IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-001168
[2021] NZHC 663

BETWEEN	CHRISTOPHER SAI LOUIE and PHILIP CHARLES CREAGH Plaintiffs
AND	PENGELLY'S PROPERTIES LIMITED Defendant

Hearing: 3 December 2020

Appearances: M D Pascariu and E I D Fox for the Plaintiffs
G J Kohler QC and J A R Barrow for the Defendant

Judgment: 30 March 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 30 March 2021 at 10:30 am
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Anderson Creagh Lai Ltd, Auckland
G J Kohler QC, (Shortland Chambers), Auckland
J A R Barrow, Barrister (Shortland Chambers), Auckland

Introduction

[1] The defendant, Pengelly's Properties Limited (Pengelly), owns land at 147-155 The Strand, Parnell, Auckland (the property). Pengelly leases the property to the plaintiffs, who trade as a partnership (the Partnership).

[2] The lease is for a 21-year term which is perpetually renewable (a so-called Glasgow lease). The term commenced 20 March 2004. It was in renewal of a lease first granted by the Auckland Harbour Board under the Public Bodies Leases Act 1969 (the PBLA).

[3] Clause 16 of the lease provides for the rent to be reviewed at the end of the seventh and fourteenth years of the 21-year term. Pengelly initiated a rent review under cl 16 in 2018. An arbitration followed. The arbitrator determined that the annual rent for the seven years from 20 March 2018 should be $390,000 plus GST. Before that review the annual rent had been $144,000 plus GST.

[4] The Partnership now says that that the 2018 rent review was ineffective. It says that a lessor's right to review the rent under cl 16 is exercisable only if the lessor is a "leasing authority" in terms of the PBLA. As Pengelly is not a leasing authority, the Partnership says Pengelly had no right to review the rent in 2018. The Partnership seeks a declaration to that effect, together with an order that Pengelly refund rent that has been overpaid since 20 March 2018. The Partnership applies for summary judgment for the declaration.

[5] Pengelly resists the Partnership's claim, and counterclaims for a declaration that the Partnership is liable to pay rent in accordance with the arbitration. Pengelly applies for summary judgment on its counterclaim.

Background

[6] On 10 February 1987, the Auckland Harbour Board, which was then the owner of the property, granted a lease of the property to the New Zealand Dairy Board. This original lease was for a term of just over 17 years, expiring 19 March 2004.

[7] The original lease provided that the Auckland Harbour Board granted the lease in exercise of the powers conferred on it by the PBLA. Clauses 14 and 15 of the original lease provided, relevantly:

> 14. THIS Lease is granted under and subject to the provisions of "The Public Bodies Leases Act, 1969" and accordingly on the expiration of the term of this Lease the Lessee shall have the right to obtain a new lease of the said premises for a further term of 21 years and so on from time to time in perpetuity at a rent to be ascertained each 21 years in accordance with the provisions of the 1st schedule to the said Act …
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> 15. THE yearly rent shall be subject to review as at the 20th day of March 1993 and at the expiration of the seventh and fourteenth years of the term of any renewals of this Lease which may be taken pursuant to clause 14 and upon all such reviews the rental for the period following up to the expiry of the term or the time for the next review as the case may be shall be determined in accordance with the provisions of section 22 of the Public Bodies Leases Act 1969 which shall apply and take effect as if the same had been herein set forth at length …

[8] I will address, below, s 22 of the PBLA. For now, it is sufficient to observe that s 22 provides that the rent review process is to be initiated by "the leasing authority", and that the PBLA defines "leasing authority".

[9] In October 1996, the Auckland Harbour Board sold the property. From that time the property has been in private ownership, by which I mean that none of the subsequent owners were, or are, "leasing authorities" in terms of the definition in the PBLA. Pengelly acquired the property on 24 April 2002. It has owned it since.

[10] The New Zealand Dairy Board assigned its leasehold interest in the property before the expiry of the term of the original lease. By the time the lease expired on 19 March 2004 there had been a further assignment, and Aoraka Ltd was the lessee.

