IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2012-409-234
[2013] NZHC 30

BETWEEN	JANSEN LIMITED First Appellant
AND	SIMON MATTHEW ADAMS AND BRENT SYDNEY EADY Second Appellants
AND	PETRA HOLDINGS LIMITED Respondent

Hearing: 5 December 2012

Counsel: A M Swan for Appellants
P J Shamy for Respondent

Judgment: 18 February 2013

JUDGMENT OF PANCKHURST J

Introduction

[1] Jansen Limited (Jansen) leased commercial premises in Christchurch from Paul and Linda Wareing (the Wareings) for several years to 1 March 2007, when the lease expired. The following day the Wareings settled a sale of the premises to Petra Holdings Limited (Petra). Jansen continued to occupy the premises until late December 2007 when Petra re-entered the premises following the emergence of differences concerning payment of rent and work required to reinstate the premises.

[2] The second appellants, Messrs Adams and Eady, are directors of Jansen. When the company entered into the lease in March 2001, they personally guaranteed the payment of rent and Jansen's performance of its covenants in the lease.

[3] Petra sued Jansen and the guarantors for unpaid rental and reinstatement costs, together with indemnity legal costs and interest. In the District Court Petra succeeded in that judgment was entered against both the company and the guarantors for damages of $85,000, costs and disbursements of $120,383.44, and interest at 15% per annum to the date of judgment.

[4] The appellants raised numerous grounds of appeal. They contended that Jansen did not hold-over under the terms of the lease following its expiry on 1 March 2007; rather a tenancy at sufferance or at will came into being, and as a consequence the guarantee was spent and Petra's make good obligation was to be assessed by reference to a short term tenancy of about nine months. Hence the appellants also contended that the District Court judgment was erroneous in relation to the assessment of damages, and in awarding indemnity costs and interest based on the terms of the previous lease.

The District Court hearing

[5] The case commenced as an application for summary judgment, but this failed on the footing that a substantive hearing was required to resolve disputed issues of fact. Following a two day hearing in November 2011 a reserved judgment dated 13 January 2012 was delivered by Judge Kellar.

[6] Unfortunately, there is no record of the District Court hearing. Either in error the hearing was not recorded, or the recording of the hearing was erased by mistake. Hence, the record of the cross-examination of eight witnesses was not available to this Court, although the Judge's personal notes taken during the hearing were produced as part of the record.

[7] Following the filing of the appeal the appellants also filed an application for a rehearing when it became known that the record of the original hearing was unavailable. However, Mr Swan did not pursue this application. Before me counsel were of the view that the appeal could probably be argued on the basis of the available materials, including the reasons for judgment of Judge Kellar. The respective cases were advanced without, it seemed to me, difficulty as primary

reliance was based upon contemporaneous documents and the Judge's findings. Against the possibility that some unexpected difficulty arose the rehearing application was left alive in the meantime. I shall return to this aspect later in the judgment.

Some further background

[8] Jansen entered into the lease of 174 St Asaph Street, Christchurch with the Wareings on 1 March 2001. The term was three years with one right of renewal for three years to 1 March 2007.

[9] The premises comprised a showroom and office space in a central inner city location. Jansen is an Auckland based company which supplies and installs audio and lighting systems suitable for use in buildings such as churches and schools. At all relevant times Wayne Singleton was Jansen's Financial Manager. He was based in Auckland, from where he had discussions with Mr Wareing and Brendan Chase, Petra's owner, in February-March 2007. Their content is important to the evaluation of the rental situation that prevailed after expiry of the lease.

[10] In addition to the main building fronting 174 St Asaph Street there was a separate warehouse to the rear. This was leased to Peter Urbani, who jointly operated a recording studio from the premises. When Jansen moved into the front building in 2001 Mr Urbani became its branch manager. This arrangement remained in place through to 2007, when Mr Urbani likewise had dealings with Mr Chase concerning continued occupation of the rear premises. In the event, Mr Urbani was served with a notice to quit, but Jansen was not.

Did Jansen hold-over from 2 March 2007?

The rival contentions

[11] Petra's case was that from the time it purchased the premises on 2 March 2007 Jansen held over under the lease until Petra re-entered in December 2007. Jansen, however, denied this interpretation of events and instead maintained that

from 2 March 2007 a new lease was negotiated for a term of three to six months at the same rental, but terminable by one month's notice from either side.

[12] The deed of lease was in the Auckland District Law Society 'Third Edition 1993' form. As to holding over clause 38 provided:

> IF the Landlord permits the Tenant to remain in occupation of the premises after the expiration or sooner determination of the term, such occupation shall be a monthly tenancy only terminable by one month's written notice at the rent then payable and otherwise on the same covenants and agreements (so far as applicable to a monthly tenancy) as herein expressed or implied.

Clause 45(a) provided that references to 'the Landlord' mean where appropriate 'the executors, administrators, successors and permitted assigns of the Landlord.... '.

