IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-1493
[2024] NZHC 560

UNDER	Section 244 of the Property Law Act 2007
IN THE MATTER	of an application for possession and cancellation
BETWEEN	TAHAROTO MOTELS LTD Applicant
AND	RITZ ENTERPRISES LTD Respondent

Hearing: 16 October 2023

Appearances: S O McAnally and W van Roosmalen for Applicant
A Ho for Respondent

Judgment: 15 March 2024

JUDGMENT OF HINTON J

This judgment was delivered by me on 15 March 2024 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:
Keegan Alexander, Auckland
Chen Sandhu, Auckland

[1] The applicant, Taharoto Motels Ltd (Taharoto), applies for possession of land at 28 Taharoto Road, Takapuna and for cancellation of a lease in respect of which the respondent, Ritz Enterprises Ltd (Ritz), is the lessee. The application is based on a notice of intention to cancel under s 246 of the Property Law Act 2007 (the Act), served on Ritz on 18 May 2023, alleging various breaches of the lease (the PLA notice).

[2] Ritz opposes the making of the order for possession on a two-fold basis; first, that it has not been served with a valid s 246 notice and, second, that any breach of the lease has been (or will be) remedied.

[3] In the event that Taharoto is found to have the right to cancel the lease, Ritz seeks relief against forfeiture.

[4] The issues therefore are:

(a) Was notice validly given to Ritz under s 246 of the Act?

(b) Is Ritz in breach of the lease?

(c) If it is, should Ritz be granted relief against forfeiture?

The PLA notice

[5] The PLA notice alleges the following breaches:

(a) Using part of the premises as long-term residential accommodation in breach of the non-assignment/subletting provisions of cls 4.1 and 8.1.4.

(b) Failing to keep the interior and exterior of the premises in good and substantial and tenantable repair and condition in breach of cls 5.1 and 5.5. This includes (but was not limited to) the premises having wet and rotting floor coverings, chemical contamination, worn and damaged paintwork, worn and damaged fixtures and fittings, waste and rubbish not removed, waste and discarded possessions throughout the premises,

damage not repaired as it occurred, several windows broken and covered with plastic sheets, grounds not maintained and unkempt, and the swimming pool not maintained, cleaned or chemically treated causing damage to the integrity of the wet surfaces.

(c) Ritz was in liquidation giving rise to an immediate right to re-enter and terminate the lease under cl 9.1 which, for purposes of s 244 of the Act, is a breach of a condition of the lease.

Background

[6] The lease, dated 1 February 2002, is of motel premises. After a series of assignments, Ritz became the lessee in late 2014.

[7] Taharoto says that from some time in 2018, Ritz allowed the premises to fall into disrepair in breach of cls 5.1 and 5.5 of the lease. Those clauses obliged Ritz as lessee to keep the interior and exterior of the premises in good and substantial and tenantable repair and condition. Clause 5.6 established a maintenance fund into which Ritz was to make payment of five per cent of the monthly rent per month. On 5 September 2018, following a series of communications between the parties regarding maintenance, Taharoto asked to inspect the premises. While Taharoto says issues following that inspection were raised with Ritz, Ritz says it received no such communication. Ms Smale, Taharoto's director and shareholder, accepted that while she remembers compiling an email outlining issues following the inspection, she may have failed to send it. This would tend to indicate that any issues were not significant.

[8] Further issues arose in 2020. On 2 March 2020 Ritz requested reimbursement of the costs of a spa pool heater from the maintenance fund. Three days later, on 5 March 2020, Ritz requested that Taharoto confirm payment by 6 March or Ritz would have to "take this further with [their] lawyer". Taharoto did not respond and on 10 March 2020 Ritz's solicitors, Pabla Law, sent a letter to Taharoto requesting reimbursement within three working days. On 25 March 2020 a COVID-19 lockdown commenced. Because of the dispute regarding the maintenance fund, Ritz did not make the monthly maintenance fund payment as required on 1 April 2020.

[9] On 9 July 2020 Taharoto's solicitors sent a letter to Pabla Law advising that Ritz had failed to make payment of $7,447 to the maintenance fund/associated invoices and demanded payment be made immediately. No payment was made.