[11] This meant that when the original lease expired the parties to the lease were Pengelly (as lessor) and Aoraka Ltd (as lessee). Those parties entered into a new lease on 15 September 2005, in renewal of the original lease. The term of the renewed lease was expressed to be 21 years from 20 March 2004. The renewed lease contained the following clauses:

> 15. This Lease is granted under and subject to the provisions of The Public Bodies Leases Act 1969 and accordingly on the expiration of the term of this Lease the Lessee shall have the right to obtain a new lease of

> the said premises for a further term of 21 years and so on from time to time in perpetuity at a rent to be ascertained each 21 years in accordance with the provisions of the First Schedule to the said Act modified as follows:
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> …
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> (b) Clause 19 of this lease relating to the determination of the rental for the period from the commencement of this term shall not be included and this provision (b) of this clause shall be deleted.
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> 16. The yearly rent shall be subject to review at the expiration of the seventh and fourteenth years of the term of this Lease and any renewals thereof which may be taken pursuant to clause 15 and upon all such reviews the rental for the period following up to the expiry of the term or the time for the next review as the case may be shall be determined in accordance with the provisions of section 22 of the Public Bodies Leases Act 1969 which shall apply and take effect as if the same had been herein set forth at length …
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> 19. The rental payable for the period of 7 years from and after the 20th day of March 2004 shall be the rental determined for that period by arbitration in accordance with clauses (7) to (11) (both inclusive) of the First Schedule to the Public Bodies Leases Act 1969 …

[12] Clauses 15 and 16, for the most part, repeated cll 14 and 15 of the original lease. Clause 19, providing for the rent for the first seven years of the renewed lease to be determined by arbitration, was new. An arbitration under cl 19 subsequently occurred. It determined the rent for that period to be $144,000 plus GST per annum.

[13] After the renewed lease was granted, the lessee's interest was assigned several times. On 11 July 2007, the plaintiffs, together with two other persons with whom they were in partnership (the Initial Partnership), took an assignment.

[14] The first seven-year period of the renewed lease ran to 19 March 2011. In advance of that period expiring, on 27 January 2011, the then parties to the renewed lease (Pengelly and the Initial Partnership) entered into a deed. This deed provided that, among other things:

> (a) The rent payable under the lease was subject to review on and from 20 March 2011.

(b) The parties had agreed that the rent payable from 20 March 2011 to 19 March 2018 should be and remain $144,000 plus GST per annum.

(c) In addition to that rent, and in consideration of Pengelly not exercising its right to have the new rent referred to arbitration under the terms of the lease and the PBLA, the Initial Partnership agreed to make additional yearly payments to Pengelly.

[15] On 2 May 2014 the Initial Partnership assigned its interest in the renewed lease to the Partnership. Since then the Partnership has been the lessee of the property.

The 2018 rent review

[16] The rent agreed under the 27 January 2011 deed applied until 19 March 2018. In November 2017 Pengelly informed the Partnership that it was initiating a rent review for the period from 20 March 2018 by instructing a valuer to prepare a rent valuation. On 14 March 2018 Pengelly forwarded to the Partnership the rent valuation it had obtained for the period from 20 March 2018.

[17] On 9 May 2018 the Partnership gave notice to Pengelly that it did not accept Pengelly's rent valuation, and that it required the rent to be determined by arbitration in accordance with the provisions of the PBLA. On 19 June 2018 the Partnership served a formal notice of arbitration on Pengelly.

[18] The parties appointed the Honourable Barry Paterson QC as arbitrator. Mr Paterson gave his award on 5 November 2018. He determined the rent for the seven-year period commencing 20 March 2018 at $390,000 plus GST.

[19] The Partnership paid rent in accordance with the award until 2 April 2020. Then, on 26 June 2020, the Partnership's solicitors wrote to Pengelly. The letter stated that the Partnership claimed that the 2018 rent review was void and unenforceable, on the basis that Pengelly was not a "leasing authority", and therefore had no right to undertake a rent review. The Partnership had not raised this issue at any point during the rent review process or arbitration.

[20] Further correspondence between the parties' solicitors followed. The Partnership commenced this proceeding on 14 July 2020.

The claim and counterclaim, and the applications for summary judgment

[21] The Partnership claims that because Pengelly is not a "leasing authority", it was not entitled to exercise a rent review under cl 16, and accordingly the 2018 rent review was void and unenforceable. By way of remedy or relief, the Partnership seeks a declaration that s 22 of the PBLA was incorporated in full in cl 16, a declaration that cl 16 is not enforceable against the Partnership, and an order that Pengelly refund to the Partnership rent that has been overcharged. The Partnership applies for summary judgment, but only for the declarations.