[13] The third schedule to the lease contained the guarantee which began:

> IN CONSIDERATION of the Landlord entering into the lease at the Guarantor's request the Guarantor:
>
> (a) guarantees payment of the rent and the performance by the Tenant of the covenants in the lease, and...

The guarantor's covenants with the landlord included that any indulgence that would have released a surety did not avail the guarantors, who were liable as if they were the tenant, and:

> 3. The guarantee is for the benefit of and may be enforced by any person entitled for the time being to receive the rent.

The guarantors' liability is joint and several.

[14] The agreement for sale and purchase dated 12 January 2007 whereby the Wareings sold 174 St Asaph Street to Petra included a special condition relating to the existing tenancies. Clause 14.2 provided that the purchaser was to be provided with all documentation relevant to the tenancies, and continued:

> The Vendor undertakes that from the date of this agreement until the earlier of settlement of this sale, or cancellation of the contract, the Vendor shall not vary, renew or enter into any other documentation or agreement affecting the leases without the Purchaser's prior written consent. The Vendor agrees that the Purchaser may, from the date of this agreement negotiate with the

> existing tenants of the property for any agreed variations to the existing leases, with any such variations being conditional upon this contract becoming unconditional in all respects and settling. Any such agreed variations will not become effective until the ownership of the property is transferred to the Purchaser. The Vendor agrees to co-operate with the Purchaser to arrange any such negotiations.

Vacant possession

[15] Jansen's first argument was that the agreement for sale and purchase provided that the property was 'sold with vacant possession' and that this precluded a holding over. Clause 3.1 stipulated that unless particulars of a tenancy were included in the agreement the property was sold with vacant possession and the vendor was to provide as much on the possession date. The agreement did not detail particulars of any continuing tenancy.

[16] However, it is apparent that this term of the agreement was varied by the parties in the build up to the possession date and settlement on 2 March 2007. Judge Kellar found this to be the case, and I adopt his conclusion and reasoning.

[17] Correspondence between the Wareings' and Petra's solicitors confirmed that Petra did indeed want vacant possession. However, the Wareings were reluctant to provide it and on 1 February 2007 their solicitor wrote in these terms:

> You want the vendor to give notice and the vendor has indicated it is willing to do so. What the vendor doesn't want to do is take on the obligation of enforcement or suffer delayed settlement should the premises not be vacant at settlement.
>
> If I could summarise:
>
> Should the agreement become unconditional my client is prepared to give notice to the tenants of their termination of tenancy with this notice to be provided by you. My client does not wish settlement to be delayed should the tenants not vacate by settlement date.

[18] On 23 February 2007 Petra confirmed the contract was unconditional. Its solicitor's letter also included this:

> [3] In terms of our prior communication we would be pleased if the attached notice could now be served on the rear tenants today.

> [4] Please advise by return when this notice has been served so our client can calculate when, after settlement, vacant possession will be available for the rear premises.

[19] The notice to quit was one addressed to Mr Urbani and his partner, Andrew Fox-Hulme, in relation to the rear premises, which they were required to vacate within a month.

[20] No notice was provided for service upon Jansen. Plainly the agreement for sale and purchase was varied so that only vacant possession of the rear premises was to be provided, and that on the basis of the notice drawn by Petra but served by the Wareings.

Holding-over

[21] The real issue does not concern vacant possession, but whether in terms of clause 38 of the lease the landlord permitted Jansen to remain in occupation of the premises after 1 March 2007. Mr Swan, for Jansen, argued that only Paul Wareing (who dealt with the lease on behalf of his then wife) could permit Jansen to remain in occupation, in order for a holding-over to arise.

[22] I note that the Wareings were cited as third defendants in the District Court proceeding. They were joined by Petra in response to a defence in the summary judgment context that Mr Wareing had waived Jansen's obligation to reinstate the premises upon the expiry of the lease. Petra, however, elected to discontinue against the Wareings provided Mr Wareing gave evidence at the substantive hearing concerning the waiver allegation. It will be necessary to refer to this evidence later.

[23] At this point it is Mr Wareing's evidence concerning Jansen's ongoing occupation of the premises that is in point. His evidence was that because Jansen's lease expired on 1 March 2007, there was no need to give the company notice to quit and that he had no involvement with Jansen concerning its continued occupation of the premises. Mr Wareing drew attention to special condition 14.2 in the agreement for sale and purchase whereby Petra was authorised to negotiate with the existing tenants while he undertook not to do so.

[24] In reliance on this evidence Jansen argued that the landlord did not permit Jansen to remain in occupation so that a holding-over did not arise. My attention was drawn to *Cigna Life Insurance New Zealand Limited v The New Zealand Counties Investment Company Limited*[1] and *Tinline Properties (Canterbury) Limited v Westfield Holdings Limited.*[2] In *Cigna* Gallen J held that in the circumstances of that case a permission to occupy after expiry of a lease required on the one part a permission to remain and on the other an intention to remain. Miller J in the *Tinline* case referred to *Cigna* with approval. Both cases I note concerned whether a subtenant had held-over, not an original tenant.

