ASSOCIATE R M BELL

Solicitors:
Parry Field (P A Cowey/D L Bell), Christchurch, for the Applicant
Russell McVeagh (W M Irving/N H Browne), Auckland, for the Respondent

[1] Coffee Culture Franchises Ltd applies to set aside a statutory demand dated 20 November 2020 requiring it to pay $43,717.14 for rent and outgoings from 14 May 2020 to 7 December 2020 for premises it leases, Unit G, HS3 Building, 21 Home Straight, Te Rapa, Hamilton. Coffee Culture Franchises Ltd disputes its liability, because it says that the rent and outgoings have reduced on account of COVID-19 restrictions that apply to its premises. It relies on a clause in the standard ADLS lease, cl 27.5. This is apparently the first case in which this clause has been considered in the context of the COVID-19 pandemic.

[2] Coffee Culture Franchises Ltd applies to set aside under s 290(4)(a) of the Companies Act 1993, that is, that the debt the subject of the demand is subject to a substantial dispute. It does not say that it has any set-off, counterclaim or cross-demand against Home Straight Park Trustees Ltd and it does not rely on any "other grounds" under s 290(4)(c) of the Companies Act.

[3] The standard approach under s 290(4)(a) is that the onus is on the applicant to show that there is a genuine and substantial dispute as to the existence of the debt. The task for the court is not to resolve the dispute, but to determine whether there is a substantial dispute that the debt is due. Merely asserting that a dispute exists is not enough. What is required is material, which may be short of proof, to support the claim that the debt is disputed. If that material is available, the dispute should normally be resolved by means other than proceedings in the companies court. It is usually not possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise, although the courts have sometimes found that statements made on affidavit are contrary to available documents or are inconsistent with earlier statements by the parties.

[4] Coffee Culture Franchises Ltd runs and franchises cafés and restaurants. It has 20 around the country. This case concerns its lease of one of its cafés. The premises are defined as Unit G23, HS3 Building, 21 Home Straight, Te Rapa, Hamilton, and include car parks and some use of common property. The premises are part of a larger

commercial building. The anchor tenant is the Inland Revenue Department. The Inland Revenue offices have capacity for a large number of staff. There are varying numbers given in the evidence – in one place it said that there are 350 staff and elsewhere it is suggested there are up to 500. According to Ms Coburn, Coffee Culture Franchises Ltd's director, the café was provided to attract the anchor tenancy. She says that the company invested about $550,000 in setting up the premises. The café's business comes from Inland Revenue staff and foot traffic to the Inland Revenue offices.

[5] The lease is for 10 years, beginning 8 July 2019, with one right of renewal for a further six years. The original landlord was Hamilton Homezone Ltd, but it assigned its interest when it sold the premises to Home Straight Park Trustees Ltd. That company took ownership on 1 May 2020. Tenancies in the building are managed by Oyster Management Ltd.

[6] The lease is the Auckland District Law Society's standard deed of lease but with added terms. The key provision for this case is cl 27.5:

> **No Access in Emergency**
>
> 27.5 If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises because of reasons of safety of the public or property or the need to prevent reduce or overcome any hazard, harm or loss that may be associated with the emergency including:
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> (a) a prohibited or restricted access cordon applying to the premises; or
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> (b) prohibition on the use of the premises pending the completion of structural engineering or other reports and appropriate certifications required by any competent authority that the premises are fit for use; or
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> (c) restriction on occupation of the premises by any competent authority,
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> then a fair proportion of the rent or outgoings shall cease to be payable for the period commencing on the date when the Tenant became unable to gain access to the premises to fully conduct the Tenant's business from the premises until the inability ceases.

[7] "Emergency" is defined in cl 47.1(d) –

47.1 In this lease:

…

(d) "emergency" for the purposes of sub-clause 27.5 means a situation that:

(1) is a result of any event, whether natural or otherwise, including an explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, cyclone, serious fire, leakage or spillage of any dangerous gas or substance, infestation, plague, ***epidemic***, failure of or disruption to an emergency service; and

(2) causes or may cause loss of life or serious injury, illness or in any way seriously endangers the safety of the public or property; and

(3) the event is not caused by any act or omission of the Landlord or Tenant.