[22] Pengelly opposes the Partnership's application for summary judgment. Pengelly has also filed a defence and counterclaim, and seeks summary judgment on parts of its counterclaim. It seeks summary judgment for a declaration that the Partnership is to pay the rent in accordance with the terms of the arbitration.[1]

[23] Pengelly has not sought defendant's summary judgment. However, I understood Mr Pascariu, counsel for the Partnership, to acknowledge that, if I were to grant summary judgment to Pengelly on its counterclaim, practically there would be no point in the Partnership continuing with any part of its proceeding.

The issues raised by the summary judgment applications

[24] The primary issue for determination on the summary judgment applications concerns the interpretation of cl 16 of the renewed lease. The Partnership contends that, properly interpreted, cl 16 entitles only a leasing authority to initiate a rent review. Pengelly is not a leasing authority. By contrast, Pengelly contends that cl 16 entitles the current lessor, whether a leasing authority or not, to initiate a rent review.

[25] Pengelly raised a subsidiary issue. This would arise only if I accepted the Partnership's interpretation of cl 16. In that event, Pengelly contended that the

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1 Pengelly's application also sought summary judgment for payment of the outstanding rent and for interest. However, it did not pursue summary judgment for those matters at the hearing.

Partnership was estopped from denying that the arbitration was binding and determinative.

Summary judgment principles

[26] There was no dispute between the parties as to the principles applicable to summary judgment applications. The question is whether the defendant has no defence to the claim—that is, that there is no real question to be tried. The onus is on the plaintiff. The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents.[2]

[27] The primary issue on these applications is one of contractual interpretation. In summary judgment applications that turn on contractual interpretation, the affidavits will sometimes reveal material disputes as to the context in which the parties entered into the contract. In such cases, the Court, in accordance with ordinary summary judgment principles, will not normally resolve such disputes, and will decline to grant summary judgment. But in this case there is no such dispute in the affidavits, and neither party suggested that there was any factual dispute that made summary judgment inappropriate.

Interpretation principles

[28] There was also no dispute as to the applicable principles of contractual interpretation. Contracts are interpreted objectively. The aim is to ascertain the meaning that the contract would convey to a person having all the background knowledge that would have been reasonably available to the parties at the time of the contract. Context may point to an interpretation other than the obvious one, or may assist in resolving an ambiguity. But the text remains centrally important. Its ordinary and natural meaning in the context of the contract will be a powerful, albeit not conclusive, indicator of what the parties meant. In commercial contracts the courts should have regard to the commercial purpose and structure of the parties' bargain. Where contractual language, viewed in the context of the whole contract, has an

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2 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26].

ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.[3]

[29] The parties also made submissions as to the meaning of provisions of the PBLA. Again, there was no dispute as to the interpretative principles. The meaning of an enactment must be ascertained from its text and in the light of its purpose.[4] Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose. In determining purpose, the court must have regard to the immediate and the general legislative context. Of relevance also may be the objective of the enactment.[5]

The meaning of clause 16

[30] For convenience, I repeat cl 16:

> 16. The yearly rent shall be subject to review at the expiration of the seventh and fourteenth years of the term of this Lease and any renewals thereof which may be taken pursuant to clause 15 and upon all such reviews the rental for the period following up to the expiry of the term or the time for the next review as the case may be shall be determined in accordance with the provisions of section 22 of the Public Bodies Leases Act 1969 which shall apply and take effect as if the same had been herein set forth at length …

[31] Mr Pascariu's submissions on the meaning of cl 16 involved three steps. The first was that the concluding words of cl 16 incorporated the text of s 22 of the PBLA into cl 16. He said that the effect of cl 16 was to "cut and paste" the provisions of s 22 into the lease.

[32] I accept that part of his submissions. Clause 16 could hardly be plainer in expressing that effect.

[33] The second step of Mr Pascariu's submissions concerned the meaning of s 22 in the context of the PBLA itself. Section 22 provides:

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3 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2013] NZSC 147, [2015] 1 NZLR 432 at [60]-[63] and [93].