[10] By September 2021 Ritz had engaged new solicitors, Morrison Kent. Ritz sought advice from Morrison Kent as to how to proceed with maintenance fund payments given its perception that Taharoto was failing to appropriately authorise any payments from that fund and Ritz was incurring significant maintenance costs. Morrison Kent advised Ritz to deposit the maintenance fund payments into its trust account. Ritz followed that advice and on 8 September 2021 Morrison Kent advised Taharoto's solicitors that Ritz would be making the necessary payments for the maintenance fund into a separate bank account.

[11] Taharoto viewed this as a breach of the lease and on 5 November 2021 Taharoto served a PLA notice. That breach not being remedied, on 7 March 2022 Taharoto applied for an order for possession and cancellation of the lease. That application was discontinued on 12 July 2022 when the maintenance fund payments were made good.[1] Taharoto was awarded indemnity costs and disbursements of $30,312.43 on 20 December 2022.[2]

[12] On 31 January 2023, Taharoto issued a statutory demand for the costs award. Payment was not received by Taharoto and, on 24 February 2023, it applied for Ritz to be placed into liquidation. On 30 March 2023 Morrison Kent informed Taharoto's solicitors that Ritz would pay the amount owing under the statutory demand and on 6 April 2023 Taharoto's solicitors provided Ritz with a deposit slip for payment to be made into their trust account. On 13 April 2023 Ritz made payment accordingly, but mistakenly used an incorrect suffix. On 14 April 2023 Ritz's solicitors informed Taharoto that the statutory demand had been met. However, because of the incorrect suffix, Taharoto's solicitors could not see this payment in their trust account. Taharoto obtained an order for liquidation on 5 May 2023. Morrison Kent did not appear for Ritz. Ritz says this was on the assumption that the proceeding had been discontinued. On becoming aware of the liquidation order, Morrison Kent immediately informed the

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1 *Taharoto Motels Ltd v Ritz Enterprises Ltd* HC Auckland CIV-2022-404-304, 12 July 2022.
2 *Taharoto Motels Ltd v Ritz Enterprises Ltd* [2022] NZHC 3553.

liquidators and Taharoto of the error and that steps would be taken for the liquidation order to be set aside.

[13] The liquidators nonetheless took possession of the premises on 5 May 2023, and instructed all of the motel clients to move out without giving them any opportunity to organise and collect their belongings, nor any opportunity to Ritz to clean up after them.

[14] Ritz applied for recall of the liquidation order on 15 May 2023. Taharoto served the PLA notice at issue in this proceeding on the liquidators on 18 May 2023, relying on wrongful assignment of the lease, failure to keep the premises in good repair and Ritz being in liquidation. The liquidation order was recalled on 25 May 2023.[3] Taharoto initially opposed the application for recall but later withdrew its opposition with no issue as to costs.[4]

[15] On 30 May 2023, Taharoto wrote to Ritz setting out terms on which it was willing to defer cancellation of the lease, including addition of a clause requiring Ritz to pay a performance bond of $200,000 on which Taharoto may draw in the event of any breach. Ritz responded on 6 June 2023, informing Taharoto of its position that the PLA notice was defective, relying on substantially the same bases it advances in support of its application for relief. That is, the notice was not sufficiently particularised, use of emergency housing is not a breach of the non-assignment clauses, the breach of the liquidation clause has been remedied and Taharoto had not provided a reasonable period for Ritz to remedy any breaches. Ritz invited Taharoto to inspect the premises and to identify any matters that required attention informally, or to issue a fresh notice.

[16] Taharoto did not respond. Instead, on 26 June 2023, it commenced this proceeding. At that point, Ritz was provided with specific details as to the breaches requiring remedy by virtue of the affidavits of Ms Smale and Sylvia Schiller-Cooper, a health and safety consultant, filed in support of Taharoto's application. Those affidavits included photos and particularised descriptions of each alleged breach.

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3 *Taharoto Motels Ltd v Ritz Enterprises Ltd* [2023] NZHC 1290.
4 At [14] and [22].

[17] Ritz says it has taken steps to remedy those breaches that had been specified (bar the swimming pool) and that an inspection conducted by Taharoto on 15 September 2023 pointed to only minor and cosmetic issues which Ritz has also addressed. Ritz says the only remaining item requiring remediation is the swimming pool which it is willing to attend to.[5]

Issue one: is the PLA notice valid?

