IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-006799

BETWEEN	HENDRIK VAN KAN AND WILHELMINA VAN KAN SEEGERS Plaintiffs
AND	GLENN KIPLING First Defendant
AND	KAREN JANINE WHITE Second Defendant
AND	RODNEY THOMAS WHITE Third Defendant

Hearing: 15 February 2011

Appearances: A M Swan for Plaintiffs
L Herzog for Defendants

Judgment: 23 February 2011 16:00:00

JUDGMENT OF VENNING J

This judgment was delivered by me on 23 February 2011 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Davenports West Lawyers, Auckland
Armstrong Murray, Takapuna
Copy to: A M Swan, Auckland
L Herzog, Auckland

Introduction

[1] The plaintiffs seek summary judgment against the defendants in the sum of $57,311.69.

[2] The claim is for rental, interest and costs payable by Brave Design Limited under a lease from the plaintiffs. The defendants guaranteed Brave Design's payment of rent and the performance of its obligations under the lease.

[3] The defendants accept their obligations as guarantors but deny liability on the basis that Brave Design cancelled the lease effective as of 31 December 2009. The defendants say their obligations as guarantors ceased from that date.

Background

[4] Brave Design commenced trading in 2002 from premises at 1/94 Henderson Valley Road owned by the plaintiffs. A written lease was not entered into until 9 November 2006. The lease was for a term of four years from 1 September 2006. The rent for the first two years was set out in the lease and provision was made for review on 1 September 2008. The premises leased were recorded as:

PREMISES:	Commercial Unit at 1/94 Henderson Valley Road, Henderson
CARPARKS:	Eight (8) (to be allocated)

The business use was recorded as signwriting.

[5] The defendants executed a guarantee in standard form recording, inter alia, that they guaranteed payment of the rent and the performance by Brave Design of the covenants in the lease. The guarantee also stated that as between the guarantor and the plaintiffs, the guarantor was for all purposes to be treated as the tenant, Brave Design.

[6] The unit at 1/94 Henderson Valley Road was one of a number of units owned by the plaintiffs at 94 Henderson Valley Road. 1/94 was closest to the road. Access

to the remaining units was by way of a driveway running beside the unit at 1/94. Immediately adjacent to that driveway was a separate right-of-way for the next-door property at 94A Henderson Valley Road. 94A was owned by Silverdale Estates Limited. The plaintiffs had formerly held a right-of-way over 94A and could access their property at 94 by using the right-of-way over 94A as well as directly from the road. Although there was a separate path and drain between the driveway running beside 94 and the right-of-way over 94A, the path was bordered with champered curb stones. While the curb stones were still a physical barrier, vehicles were able to drive up and over them. From the time it commenced its occupation in 2002 Brave Design also used that adjacent right-of-way to access its premises at 1/94 Henderson Valley Road.

[7] It suited Brave Design to access its premises via 94A, because that enabled it to park additional vehicles on the driveway of 94. In that way it had parking space additional to the eight car parks provided for under the lease. It also carried out some of its signwriting work in the driveway area. Even though this blocked access to the units of other tenants at 94 they were still able to access their units by using the right-of-way over 94A.

[8] However, in 2004 the plaintiffs surrendered the right-of-way easement over 94A. From that time neither the plaintiffs nor their tenants had the right to use the right-of-way over 94A. Despite this, Brave Design (and it seems from time to time others as well) continued to use 94A as an access way to the units at 94.

[9] In November/December 2008 Silverdale erected a security fence along the boundary between the driveway of 94 and its right-of-way over 94A. This prevented the use of 94A as an access way to the units at 94. Further, Brave Design was no longer able to park vehicles on the driveway of 94 as it had been accustomed to do, because the driveway was required for access to the rear units at 94.

[10] Issues arose between Brave Design and the plaintiffs concerning the car parks at 1/94 and access to the rear units by the other tenants. Brave Design short-paid rental for the months March to December 2009. Correspondence was exchanged.

[11] The issues remained unresolved and Brave Design had its solicitors write on 27 October 2009 purporting to cancel its lease effective as of 31 December 2009. Brave Design has not paid any rent since 31 December 2009.

[12] The quantum of the plaintiffs' claim is made up of:

• Shortfall in rental 1 March 2009 – 31 December 2009	$4,046.60
• Rental 1 January 2010 – 31 August 2010	$32,487.28
• Interest at the default rate	$2,509.26
• Legal costs	$18,268.55
Total:	$57,311.69

The quantum is not in issue.