4 Interpretation Act 1999, s 5(1).

5 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

22 Periodic review of rents

(1) Subject to this section, a lease granted under this Act may contain provision for the review of the yearly rent payable thereunder at such periodic intervals during the term of the lease, being not less than 5 years, as the leasing authority thinks fit.

(2) Where a lease contains any such provision for the review of rent—

(a) not earlier than 9 months and not later than 3 months before the expiry by effluxion of time of any such period (not being the last such period of the term of the lease), or as soon thereafter as may be, the leasing authority shall cause a valuation to be made by a person whom the leasing authority reasonably believes to be competent to make the valuation of the fair annual rent of the land for the next ensuing period of the term of the lease, so that the rent so valued shall be uniform throughout the whole of that ensuing period:

(b) as soon as possible after that valuation has been made, the leasing authority shall give to the lessee notice in writing informing him of the amount of that valuation and requiring him to notify the leasing authority in writing within 2 months whether he agrees to the amount of that valuation or requires that valuation to be determined by arbitration in accordance with paragraph (c):

(c) within 2 months after the giving of that notice to the lessee, he shall give notice in writing to the leasing authority stating whether he agrees to the valuation specified in the notice given to him or requires that valuation to be determined by arbitration. If he so requires, that valuation shall be determined in accordance with the provisions of clauses 7 to 11 of Schedule 1, which shall, with the necessary modifications, apply as if the valuation were being made to determine the rent payable under a renewal lease:

(d) if the lessee fails to give to the leasing authority within the time specified in paragraph (c) the notice referred in that paragraph, he shall be deemed to have agreed to the valuation set out in the notice given to him under paragraph (b):

(e) the yearly rent agreed to or deemed to have been agreed to by the lessee or determined by arbitration under this subsection shall be the yearly rent payable under the lease for that ensuing period.

[34] Mr Pascariu emphasised that s 22(2)(a) provides for the rent review process during the term of a lease to be exercised by "the leasing authority". He contrasted this with the process that governs the review of rent when a perpetually renewable lease is renewed. Section 7(1)(e) provides that the rent on a renewal is to be reviewed

in accordance with sch 1, and cl 2 of sch 1 provides that the process is initiated by "the lessor". He submitted that the drafters of the PBLA intended the rent review provisions during the term of a lease to be exercisable only by leasing authorities (and therefore not by a successor in title that was not a leasing authority), while the rent review on renewal was exercisable more generally by lessors (including a successor in title that was not a leasing authority).

[35] This contrast, Mr Pascariu said, was consistent with the objective of s 22. The PBLA was a revision of the Public Bodies Leasing Act 1908, which provided a code for the leasing powers of all public bodies. The 1908 Act did not include a provision for rent reviews during the terms of leases granted under the Act. Parliament had identified that the lack of such a provision encouraged public bodies to grant only short-term leases so that they could review rents each time a lease was renewed. This did not tend to give lessees the security of tenure and investment needed to encourage the best land utilisation.[6] The objective of s 22, Mr Pascariu therefore said, was to encourage the granting of long-term leases. This objective was achieved once such a lease was granted, and was reflected in the provision that, on renewal, a rent review could be initiated by a lessor that was not a leasing authority.

[36] So, on this second step in Mr Pascariu's submission, if a leasing authority grants a perpetually renewable lease that contains a provision for rent review during the term of the lease, s 22 means that:

(a) For so long as a leasing authority retains ownership of the land, the leasing authority will be able to exercise the provision for rent review during the term (as well as initiate rent reviews on renewal); but

(b) The moment the leasing authority sells the land to someone who is not a leasing authority, the new lessor will not be able to exercise the provision for rent review during the term (though the new lessor will be able to initiate rent reviews on renewal).

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6 (21 October 1969) 364 NZPD 3678.

[37] The third step of Mr Pascariu's submissions was that, when the text of s 22 was incorporated into the renewed lease, that text bore the same meaning in the lease as it did in the PBLA.

[38] I do not accept Mr Pascariu's second or third steps. I will deal first with the meaning of s 22 in the context of the PBLA itself, and then with the meaning of s 22 in the context of the renewed lease.