[25] But ultimately an issue such as this is fact specific. It is dependent upon an evaluation of the particular circumstances and conduct said to give rise to the permission to remain in occupation. I turn, therefore, to the factual circumstances of this case.

[26] I have already referred to the special conditions in the agreement for sale and purchase, and to the variation agreed to by the parties whereby Mr Wareing was relieved of the obligation to provide vacant possession, provided he co-operated in facilitating Petra's wishes in relation to the tenants. This he did, by effecting service of the notice to quit the monthly tenancy of the rear premises provided on 23 February 2007 by Petra's solicitors. Jansen's fixed term lease, of course, was about to expire. Despite that fact Mr Wareing took no steps to secure Jansen's departure from the premises.

[27] A few days later, on 27 February, Mr Chase met with Mr Urbani concerning the rear premises. Mr Urbani said that he was keen to stay and so was Jansen. A discussion ensued, at the end of which Mr Chase made it clear that despite the discussion the notice to quit remained in place.

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1 *Cigna Life Insurance New Zealand Limited v The New Zealand Counties Investment Company Limited* (1997) 3 NZ ConvC192, 540.

2 *Tinline Properties (Canterbury) Limited v Westfield Holdings Limited* [2012] NZHC 1067.

[28] The next day Mr Singleton spoke to Mr Chase. Several issues were discussed in light of Mr Singleton's confirmation that Jansen wished to stay put. These included the term of a possible new lease, the level of any rental increase, a need for extra space, the profitability of Jansen's business and that Mr Singleton would come to Christchurch 'next week' for further discussions. There were further discussions on 7 March when Mr Singleton was in Christchurch, and again on 13 March when the two men spoke by telephone. Despite these discussions a new lease did not eventuate and rent continued to be paid as under the expired lease.

[29] To my mind the decision in *Macaulay v Wesley College Trust Board*[3] is of assistance. The case concerned a lease in the same terms as the present one. The Trust Board leased premises to the Macaulays with two rights of renewal, the first of which was exercised. The second renewal was not taken up, but the Macaulays remained in occupation and continued to pay rent for several months. At one point the Trust Board sent a valuer's report to the Macaulays in support of a rent increase, but nothing was finalised. The Macaulay's then defaulted in payment of rent; the Trust Board re-entered the premises and claimed for arrears.

[30] Paterson J held that over the period of several months the Macaulays clearly occupied the premises as a tenant holding-over under clause 38 of the lease. Thereby a monthly tenancy under s 105 of the Property Law Act 1952 arose, but the terms of the original lease continued to bind the parties, save for any terms incompatible with a monthly tenancy.

[31] Like Judge Kellar I am satisfied that Jansen held-over in the present case. The word 'permits' in clause 38 means no more than that the landlord allows the tenant to remain in occupation. Here, all parties knew that the lease was about to expire. Petra was to purchase the reversion and Jansen wished to remain in occupation, indeed to negotiate a new lease if terms could be agreed. In the meantime, Mr Wareing by taking no steps to secure Jansen's departure from the premises, allowed the company to remain in occupation.

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3 *Macaulay v Wesley College Trust Board* (1999) 8 NZCPR194.

Amendment of the statement of claim

[32] Shortly after the appeal hearing I convened a telephone conference with counsel and invited further submissions concerning whether Petra, through Mr Chase, had permitted Jansen to remain in occupation of the front premises. Mr Shamy filed a submission in which he both adhered to the original pleading, but also sought an amendment to the statement of claim to plead in the alternative that Mr Chase permitted ongoing occupation on behalf of Petra.

[33] Mr Swan opposed any amendment, essentially on the grounds that the case had been run at trial in light of the original pleading and that it would be prejudicial to the defendants to allow a late amendment. I doubt that an amendment would have occasioned prejudice, given that the dealings between Jansen and Petra were closely examined in the District Court, but for the reasons set out above the amendment is not necessary.

Enforceability of covenants

[34] For completeness I shall refer to Judge Kellar's judgment concerning the enforceability of covenants in the lease after the reversion was transferred to Petra on 2 March 2007. I did not understand Mr Swan to contest this aspect of the judgment. However, I shall briefly record my agreement with the Judge's findings.

[35] Judge Kellar held that following transfer of the reversion there was privity of estate between Jansen and Petra, as the relationship of tenant and landlord subsisted between them. However, there was no privity of contract between these parties, since they had not entered into a contractual arrangement. It followed that ss 112(1) and 113(1) of the Property Law Act 1952 governed which of the lessees' and lessors' covenants ran with the reversion. Without stating the terms of the two subsections, the test is that covenants are enforceable if they touch and concern the land. By contrast covenants not within this test are regarded as personal obligations that do not run with the reversion.