(emphasis added)

[8] The rent payment clause (cl 1.1) provides that all rent shall be paid without any deductions or set-off by direct payment to the landlord or as the landlord may direct. Clause 29.1 stipulates the essentiality of payments. Clause 43 is an arbitration clause, but under cl 43.4 the arbitration provisions do not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable under the lease and from exercising rights and remedies in the event of default.

[9] Some of the other clauses are relevant for this case. Under cl 53 the tenant has the exclusive right to operate a coffee shop in the building, subject to qualifications, one of them being that the tenant acknowledges that the landlord cannot prevent the Inland Revenue or another tenant from having tea and coffee-making facilities in their exclusive leased areas. Clause 55.1 requires the tenant to operate its business from the premises at a minimum from 9 am to 5 pm on each working day. That reflects the fact that the café is to serve the Inland Revenue Staff and visitors to the offices of the Inland Revenue and is not to serve the public generally.

[10] The importance of the Inland Revenue Department as an anchor tenant can be seen in two other provisions. The Crown can veto any request by the tenant for a

change of use (cl 16.4) and the Crown can also veto any proposed assignment or sub-tenancy (cl 33.1(b))

[11] On 26 March 2020, the Government put New Zealand into "Level 4 lockdown" on account of the COVID-19 pandemic. Home Straight Park Trustees Ltd became the landlord on 1 May 2021 when the country was under Level 3 lockdown and since then there have been alert levels for Hamilton down to 7 December 2020 sometimes alert level 2, sometimes alert level 1:

1 May 2020 to 13 May 2020	Alert Level 3
14 May 2020 to 8 June 2020	Alert Level 2
9 June 2020 to 12 August 2020	Alert Level 1
12 August 2020 to 21 September 2020	Alert Level 2
22 September 2020 to 7 December 2020	Alert Level 1

[12] Throughout this time, that is since 1 May 2020, Coffee Culture Franchises Ltd has kept its café closed and has not paid Home Straight Park Trustees Ltd anything towards rent or outgoings. Its case is that under cl 27.5 it cannot have access to the premises, and the rent must be adjusted as a result.

[13] Home Straight Park Trustees Ltd accepts that under the Alert Levels 3 and 4, there are restrictions that trigger cl 27.5. The statutory demand excludes any claim for rent or outgoings for any Alert Level 3 period. But it says that cl 27.5 of the lease does not apply during Alert Levels 1 and 2 because at that time the tenant regained full access to its premises. Under Alert Level 2 restrictions, restaurants and cafés could not have more than 100 customers at a time. Each customer had to be seated at a table, there could not be more than 10 customers at a table together, and the tables had to be arranged so that there was at least one metre of separation and only one worker could serve any table.[1] For Level 1, there is a requirement to maintain records to enable contact tracing of customers. That restriction applies also at other levels, but at Alert Level 1 there are no other restrictions on operating a café.[2]

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1 COVID-19 Public Health Response (Alert Level 2) Order 2020, cl 12.
2 COVID-19 Public Health Response (Alert Level Requirements) Order 2020, cl 8.

[14] Home Straight Park Trustees Ltd points out that a national state of emergency was declared under the Civil Defence Emergency Management Act 2002 on 25 March 2020, but that ended on 13 May 2020. It relies on that to suggest, as part of its case, that any emergency relating to the Coffee Culture Franchise premises similarly ended on the same date.

[15] Coffee Culture Franchises Ltd says, however, that that is not the full picture. Since 26 March 2020 the Inland Revenue has required that little to no staff use its offices in the building. Ms Coburn says:[3]

> As a result of COVID-19, the anchor office tenant, the IRD, has mandated little to no staff in the building since 26 March 2020.