The meaning of s 22 in the context of the PBLA itself

[39] Section 22(2)(a) provides that where a lease granted under the PBLA contains a provision for the review of the rent during the term of the lease, then within a defined time period "the leasing authority shall cause a valuation to be made … of the fair annual rent of the land". Section 22(2)(b) then provides that as soon as possible after that valuation has been made, "the leasing authority shall give the lessee notice in writing" of the amount of the valuation.

[40] The language of s 22(2) is, as Mr Pascariu submitted, quite specific. The rent review process is to be initiated by "the leasing authority". The interpretative issue is: what does "the leasing authority" mean?

[41] Mr Pascariu relied on s 2, which relevantly provides:

> In this Act, unless the context otherwise requires,—
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> …
>
> **leasing authority** means—
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> …
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> (b) every person or body of persons, whether incorporated or not, declared by or pursuant to the provisions of any enactment, whether passed before or after the commencement of this Act, to be a leasing authority for the purposes of this Act or for the purposes of the Public Bodies' Leases Act 1908 or any corresponding former Act:
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> (c) every person or body of persons declared by the Minister, pursuant to section 3, to be a leasing authority for the purposes of this Act …

[42] The Partnership's case proceeded on the basis that the meaning of "the leasing authority" started and ended with paragraphs (b) and (c) of this definition. Those paragraphs may be the start, but they are not the end. They are prefaced, as are many statutory definitions, by the words "unless the context otherwise requires". There are several matters of context which require the words "the leasing authority" to bear a meaning wider than that in paragraphs (b) and (c), to include the lessor for the time being (regardless of whether that lessor comes within paragraphs (b) or (c)).

[43] I begin with the purpose of the PBLA. Its purpose is to empower public bodies to enter into leases on particular terms. More specifically, it is clear from the subject-matter of the Act—dealing as it does with land that public bodies hold on behalf of various communities—that the objective is to allow those public bodies to obtain the best return possible from the land that is vested in them.

[44] Such returns are available not only from leasing the land, but from selling the land subject to such leases. Much of the land held by public bodies is able to be sold by those public bodies. The most likely purchasers of such land would not themselves be public bodies. The drafters of the Act (and of its predecessors) must have appreciated that public bodies might at some time sell land over which they had granted leases under the Act.[7]

[45] In order to obtain the best return possible from the sale of land subject to a lease with mid-term rent reviews, the terms of the lease must be marketable to prospective purchasers. The Partnership's interpretation of "the leasing authority" is inconsistent with that objective. On its interpretation, the land would have one value to a leasing authority (which would have the right to exercise the rent reviews) and a different value to a "private" purchaser (which would not have that right).

[46] I next turn to the rent review process in s 22(2). It has three notable aspects. First, the process is expressed in mandatory language. Section 22(2)(a) and (b) say that prior to the end of the first rent period the leasing authority "shall" cause a valuation to be made, and "shall" give the lessee notice in writing of the amount of

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[7] There is reference in the Parliamentary debates on the bill that became the PBLA to public bodies selling their land: (21 October 1969) 364 NZPD 3682.

that valuation. Section 22(2)(e) says that the rent determined by the process "shall be the yearly rent payable under the lease" for the next period. The Partnership's interpretation does not sit well with this language. On its interpretation, the process falls into abeyance the moment the land is sold to a private purchaser.

[47] The second aspect to the process is that there is no ratchet clause. That is to the benefit of lessees. This must have been intended by the drafters. That benefit would, on the Partnership's interpretation, again fall into abeyance the moment the land was sold to a private purchaser (because there would be no mechanism for conducting a rent review during the term).

[48] Third, if the rent review process leads to an arbitration, s 22(2)(c) provides that cll 7 to 11 of sch 1 (which are the provisions that apply for determining rent on a renewal) shall apply, "with the necessary modifications". Clause 7 refers to "the lessor" rather than "the leasing authority". This suggests that the drafters viewed these terms as almost interchangeable.

[49] All these contextual matters suggest that the Partnership's interpretation was not intended. There is also a textual point against its interpretation. Section 22(2) refers to "*the* leasing authority". The use of the definite article contrasts with the general empowering provision, s 7, which provides that where "*a* leasing authority" has power to let any land, it may let the land under any of various leases. This means that, if the Partnership's interpretation were to be accepted, in s 22(2) "the leasing authority" would mean the leasing authority that initially granted the lease. This would have the absurd consequence that that leasing authority would, even after selling the leased land, be able (and possibly be obliged) under s 22(2) to initiate periodic rent reviews—perhaps on a perpetual basis. This consequence does not arise if "the leasing authority" is interpreted to include "the lessor for the time being".