Judge Kellar held that the lessees' covenants to pay the rent and to make good the premises by restoring them to their condition at the commencement of the lease touch and concern the land, as does a covenant by a third party to guarantee the lessees' performance of these covenants. Macaulay v Wesley College Trust Board is authority for the proposition that a guarantor's obligation may extend beyond the original term of the lease, if the guarantee so provides. Here, as in Macaulay, the guarantee does expressly provide that whoever is entitled for the time being to receive the rent may enforce it. Accordingly, I agree with Judge Kellar that the holding-over exposed Jansen, and the guarantors, to liability for the various components of Petra's claim – provided they were made out to the necessary standard.

Quantum: Petra's claim against Jansen and the guarantors

[36] The major components of the claim were for reinstatement costs for an amount variously calculated at between $87,000 and just over $152,000, loss of rental of $3,018 per month from 19 November 2007, and indemnity costs and expenses, plus interest.

[37] Jansen, however, raised multiple defences in relation to the amounts claimed. It contended that during the term of the lease Mr Wareing waived the reinstatement obligation in whole or in part; that the condition of the premises at the inception of the lease was poor, with the result that no remedial work was needed in November 2007; that if reinstatement to the standard sought by Petra occurred betterment would result; that Petra's re-entry on 19 December 2007 unreasonably prevented Jansen from completing intended make good work; and that Petra failed to mitigate its rental loss, in that remedial work was not promptly completed and the premises promptly re-let. There is also a challenge to the interest award.

[38] Although separate in nature, the various defences are inter-related. It is convenient to first sketch the history of the lease and of the dispute between Petra and Jansen.

Some further factual background

[39] Jansen first became lessees in March 2000, and executed a lease a year later on 1 March 2001. In 2002 Jansen took up the whole of the front premises, whereas previously it had occupied 75% of the space and another tenant occupied the balance. At the same time Jansen embarked upon a major makeover of the premises to fit their business requirements. In 2000-2001 the layout comprised an open space at the front of the premises, four office areas, a strong-room and staff and toilet areas. Jansen preferred to have an expansive showroom occupying most of the floor space, with a store area and staff area in the rear corners of the premises, and the strong-room as the only other interruption to the open plan layout.

[40] Mr Wareing approved this fit-out, which necessitated the removal of several internal walls that previously divided up the space, but which were not load bearing. Jansen said that the fit-out cost about $100,000 although there was no documentary evidence proffered in support of this figure. Mr Wareing agreed that the partitioning removed by Jansen need not be replaced at the end of the lease. He also provided rent concessions in relation to the 25% of additional space for a period of two months and in relation to 50% of a rent increase for three months, September to November 2002, when the refit occurred. The work undertaken by Jansen extended to replacement of the main entrance door into the premises, replacement of carpet and recladding the showroom wall areas with battens and gibraltar board to facilitate the display of sound and lighting equipment sold by the company. At the same time Mr Wareing replaced the roofing butynol to resolve some water ingress problems that had affected the premises.

[41] Mr Wareing's evidence in the District Court included observations that:

> Jansen were good tenants. They always paid their rent on time. I left them to get on with their business and that was the way it remained until about 5 years later I was approached by Mr Chase wanting to buy the building...

[42] On 12 January 2007 the Wareings and Petra entered into a conditional sale agreement at a purchase price of $825,000. On 23 February 2007 the agreement

became unconditional, and Mr Wareing was requested to serve a notice to quit in relation to the rear premises. Settlement occurred on 2 March 2007, and the rear premises were vacated later that month while Jansen continued to occupy the front premises and paid rental and outgoings as previously.

[43] On 5 October 2007 Mr Singleton wrote to Petra advising that Jansen would vacate the premises by 4 November 2007. Five days later Mr Chase acknowledged the notice of termination, noted that Jansen had held over pursuant to clause 38 of the lease and that it was required to yield up the premises in 'clean order repair and condition'. The letter detailed aspects of the work including repainting the interior, repairing breakages, replacing worn floor coverings, removing signage and opaque coatings from exterior windows, removing tenant's fittings and making good all resulting damage.

[44] Mr Singleton replied on 18 October 2007 commenting that according to Peter Urbani the premises were 'essentially a bomb site' at the commencement of the lease, and:

> Obviously you don't want it put back to this state, so at this stage I have instructed Peter to remove all our fittings, fixtures and signage, paint the front part of the building to a neutral colour (or a colour that suits you), clean off the windows, fix any damage/defects and generally make it tidy.

[45] On 19 November Mr Chase e-mailed Mr Singleton concerning progress with the make good work. He attached a quotation obtained from Pace Project Management, which outlined work costing $94,829 to reinstate the premises. The suggested timeline was six weeks, although this period could be considerably longer if a building consent was required.

[46] The following day Messrs Chase and Singleton had a telephone discussion, in which the latter said that Jansen's estimate for the work was $10,000 to $12,000. An e-mail dated 28 November further explained Jansen's approach, namely that the premises were 'already in a better condition than when we moved in', that 'any structural type changes made to the building were with the consent of the landlord and an agreement was made... that reinstatement of those changes would not be

required', and that the remedial work would be at 'a rough cost of $10,000' using 'our own casual workers for the bulk of the work'.