[16] The landlord recognises that there is at least a problem with the number of Inland Revenue staff going to work in the building. An email of 21 July 2020 from Oyster Management Ltd to Ms Coburn said amongst other things:[4]

> In addition to the above, we are meeting with IRD to discuss timing for their full return to their premises. We appreciate the difficulty the reduced occupancy poses on tenants and whilst we have no legal ability to require them to occupy the premises at full capacity, we will be raising our concerns for the retail businesses should they delay their return further.

[17] Coffee Culture Franchises Ltd says that without the Inland Revenue offices being fully staffed and with reduced numbers of people visiting the Inland Revenue offices, it has lost business and cannot fully operate its café. Coffee Culture Franchises Ltd also says that it is not insolvent and as a sign of good faith it has paid the sum demanded into its solicitors' trust account.

[18] Before Home Straight Park Trustees Ltd issued its statutory demand, there was correspondence between the parties trying to reach a resolution, but they were unsuccessful. In that correspondence, Coffee Culture Franchises Ltd did refer to the difficulties it was under because the Inland Revenue office was not fully manned. The email from Oyster Management Ltd which I have just quoted seems to reflect that understanding.

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3 Affidavit of Sacha Maree Coburn, sworn 3 December 2020 at [26].

4 Email of Liam Costley, Property Manager Oyster Management Ltd, dated 21 July 2020.

[19] I make clear that I am only required to decide whether the debt is subject to a "substantial dispute". The evidence that would be required to decide the final merits is missing. If I do decide that there is a substantial dispute, I am not in a position to decide what might be a "fair proportion" of the rent and outgoings under cl 27.5. That matter of assessment cannot be decided on an application to set aside a statutory demand.

[20] There was a suggestion by Coffee Culture Franchises Ltd that the arbitration clause in the lease applied, but at the time of the hearing it withdrew that part of its case. It accepted that the arbitration clause does not apply to proceedings by the landlord to recover rent and outgoings. In the hearing, Mr Cowey emphasised the point by saying that in this case the tenant was contesting its liability for the rent and was not asserting any set-off, counterclaim, or cross demand and therefore would not be pursuing arbitration. The matters it raises are purely by way of defence to the claim for rent and outgoings.

[21] Home Straight Park Trustees Ltd raised a "pay now, argue later" point. In the original submissions this was put as an absolute bar on Coffee Culture Franchises Ltd being able to raise the defence at all, but in his submissions today Mr Irving modified it to say that the "pay now, argue later" matter he was raising really went to weight in how the court assessed the arguments for Coffee Culture Franchises Ltd that there was a substantial dispute. For its "pay now, argue later" submission, Home Straight Park Trustees Ltd emphasised Associate Judge Lester's decision in *Kkeshav International Ltd v Heaton Holdings Ltd*.[5] In that case, Associate Judge Lester dealt with cl 27.3 of the ADLS lease, which has a similar formula to cl 27.5. Clause 27.3 provides:

> 27.3 Until the completion of the repairs or reinstatement a fair proportion of the rent and outgoings shall cease to be payable as from the date of damage.

[22] Part of the argument today has been whether Associate Judge Lester's comments were directed at a purely retrospective abatement claim – that is, a claim by the tenant that he had overpaid in the past and he should be able to deduct his overpayments from any rent currently due, or whether the tenant was also seeking an

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5 *Kkeshav International Ltd v Heaton Holdings Ltd* [2020] NZHC 1513, (2020) 21 NZCPR 125.

abatement of current rent. Associate Judge Lester's decision suggests that the abatement of current rent would be some $646.00.[6] The important thing for this decision is to note what Associate Judge Lester said:[7]

> [39] I am not satisfied that the fact a tenant claims an abatement against the current rent reduces the rent payable by the tenant in the face of clauses 1.1, 29.1 and 44.3. The scheme of the leases is that the payment of rent is an essential requirement. Rent is to be paid without any deduction. The tenant seeks a deduction by raising a disputed abatement. The landlord is not to be deprived of the benefit of the no deduction—no set-off clause, by the *assertion* of a right to an abatement, even if such is referred to arbitration. If [counsel for the applicant]'s submissions were correct, the tenant's claimed abatement would prevail until arbitration. I consider that proposition inconsistent with the scheme of the lease as a whole. I do not see any basis to treat a disputed abatement claim any different from any other disputed tenant claim.