Summary judgment principles

[13] As an application for summary judgment the onus is on the plaintiffs to satisfy the Court that the defendants have no arguable defence. The principles were recently summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd*:[1]

> [26] The principles are well settled. 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).

[1] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162.

The issue

[14] As noted, the defendants acknowledge they are guarantors of Brave Design. As such, given that quantum is not in dispute, they are liable to pay the plaintiffs the sum claimed unless Brave Design was entitled to cancel the lease as from 31 December 2009. Rephrasing that issue in terms of the onus of proof on a summary judgment application, the issue is whether the plaintiffs have satisfied the Court that Brave Design did not have an arguable basis to cancel the lease.

[15] If Brave Design was arguably entitled to cancel the lease for the plaintiffs' breach then the defendants as guarantors are similarly discharged: *National Westminster Bank Plc v Riley,*[2] subject to their liability in respect of obligations to the date of termination: *Elkhoury v Farrow Mortgage Services Pty Ltd (in liq).*[3] It follows that on any view of it the defendants are liable for the under-paid rental of $4,046.60 from 1 March 2009 to 31 December 2009.

[16] The provisions of the Contractual Remedies Act 1979 apply. In *Westpac Merchant Finance Ltd v Winstone Industries Ltd*[4] the Court concluded that, contrary to the earlier decision of *Chatfield v Elmstone Resthouse Ltd,*[5] the lessees' rights in connection with cancellation of a lease are defined by the provisions of the Act. Similarly, in *Scales Trading Ltd v Far Eastern Shipping Co Public Ltd*[6] the Court of Appeal preferred the view that the avoidance of a guarantee for non-disclosure (amounting to a representation) fell to be determined under s 7 of the Act dealing with cancellation rather than general law.

[17] In the present case Mr Herzog submitted Brave Design was entitled to cancel because Brave Design was induced to enter into the lease by the plaintiffs' misrepresentation that Brave Design was able to use the right-of-way over the neighbouring property at 94A Henderson Valley Road for access. It is the defendants' case that the use of that right-of-way was critical to Brave Design's

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2 *National Westminster Bank Plc v Riley* [1986] BCLC 268, [1986] FLR 213 (CA).
3 *Elkhoury v Farrow Mortgage Services Pty Ltd (in liq)* (1993) 114 ALR 541 (FCA).
4 *Westpac Merchant Finance Ltd v Winstone Industries Ltd* [1993] 2 NZLR 247 (HC) at 254-255.
5 *Chatfield & Another v Elmstone Resthouse Ltd & Others* [1975] 2 NZLR 269 (SC).
6 *Scales Trading Ltd v Far Eastern Shipping Co Public Ltd* [1999] 3 NZLR 26 (CA) at 38.

business operation so that the effect of the misrepresentation was to substantially reduce the benefit of the contract or to make the benefit of the contract substantially different from that represented.

[18] The starting point is that Brave Design had no right to use the right-of-way over 94A. The lease itself does not provide for access to and use of the neighbouring right-of-way over 94A Henderson Valley Road. The leased premises are limited to the unit itself together with the eight car parks to be allocated by the plaintiffs.

[19] The evidence to support the misrepresentation is found in Mr White's affidavit in opposition to the application. He says that from 2002 Brave Design used the driveway area for parking and working on customers' vehicles and continued to use the right-of-way over 94A to access its premises, as did the tenants of the other units belonging to the plaintiffs at 94 Henderson Valley Road.

[20] Mr White says that in November 2008 Silverdale, without any notice, erected a security fence along the common boundary between the driveway at 94 and the right-of-way over 94A. He says he was shocked by this as it resulted in the bulk of Brave Design's car parks/work space and access being removed. He says the quiet enjoyment of the leased premises was detrimentally affected as access using 94A was essential to enable Brave Design to properly conduct its business. Mr White's evidence of the misrepresentation is that:

> ... at no time were we advised by [the plaintiffs] that the use of the ROW was not available to Brave and in fact we were encouraged by them to use ROW. ... [W]e would never have entered into the verbal lease in 2002 and the written lease in 2006 if we were made aware that there was a potential for losing our right of access over the ROW. *We were induced to enter into the lease in 2006 by the failure by [the plaintiffs] to advise us that the ROW was not available for access.*
>
> (Emphasis added.)