[47] On 3 December Petra responded through its solicitor, who asserted that reinstatement of the premises to their original condition was required with rent to continue until the work was affected. There was no immediate response to this letter or to two follow up letters. On 19 December 2007 Petra's solicitor again wrote to Jensen stating that rental was in arrears for in excess of 14 days and that Petra was re-entering the premises pursuant to clause 29 of the lease.

[48] Mr Singleton responded on behalf of Jansen on 21 December 2007 repeating the better condition and structural changes assertions and adding that Jansen was unable to complete the make good work because 'workers are unable to access the building as the locks have been changed'.

[49] An impasse developed. Petra obtained further advice from Pace concerning the cost of required work, being a reduced figure of $62,961 subject to various contingencies. In mid 2008 Petra painted the exterior street frontage of the premises.

[50] In April 2008 Mr Wareing signed a document that was subsequently relied upon by Jansen at the District Court hearing. Mr Urbani owed rent to the Wareings for about the two months prior to his vacating the rear premises. One evening he called unexpectedly at Mr Wareing's house and offered to install a sound system in lieu of the rent arrears. Before leaving Mr Urbani produced a document that Mr Wareing signed. It read:

> TO WHOM IT MAY CONCERN
>
> We confirm in respect of the premises, being part of 174 St Asaph Street, Christchurch, leased by us to Jansen Limited, we agreed with Jansen Limited, that because of the state of the premises when it took occupancy, Jansen Limited would have no obligation to reinstate the premises at the end of the leases in respect of any alterations or additions Jansen Limited made to the premises.

Mr Wareing described himself as a 'complete mess' at this time as a result of depression following a marriage break-up. He signed the letter 'unthinkingly' and

because he was ‘delighted’ that Mr Urbani was prepared to provide compensation for the unpaid rent. Subsequently, the sound system was installed.

[51] In November 2008 Petra issued District Court proceedings against Jansen. Based upon the affidavit dates, I infer that the summary judgment hearing of the case occurred in about April 2009. After dismissal of that application Petra amended its claim by citing the Wareings as third defendants and alleging contractual misrepresentation against them. The gist of the claim was that Mr Wareing had agreed to waive Jansen’s obligation to make good/reinstate the premises at the termination of the lease and that this was not disclosed to Petra before it confirmed and settled the sale and purchase agreement. However, in light of a brief of evidence filed by Mr Wareing in anticipation of the substantive hearing, Petra discontinued against the Wareings before the case was heard in November 2011.

The claim in the District Court

[52] The losses claimed by Petra in the District Court were:

(a) Costs to make good/reinstate the premises $127,695.20 (inclusive of GST)

(b) Painting $5,569 (plus GST).

(c) Exterior facade repairs $699 (plus GST)

(d) Broken window repairs $456.19 (inclusive of GST)

(e) Installation of disabled access-way and toilet $17,821 (plus GST)

Total $155,853.74 (inclusive of GST)

In addition Petra claimed lost rental income of $3,018.48 per month from 19 November 2007 for, presumably, a reasonable time for completion of the required remedial works.

Were damages payable?

[53] Before he could make a quantum finding Judge Kellar had to consider the various grounds of defence raised by Jansen. He then arrived at a global damages figure, to which I will refer shortly.

Waiver of reinstatement/make good obligation?

[54] Jensen contended that in the context of its fit-out of the premises in 2002 Mr Wareing waived any obligation to reinstate the premises upon the expiry of the lease, given the run down state of the premises and the expenditure on the fit-out. It relied upon the document signed by Mr Wareing in April 2008 as confirmation of the oral 2002 agreement.

[55] The Judge found that 'there was no meeting of minds between Mr Wareing and Jansen over the intended meaning of the document'. He was influenced by Mr Wareing's evidence that the only waiver was in relation to non reinstatement of the partitions removed to create the open plan showroom. Otherwise, reinstatement as per the lease was required. Judge Kellar also noted that Mr Eady, one of the guarantors, seemingly backed down in the face of Mr Wareing's evidence in that his witness statement characterised the alleged agreement as a 'misunderstanding', but continued that 'it was implicit that because we had improved the premises so significantly no such reinstatement would be required'. Unsurprisingly the Judge viewed this as a significant backdown.

[56] In my view there is no basis to interfere with the Judge's finding. The alleged waiver occurred in 2002 and the document subsequently signed by Mr Wareing was proffered as confirmation of that agreement. Mr Wareing's evidence, however, seemingly largely accepted by Mr Eady, explained the limited nature of the landlord's concession. Understandably enough Mr Wareing waived any obligation to reinstate partitioning removed to create the expansive showroom required by Jansen. Otherwise the obligation to reinstate remained. Petra's claim must therefore bring Mr Wareing's limited concession to account.