[23] Mr Cowey submitted that that was directed only at a retrospective abatement, but for this decision I will also consider it on the basis that there might be an abatement of $646.00 from current rent. If paragraph [39] of Judge Lester's decision is read in isolation, it suggests that under clauses of the lease such as cls 27.3 and 27.5, the tenant is required to pay the full rent even in circumstances of destruction of premises or total exclusion from the premises, and to bring a later proceeding against the landlord to recover the overpaid rent. That would be while the tenant cannot gain access to the premises, cannot carry on the business and is suffering cash-flow difficulties.

[24] With great respect to Associate Judge Lester, I do not consider that cls 27.3 or 27.5 were intended to require a tenant whose business has collapsed to carry on paying rent and to claim back an overpayment later if it has managed to survive despite cash-flow difficulties in the meantime. In my judgment, under cl 27.5 rent is re-set and there is not a deduction as such. A tenant who says that cl 27.5 has been triggered is saying that a new rent is payable, even if it may be difficult to work out what the new amount should be. It is then an abatement clause. I use "abatement" in the same sense as Duffy J used that term in *Auckland Council v Cosdo Equity Ltd* where she said:[8]

> Abating the rent is not the same as a set-off, the latter being prohibited by the lease. If the right of abatement were to be treated as legally the same as a set-off, the abatement provision would be unworkable for Council. The parties to

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6 *Kkeshav International Ltd v Heaton Holdings Ltd* [2020] NZHC 1513 at [38].
7 *Kkeshav International Ltd v Heaton Holdings Ltd* [2020] NZHC 1513 at [39].
8 *Auckland Council v Cosdo Equity Ltd* [2014] NZHC 1900, (2014) 15 NZCPR 537 at [38].

> this lease can never have intended such an outcome. The inclusion in the lease of a power to a lessee to abate rent in certain circumstances must mean that such is available, the only question being whether the circumstances for its exercise actually exist.

[25] Associate Judge Lester considered that the abatement provisions were a form of deduction. I refer to the Court of Appeal's decision in *Grant v NZMC Ltd*,[9] where it considered the effect of a provision requiring rent to be paid "free and clear of exchange or any deduction whatsoever". The court recognised that under the common law a tenant has a right to make certain deductions from rent. Examples it gave include money paid on repairs, covenanted to be but not in fact done by the landlord, and monies payable by the landlord where the failure to pay imperilled the tenant's possession. The Court of Appeal held that a covenant to pay rent without deduction would embrace such matters. Clearly the court intended that if there was no common law or statutory right for a tenant to make deductions the requirement to pay the rent applied anyway.

[26] In the light of *Grant v NZMC Ltd*, the requirement in this lease to pay rent without deduction is a requirement not to exercise any common law or statutory rights to make deductions from the rent lawfully payable. That does not apply where the rent has itself been adjusted by circumstances such as an emergency under cl 27.5. So, with great respect to Associate Judge Lester, I am unable to accept what he has said in his paragraph [39].

[27] Now for the substance of the dispute.

[28] Clause 27.5 applies if there is an emergency and the tenant is unable to gain access to the premises to fully conduct the tenant's business. It is helpful to consider the lease without an emergency and the access that the tenant would enjoy under normal circumstances. "Access" means that the tenant and those associated with it may enter, stay in the premises and leave. It must be remembered that the tenant itself is a company, an artificial entity without a physical presence. It would not make sense to say that access is restricted to the company and does not extend to the humans associated with it. The lease gives the tenant exclusive possession of the premises.

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9 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 13.

With that, the tenant has the right to occupy the premises and the right to allow and bar entry to others. It can control access and has access itself. The permitted use under the lease is a café and restaurant. To operate as a café and restaurant the tenant must be able to have access to the premises for its staff, for contractors such as cleaners, for suppliers and also for customers. If customers cannot access the premises, the business cannot operate. A requirement for access must be access to allow the business to operate. That covers suppliers, staff and customers. When cl 27.5 says "the tenant is unable to gain access to the premises to conduct the tenant's business", that means that those people cannot access the premises as they normally would but for the emergency.