[21] Mr White's allegation is of a misrepresentation by silence combined with conduct in encouraging the use of 94A by continuous use of the right-of-way and the use of the champered curb stones.

[22] In response Ms Van Kan Seegers says that at the time the plaintiffs surrendered the right-of-way in 2004 they anticipated Silverdale would erect a permanent fence but as they did not do so the plaintiffs erected a temporary rope fence. She says that at the time they made all tenants, including Brave Design, aware of the situation relating to the 94A right-of-way so that when Brave Design entered into the written lease in 2006 it was well aware that access was not permitted over it because not only had Brave Design been advised of the position by that date but also the temporary fence had been in place for some years.

[23] There is a conflict between Mr White's evidence and the evidence of Ms Van Kan Seegers. However, Ms Van Kan Seegers' evidence is supported by affidavits from a number of independent witnesses, Messrs Stevenson, Baya, Goodwin and MacKay. Mr Stevenson confirms that his company leased unit 2 at 94 Henderson Valley Road in 2002. He says that at the time he signed the lease with the plaintiffs he was informed that access was from the driveway on 94 and not from the adjacent access way over 94A. Mr Stevenson says they initially used the right-of-way over 94A for access as there was no fence in place but was told by Mr Van Kan that that was to stop. He says that a temporary fence was put in place in 2004 – 2005 in the form of steel frames with ropes tied between them.

[24] Mr Baya says that he inspected a unit at 94 in 2006 with the intention of leasing a factory. He confirms there was a temporary fence erected on the driveway between 94 and 94A at that time and that he was told by Mr Van Kan there would be a permanent fence erected along the driveway but he was not sure when.

[25] Mr Goodwin says that he ran a car trimming business at 96 Henderson Valley Road and recalls that the plaintiff Mr Van Kan put up a temporary fence along the boundary between 94 and 94A in around 2004.

[26] Mr MacKay leases unit 4/94. He says that when he moved into the premises in 2007 he was told by the plaintiff Mr Van Kan he could not use the driveway at 94A. He says that at that time there was a temporary fence there.

[27] The defendants filed a reply affidavit from Mr Dillon, a director of Silverdale (Silverdale was engaged in litigation with the plaintiffs over the right-of-way). Mr Dillon says that the use of 94A by the plaintiffs and their tenants continued even after Silverdale issued proceedings against the Van Kans relating to the right-of-way. While Mr Dillon denies there was ever a "fence" erected prior to Silverdale erecting the security fence in December 2008, even he confirms that a rope was strung along two-thirds of the driveway boundary, he presumes by the Van Kans. He says it was easy enough for the rope to be dropped to allow access, and it was only there for a short period.

[28] Mr White also annexes the letter from his solicitors of 27 October 2009 in which they purport to cancel the lease. While Mr White does not say that the plaintiffs made a positive misrepresentation, the solicitors' letter suggests that was the position. The solicitors say there was a representation that access to the premises would be available by way of a right-of-way over 94A at the time Brave Design entered into the lease in November 2006.

[29] However, it is inherently improbable that the plaintiffs would have made such a positive representation to Brave Design and its principals in 2006 when the written lease was entered into, given that by then the plaintiffs had surrendered any right-of-way they had over it (in 2004). The plaintiffs knew that neither they (nor their tenants through them) had any legal access over 94A. Further, on the evidence of the independent witnesses, the plaintiffs had erected at least a temporary fence between 94 and 94A prior to 2006 and made the legal position clear to their tenants. Even Mr Dillon, the defendants' witness confirms the existence of such a fence, although he questioned its efficacy. Given the rope fence (which Mr White says nothing about in his evidence) the defendants cannot rely on the alleged misrepresentation by silence or conduct. The plaintiffs' conduct in erecting the rope fence was entirely inconsistent with any suggestion the defendants were entitled to continue to use the right-of-way over 94A. There is little in the champered curb stones point. Whatever "encouragement" to use the right of way over 94A they might have offered was met by the clear impact of the rope fence.

[30] I am satisfied a robust approach is appropriate to this application. The evidence satisfies the Court that Brave Design was not induced to enter into the lease in 2006 by an actionable misrepresentation – whether positive, by conduct or by silence – that it was entitled to use the right-of-way over 94A. The evidence, notably that of the independent witnesses, satisfies me that the plaintiffs made it clear at that time (2006) there was no such legal entitlement.