The condition of the premises

[57] This aspect, and the resulting betterment argument, can be considered together. Jansen's case was that the premises were in a very poor state of repair at the inception of the lease. Petra, essentially in reliance upon Mr Wareing's evidence, disputed this and maintained that the premises were in at least reasonable condition.

[58] Having seen and heard the witnesses Judge Kellar accepted Mr Wareing's account that in 2001 the premises were in reasonable condition, although showing some wear and tear and probably in need of some repainting. He considered this assessment was supported by photographs of the premises, as well as the fact that Jansen occupied and operated its business from the premises for about two years before the major refit in late 2002. Had the premises been a 'bomb site' complaint would surely have been to the landlord. I can see no basis upon which to disturb this finding. I note that the premises were always tenanted, the space taken over by Jansen in 2000 being leased to an Asian supplier, while a computer company occupied the balance of the premises (25%) until mid 2002. This history, and Jansen's willingness to become a tenant and then take over the whole premises, is inconsistent with a building in significant disrepair.

[59] Mr Swan, however, submitted that it was not open for Judge Kellar to make the reasonable condition finding. He pointed to evidence volunteered by Mr Wareing that his memory was not good and his acknowledgement that photographs were taken in 1991 (not 2001). Also no regard was paid to evidence from Messrs Eady and Urbani. Both gave graphic evidence concerning carpets, the walls and ceilings, and the electrical and lighting systems; concluding that the premises were generally in disrepair and very, very tired.

[60] I have not overlooked these matters which were not referred to by the Judge. That said, Mr Wareing's evidence had a measured tone to it. He was independent, being well disposed to Jansen which he regarded as a good tenant over the years. Nor did he shrink from acknowledging his own limitations, yet he remained firm in relation to the opinion that he expressed. His evidence, viewed in a commercial context, impresses as credible. Photographs annexed to Mr Adams' affidavit show

the premises in 2001, soon after the lease was signed. These seemed to me to support Mr Wareing's assessment that the premises were 'neither pristine nor shabby', but rather 'reasonable'.

[61] A comparison was also required. What was the condition of the premises in November 2007 when Petra vacated the building? Although counsel made submissions on the basis there was a dispute as to the condition of the premises when Jensen vacated, I am doubtful that this was so. Jensen in a number of letters asserted that the premises were in a better condition than at the inception of the lease (see [43], [45] and [47]). Nonetheless, Mr Singleton in his letter of 18 October 2007 detailed the work that Jansen proposed to undertake being to remove all our fittings, fixtures and signage, paint the front of the building, clean off the windows, fix any damage/defects and generally make tidy. This, to my mind, provides a general outline of the required scope of works. Jansen did not intend to reinstate the partitioning walls which they had removed, but this was appropriate given the limited waiver granted by Mr Wareing in 2002.

[62] To my mind the real dispute between the parties is as to the cost of the remedial work. Petra commissioned Pace to estimate the repair costs, being a revised figure of $62,961 in January 2008 but subject to certain contingencies. In addition, Petra called evidence from Peter Harris, a building surveyor who produced an item by item schedule of the required work and a cost of work figure of $84,625, excluding allowances for contractors preliminaries and profit, administration fees, building consent fees and his own surveying fee. These increased the total to over $134,000.

[63] Judge Kellar thought that an important feature of Mr Harris's evidence was his opinion that the damage he observed occurred when Jansen endeavoured to remove its fittings, not in the course of its normal business operation. In the end result the Judge accepted Mr Harris's evidence that 'much of the work outlined in his schedule' was necessary to make good Jansen's removal of its fit-out and subsequent 'amateurish attempts at effecting repairs'.

[64] However, the Judge also accepted Jansen's contention that if the premises were reinstated to the standard sought by Petra betterment would result. Put another way the premises would be pristine whereas they were in only a reasonable condition at the inception of the lease. Betterment, however, is frequently a vexed issue: see the discussion in *Civil Remedies in New Zealand*.[4] In this instance the remedial work did not proceed, and the case was decided on the basis of work estimates. In these circumstances I regard betterment as a consideration to be brought to account in assessing damages, should it come to that.

Was Jansen prevented from making good the premises?

[65] Judge Kellar held Jansen had ample opportunity to complete the required work and that Petra did not prevent it doing so by re-entering the premises on 19 December 2007. Furthermore, he considered that Jansen intended to undertake 'very limited' work and what it did was 'done poorly'.

[66] Mr Swan submitted there was no evidence that Jansen had ample opportunity to complete the work, nor was the quality of the workmanship challenged, and the evidence demonstrated that a lock-out occurred in the very midst of the remedial work. Mr Shamy, by contrast, supported the Judge's finding and the basis upon which it was made.

[67] There were a number of factual elements advanced by Mr Swan in support of this argument. Jansen was required to vacate by 4 November 2007. During October 2007 Messrs Chase and Singleton corresponded concerning the scope of the remedial work (see [42] and [43]). On 8 November 2007 Mr Chase confirmed agreements reached with Mr Singleton, including:

> - Jansen would pay a further two weeks rent for the period from the notice date you had given, in order that we could carry out investigations into the scope and pricing of the maintenance and decoration, reinstatement and make good works required under the lease. We discussed that you would continue your own investigations into these matters during that period and the situation

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[4] Maree Chetwin "Contract" in Rt Hon Sir Peter Blanchard (ed*) Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 3 at 1.3.2[1].