[29] Home Straight Park Trustees Ltd put its case on the basis of the Government restrictions under the various Alert Level orders. It accepted that under Alert Levels 3 and 4 the premises had to remain closed and could not operate. But it said it was still legally open to the tenant to operate a café and restaurant under Alert Level 2 and Alert Level 1 conditions. It was a matter of economic bad luck for the tenant that no Inland Revenue staff were coming to the premises, but that was entirely irrelevant to the question of access.

[30] The position for Coffee Culture Franchises Ltd is that the Inland Revenue restrictions on access to the café are relevant and amount to additional restrictions on access which go beyond the government's restrictions imposed by the COVID-19 orders. Coffee Culture Franchises Ltd says that since the start of the pandemic the Inland Revenue offices have been de-populated, with little or no staff working there. There was some debate as to what Ms Coburn meant by "mandated." Home Straight Park Trustees Ltd said that that simply meant that the Inland Revenue had authorised its staff to work from home rather than actually barring them from coming to work. I am not sure that much turns on the terminology. The practical effect is that because of the directions of the Inland Revenue, the staff working in the Inland Revenue office were much reduced. The case is similar to many commercial buildings where a café on the ground floor is a facility for those working in the building and for those visiting those offices, rather than for passing foot traffic.

[31] It is arguable for the tenant that when the Inland Revenue told its staff they do not have to come to work, (or alternatively they should not come to work), and the

numbers coming to work were to be reduced, that was a measure within cl 27.5 to reduce or prevent any hazard (in this case, spreading the coronavirus). For Coffee Culture Franchises Ltd, it is arguable that that has had a practical effect on its business. If Inland Revenue staff are discouraged from coming to their place of work, that effectively amounts to a bar on those customers coming to the café which is to service the offices of the Inland Revenue Department.

[32] The point can be put this way. If Inland Revenue staff do not have to go to work at Home Straight, there is no point in them, the café's standard customers, coming to the café. The practical effect is that the staff stay away and similarly taxpayers who might have to deal with the Inland Revenue are also discouraged from coming to Home Straight.

[33] In short, the directions of the Inland Revenue to its staff to stay away have a practical effect. It restricts the access of those staff to the premises of the café, and the access of customers is relevant access under cl 27.5. Without access by customers, the business cannot work. There is an arguable case for Coffee Culture Franchises Ltd that cl 27.5 has been triggered.

[34] Having reached that point, I recognise that there is a substantial dispute. As I indicated earlier, it is not possible for me to go further and specify what would be a fair proportion under cl 27.5. I cannot adjust the amount of the statutory demand to a minimum amount which should be paid notwithstanding the emergency under cl 27.5.

[35] I have simply outlined the argument available to Coffee Culture Franchises Ltd. To make out its case in full it will need to muster considerable evidence to support its case. But that will be for determination in another forum. As the amount of the demand is within the jurisdiction of the District Court, it appears that a District Court Judge will have the honour of giving the first definitive interpretation of cl 27.5.

[36] As I am satisfied that there is a substantial dispute under s 290(4)(a), I set aside the statutory demand. I add this. I consider this was an unusual case for a statutory demand. Home Straight Park Trustees Ltd is seeking a determination on a new issue which had not been tested in court before. I understand there have been no decisions

on cl 27.5 in the context of the COVID-19 pandemic, even though many landlords and tenants must have grappled with it. There are clear questions of interpretation to be decided. Statutory demands are best left for occasions where the test for legal liability in the demand is already clearly established. Home Straight Park Trustees Ltd was taking a risk using the statutory demand when it knew that the law was uncertain.

[37] Home Straight Park Trustees Ltd is to pay costs to Coffee Culture Franchises Ltd. If counsel cannot agree costs, memoranda may be filed.

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Associate Judge R M Bell