[50] The only thing that the Partnership can rely on to support its interpretation is that s 22(2) uses the defined term "the leasing authority". That choice of words is, of course, an important indicator of meaning. But it must yield to the contextual and textual matters to which I have referred.

[51] For these reasons I conclude that, in the PBLA itself, the words "the leasing authority" include the lessor for the time being (regardless of whether that lessor comes within paragraphs (b) or (c) of the definition of "leasing authority").

The meaning of s 22 in the context of the renewed lease

[52] Even if I had accepted Mr Pascariu's submissions as to the meaning of "the leasing authority" in the context of the PBLA, I would not have accepted that that meaning applied in the context of the renewed lease.

[53] Clause 16 says that s 22 "shall apply and take effect as if the same had been herein set forth at length". As I said earlier, this plainly means that the terms of s 22 are incorporated into the renewed lease.

[54] The parties' submissions did not closely examine the effect of incorporating statutory terms into a contract. The effect of such incorporation is expressed by Lewison LJ, writing extra-judicially. Where the terms of a statute are incorporated by reference into a contract, "the contract has to be read as if the words of the statute are written out in the contract and construed, as a matter of contract, in their contractual context".[8] Because the statutory terms have to be construed in their contractual context, "their meaning in the context of the contract is not necessarily the same as their meaning in the context of the statute".[9]

[55] If "the leasing authority" bore the meaning in the PBLA contended for by the Partnership, there are two reasons why that meaning could not apply in the context of the renewed lease. First, the renewed lease was entered into at a time when the land was already owned by a private company. So, as Mr Kohler QC submitted for Pengelly, on the Partnership's interpretation, the rent review provision in cl 16 was inoperative and meaningless from the moment the parties entered into the renewed

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8 Kim Lewison *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, London, 2015) at 125, citing *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 (HL); *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16, [2011] 1 WLR 921 at [51].

9 Kim Lewison *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, London, 2015) at 126, citing *Brett v The Brett Essex Golf Club* (1986) 52 P & CR 330 and *GREA Real Property Investments Ltd v Williams* [1979] 1 EGLR 121.

lease. I cannot accept that the parties intended that so important a provision as a rent review clause was inoperative.

[56] Second, the only provisions that the renewed lease made for rent were in cll 16 and 19. Clause 19 provided for the rent payable for the first seven years of the lease. The only provision in the renewed lease that could apply beyond those first seven years is cl 16. On the Partnership's interpretation, cl 16 was inoperative from the moment the parties entered into the lease. That would mean that the parties had entered into a new lease without making any provision for rent after the first seven years. I cannot accept that that was the parties' intention.

[57] For these reasons, the parties must have intended that cl 16 was operative. Clause 16 can operate only if the words "the leasing authority", when incorporated into that clause, mean the lessor for the time being.

Conclusion

[58] I conclude that Pengelly's interpretation of cl 16 is the correct one. It follows that it was entitled to initiate a rent review in 2018. The Partnership fails in its application for summary judgment. Pengelly succeeds in its application for summary judgment on its counterclaim.

Is the Partnership estopped from denying that the arbitration was binding and determinative?

[59] Having reached that conclusion, it is not necessary for me to address Pengelly's fall-back estoppel argument.

Costs

[60] Pengelly is entitled to costs. If the parties are unable to agree costs, Pengelly is to file a memorandum by 23 April 2021, with the Partnership to follow by 7 May 2021. Each memorandum must not exceed three pages (excluding schedules or annexures).

Result

[61] I dismiss the Partnership's application for summary judgment.

[62] I grant Pengelly's application for summary judgment on its counterclaim. I make a declaration that the Partnership is obliged to pay rent under the lease in accordance with the terms of the arbitration award by the Honourable Barry Paterson QC dated 5 November 2018.

[63] The Partnership is to pay costs to Pengelly on the two applications. Failing agreement, I will determine costs following receipt of the parties' memoranda.

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Campbell J