> regarding rental would be revisited at the end of this additional period.

[68] Mr Chase also advised that he expected to receive 'by the middle of next week the quotation for the maintenance and redecoration, reinstatement and make good works, and will of course forward this to you when it is to hand'. On 19 November 2007 Mr Chase provided the Pace quotation, that included a timeline for the work of six weeks. The e-mail ended on the note 'I would be pleased to discuss this at your earliest convenience with a view to finalising this matter'.

[69] Mr Singleton responded the following day by acknowledging receipt of the Pace quote, but adding 'we will be finishing the make good ourselves. I will let you know a timeframe once I have discussed it with Peter'. On 23 November Mr Chase e-mailed Mr Singleton indicating his alarm at Jansen's estimate of the required work, $10,000 to $12,000, both on account of its quantum and vagueness. The e-mail ended 'time is of the essence'. Mr Singleton replied on 28 November 2007 by repeating that the premises were already in better condition than at inception and that the work could be done at a rough cost of $10,000 using our own casual workers for the most part.

[70] On 3 December 2007 Petra's solicitor advised Jansen of the work Petra considered was required and that rental was payable until the work was completed. An invoice for one month's rent to 18 December 2007 was enclosed for immediate payment. There was no response to this letter, nor to two follow up letters. Accordingly, on 19 December 2007 Petra gave notice of its intention to re-enter and take immediate possession of the premises. It did so on two grounds; that rent was in arrears for more than 14 days, and that Jansen was in breach of its covenant to reinstate at "the end or earlier termination of the lease", i.e. by 4 November 2007 when it moved out.

[71] Mr Swan implied in the course of his argument that Jansen was entitled to some unspecified period of time beyond 4 November 2007 to carry out remedial work. I disagree. In terms of the lease this work should have been performed by the termination date. Where this is not attainable the parties commonly negotiate a rental arrangement to cover the period required for the work to be completed. That

occurred here, but it is evident that by 19 December 2007 there was no rental arrangement in place and Petra's solicitors purported to found the re-entry on the arrears situation, at least in part. Correctly, Mr Swan pointed out in an oral submission that there were no rent arrears because presence to effect remedial work does not constitute occupation giving rise to an extension of the term of the lease, rather the tenant's ongoing presence to effect repairs sounds in damages not rental: see Gallen J in *Cigna Life* at 192, 549.[5]

[72] Although Petra's re-entry notice was defective in part, it was still entitled to re-enter given the situation as at 19 November 2007. It was incumbent upon Jansen to obtain extensions of the work access arrangement, otherwise it ran the very risk that materialised in this case. I do not accept that Jansen, in some way, was entitled to delay commencement of the work until late November 2007, and then have such further weeks as it required to complete the work absent an arrangement with Petra to that end.

[73] For these reasons, I consider the re-entry was valid. I agree that the poor quality of the remedial work was not relied upon, at the time of the re-entry. This concern was most evident in early 2008 when Petra commissioned Mr Peter Harris to inspect the premises. Nonetheless an adequate basis for re-entry existed.

Repair costs: loss of rental income: failure to mitigate

[74] These aspects are inter-related. Petra claimed damages for loss of rental income at $3,018.48 per month from 19 November 2007, being the date to which rental was paid by Jansen. This monthly figure was supported by a registered valuer's report prepared by David Harris. The statement of claim did not nominate a cut off date at which the amount claimed per month ceased. This prompted the ground of defence that Petra had failed to mitigate its loss. It is common ground that following re-entry Petra did not undertake the remedial work, and could not re-let the premises.

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5 *Cigna Life Insurance NZ Ltd v NZ Counties Investment Co Ltd* (1997) 3 NZ ConvC 192,540 at 192, 549.

Mr Chase said that the company was short of funds and the economic downturn in 2008 further hindered progress. In due course Petra did strip out the premises, and determined to refurbish them, not reinstate them as Jansen had set out to do.

[75] This prompted a further argument, namely that the premises having been stripped back to a shell, not only was reinstatement impossible, but there was no adequate basis upon which to assess damages. It is common ground that the correct measure of damages is the diminution in the value of the reversion. Petra was required to prove the diminution of value, and because it embarked upon a plan for complete interior refurbishment there was no adequate evidence to establish the diminution – being the reasonable repair at cost. Indeed, Mr Swan even argued that Petra suffered no loss given its complete change of plans.