[31] It may well be that from time to time the parties, including Brave Design, continued to access premises at 94 by using 94A but they did so in the knowledge that there was no formal right to do so.

[32] Further, even if there was a misrepresentation that 94A could be used to access unit 1 the representation could not have substantially reduced the benefit of the contract or have made the benefit substantially different from that represented because Brave Design always had alternative access to its property from the road frontage on Henderson Valley Road. Brave Design did not require the access from 94A to access its premises under the lease. There is nothing in the access point.

[33] As noted, by using 94A for access Brave Design was able to park more vehicles on the driveway of 94 (rather than keep it clear for the tenants of the other units) but under the lease it was not entitled to use the parking outside the premises for work in that way. The provisions of the lease made that clear:

> Lease of Premises and Carparks Only
>
> 17.1 THE tenancy shall relate only to the premises and the car parks (if any) and the Landlord shall at all times be entitled to use occupy and deal with the remainder of the property without reference to the Tenant and the Tenant shall have no rights in relation thereto other than the rights of use herein provided.

[34] The car parks that Brave Design had allocated to it under the lease were allocated to allow the other tenants to use the driveway of 94 past unit 1 to access their units. Brave Design's use of access from 94A by it (and by other tenants at 94 when Brave Design blocked the driveway of 94) was a matter of convenience. By using that access, Brave Design may have been able to park vehicles on the driveway of 94 and thereby enjoy more than the eight car parks bargained for under the lease,

but when the legal position was asserted by Silverdale it can hardly be said that affected the benefit or burden of the lease.

[35] Finally, Brave Design affirmed the lease with knowledge of any breach. On the defendants' case, when Silverdale erected the security fence in November 2008 that came as an absolute shock to them, and was contrary to their understanding of the arrangements. The result was, on Mr White's evidence, "chaotic" as they could not carry out their business:

> The access that was essential to be able to properly conduct our business from the premises was immediately removed. It also created an unworkable situation regarding vehicle access for the 4 rear units.

[36] Despite that serious and immediate effect, Brave Design remained in the premises and paid rental at an unabated (indeed increased) rate until February 2009. Brave Design then did reduce the rental paid, paying it at an abated figure from March 2009 until 31 December 2009. But it only sought to cancel by letter of 27 October 2009. In the circumstances s 7(5) of the Act and cl 41.1 of the lease apply:

> Affirmation
>
> 41.1 A party to this lease shall not be entitled to cancel this lease if, with full knowledge of any repudiation or misrepresentation or breach of covenant, that party affirmed this lease.

[37] Apart from reducing the rental paid from March 2009 (which seems to have been in response to an issue concerning the car parks) the earliest complaint in terms of formal correspondence appears to be a letter from the defendants' solicitors of 7 April 2009. By remaining in possession and paying rental during 2009 Brave Design affirmed the lease and lost the right to cancel.

[38] It is also clear from the initial correspondence from Brave Design that its initial concern was directed at the loss of some car parking. The initial position taken on behalf of Brave Design was that the loss of use of 94A was a breach of the term of quiet enjoyment under the lease. There was no suggestion of cancellation until much later.

[39] There is some debate in the correspondence between the parties about the car parks allocated by the plaintiffs to Brave Design, but the car parks were to be allocated by the plaintiffs. By inference they could be changed from time to time and if, for a period of time, the number of car parks was limited, that might support a cross-claim or set-off for damages, but of itself would not be a substantial enough breach to support cancellation. Further, as a breach not justifying cancellation, it could not support non payment of rent given the no set-off clause:

> 1.1 THE Tenant shall pay the annual rent by equal monthly payments in advance ... . All rent shall be paid without any deductions or set-off by direct payment to the Landlord or as the Landlord may direct.

The guarantors are bound by that provision as well because the terms of the guarantee provide the guarantor may for all purposes be treated as the tenant.

Result/judgment

[40] The plaintiffs satisfy the Court the defendants have no arguable defence that Brave Design was entitled to cancel the lease. The defendants have no defence to the claim for summary judgment under their guarantees. Judgment for the plaintiffs against the defendants jointly and severally in the sum of $57,311.69.

[41] Costs on a 2B basis to the plaintiffs against the defendants.

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Venning J