[76] Judge Kellar found that the cost of the repair work would have been in the region of $90,000 that it 'may be unreasonable' to expect a lessor to immediately expend that sort of money, but completion of some remedial work sufficient to enable the premises to be re-let was to be expected (see [77] of the judgment). Hence, there was no failure to mitigate. It is apparent from the judgment that he most relied upon the evidence of Peter Harris to assess damages. But, because a global award of damages in the sum of $85,000 was awarded, it is not evident what sums were allowed for repair costs on the one hand, and loss of rental income on the other. I shall return to this dilemma shortly.

[77] I am not persuaded that the Judge's mitigation finding was in error. His reasoning is unassailable, although it remains to consider when Petra should have assumed the initiative and undertaken some remedial work. Likewise, I am satisfied there was a sufficient evidential basis to enable repair costs to be quantified and an award of damages fixed. This was not a case where the Court was invited to indulge in mere guess work or make a blind guess.

[78] The more difficult question is whether the quantum of the global award, $85,000, was appropriate – when there is little explanation how it was arrived at.

Damages: Quantum

[79] The Judge conducted an 'overall assessment' in order to fix a global damages award. He said it was necessary to achieve fairness between the parties. Reference was made to various relevant factors, including that the premises were left in a poor state largely as a result of removal of the fit-out and amateurish attempts at remedial work. The Judge was satisfied that 'at least in part' Petra was unable to re-let the premises because of Jansen's default in effecting the repairs, and he described the market valuation evidence of Mr David Harris as 'uncontradicted' (see [80] of the judgement). Without more, the award of $85,000 in damages was made.

[80] With respect, this was an inadequate approach to the assessment of damages. Despite the difficulties to which this case gives rise, it was necessary to fix separate awards for the repair costs and the loss of income rental, with at least brief reasons to explain the make-up of the two figures.

[81] This being an appeal by way of rehearing I can undertake the required exercise. With regard to the repair costs I consider that a degree of caution is required. Mr Peter Harris did not inspect the premises until September 2009, almost two years after the event. His report dated October 2009 is detailed and includes in the preamble that the costings are provided 'as a basis for negotiation', while schedule 3.0 describes the costings as 'the landlord's view on the cost of works'.

[82] Pace provided two repair quotations, one in November 2007 of $94,829 (GST exclusive) and a second in January 2008 of $62,961 (GST exclusive). The difference between the two is substantial. The second quotation was only about a month after Jansen's workmen had been locked out of the premises. It should, I think, be accorded significant weight.

[83] Some work included in subsequent estimates, the cost of providing facilities for the disabled for example, was clearly outside the scope of reinstatement. While it is necessarily a matter of impression, my reading of the various quotations and estimates indicates that had the work been carried out as costed, the end result would have been premises in a pristine state rather than premises reinstated to a reasonable

condition, similar to the condition at the inception of the lease. Due allowance for this factor is required. Standing back, and recognising the onus upon Petra to prove the extent of the diminution, I consider that $50,000 is the appropriate award of damages under this head.

[84] Turning to the loss of rental claim I agree that the monthly figure of $3018.48, supported by Peter Harris's evidence, was appropriate. But, for what period was Petra entitled to recover damages based on this figure? In my view only a reasonable period can be allowed for Petra to find a way to undertake the remedial works. The premises comprise a substantial commercial asset and it was incumbent on Petra to re-let them within a reasonable time. The period to the end of June 2008 was, I think, sufficient time.

[85] This represents seven and a half months, and I allow a rounded figure of $22,500 for loss of income rental producing a total damages award of $72,500.

Payment of interest

[86] In a separate judgment as to interest and costs dated 23 April 2012 Petra was awarded interest at 15% per annum on $85,000 from 19 December 2007 to the date of judgment. Mr Swan challenged this aspect of the judgment on a number of grounds, including that Petra did not carry out any remedial work and hence it expended no money, nor did it intend to do so; Petra was guilty of delay in issuing proceedings and in pursuing its claim in the District Court; and damages were not assessed until the date of judgment, so the amount payable was unascertained until then. On the basis of these contentions counsel argued that interest should not run from the date the causes of action arose, rather from the date of judgment.

[87] Without going into the merit of the various arguments, the fact is that clause 5 of the lease provided for the payment of interest on unpaid money 'at the default interest rate', being 15% per annum. It follows that submissions of the kind advanced by Mr Swan based on s 87 of the Judicature Act 1908 have no part to play. Specifically, s 87(1)(b) provides that the discretion to award interest does not 'apply in relation to any debt upon which interest is payable as of right, whether by virtue of

any agreement... or otherwise'. *In Alington Group Architects v Attorney General,*[6] the Court of Appeal confirmed that the application of s 87(1) is precluded where the parties have made their own bargain as to payment of interest.

[88] Accordingly, interest is payable on the basis Judge Kellar determined, but of course subject to the adjustment in the damages award.

The rehearing application: Costs

[89] As will be apparent, counsels' view that the appeal could be decided on the basis of the available materials has been borne out. A full rehearing is not necessary. Costs in this Court are reserved, in case there is any dispute as to the amount payable.

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[6] *In Alington Group Architects v Attorney General* 1998 [2] NZLR 183.