[18] Section 246 of the Act provides:

> (1) A lessor may exercise a right to cancel a lease because of a breach of a covenant or condition of the lease (except the covenant to pay rent) only if—
>
> (a) the lessor has served on the lessee a notice of intention to cancel the lease; and
>
> (b) at the expiry of a period that is reasonable in the circumstances, the breach has not been remedied.
>
> (2) The notice required by subsection (1)(a) must adequately inform the recipient of all of the following matters:
>
> (a) the nature and extent of the breach complained about:
>
> (b) if the lessor considers that the breach is capable of being remedied by the lessee doing or stopping from doing a particular thing, or by the lessee paying reasonable compensation, or both,—
>
> (i) the thing that the lessee must do or stop doing; or
>
> (ii) the amount of compensation that the lessor considers reasonable; and
>
> (c) the consequence that, if the breach is not remedied at the expiry of a period that is reasonable in the circumstances, the lessor may seek to cancel the lease in accordance with section 244:
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> (d) the effect of section 247(1) and (2):
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> (e) the right, under section 253, to apply to a court for relief against cancellation of the lease, and the advisability of seeking legal advice on the exercise of that right.

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5 Ritz also acknowledges that a spa pool requires maintenance but it was not referred to in the PLA notice.

[19] The underlying objective of s 246 is that the notice ought to enable a recipient to understand with reasonable certainty what they are required to do.[6] A notice that fails to do that or which misleads the recipient as to the nature or extent of the breach will be invalid.[7]

[20] Ritz says that the PLA notice is invalid because:

(a) There was no breach of the covenant not to assign.

(b) As to the repair and maintenance covenant, the notice was insufficiently specific — the lessee has to be able to understand with reasonable certainty what they are required to do.[8] The notice does not, for example, specify which floor coverings are wet and rotting or otherwise identify specific areas referred to, nor does it say what is required to fix those breaches. In fact, the notice wrongly says the breaches (presumably all of those described) are not capable of remedy.

(c) The notice does not provide a reasonable period to remedy the breaches, as required by s 246(2)(c). It gives notice that the lessor will re-enter at the expiry of five working days of the notice. Ritz says the period of only five days also contradicts cl 9 of the lease in that the relevant default must be left unremedied for more than 30 days before the lease can be determined. Ritz says this indicates that a reasonable time would be, at a minimum, 30 days.

[21] I agree with Ritz that it was not in breach of the non-assignment clauses. Those clauses provide:

> 4.1 The Lessee shall not assign, transfer, sublet, mortgage, charge or part with the possession of the Premises or any part or parts thereof or the Lease thereof or any estate or interest therein to any person …
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> 8.1.4 [The Lessee shall] [n]ot convert the Premises or any part thereof into private residential accommodation or use or permit the same to be used for any purpose other than the Permitted Use of Premises

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6 *Fox v Jolly* [1916] 1 AC 1 at 13.
7 *Kent Sing Trading Co Ltd v JNJ Holdings Ltd* [2019] NZCA 388 at [111].
8 *McConnell v McCormick* [1929] NZLR 560 (SC) at 567.

> other than the part thereof required by the Lessee (or manager if so appointed as in accordance with clause 8.3 herein) for use as a private residence.

[22] Taharoto alleges that the Popata family and an unspecified "third family" had been permitted to use the premises as long-term residential accommodation in breach of the above clauses. The evidence, however, is that the Popata family were Ministry of Social Development (MSD) clients who lived at the premises on a week-to-week basis. While the Popata family resided at the premises for more than twelve months, Ritz had the right, as with any MSD client, to refuse extension of their stay at the end of each week. That is not an assignment, sub-lease or sublet arrangement. Ritz did not part with possession. I agree with Ritz that there is no clause in the lease prohibiting Ritz from being an emergency housing provider. Taharoto's counsel acknowledged that the argument in respect of this alleged breach was not strong.

[23] I also agree with Ritz that some of the breaches regarding repairs and maintenance were insufficiently described. The alleged breach of the condition to keep the premises in good and substantial and tenantable condition was listed as "including, but not limited to" and no specific details were provided. The descriptions of the alleged breaches concerning waste and rubbish, damage and issues with the grounds of the premises were general in nature and did not, as required, describe the issues in such a manner that Ritz "could have any reasonable doubt as to the particular breaches which are specified".[9] The breach that was raised regarding the spa pool — which both parties agree is in need of remediation — was not included in the notice at all. It was raised in the affidavit evidence.

[24] However, I consider the breach concerning the swimming pool was adequately described. The notice stated that the "swimming pool has not been maintained, cleaned or chemically treated causing contamination and damage to the integrity of the wet surfaces". I do not accept Ritz's submission that Taharoto was required to provide a detailed specification of the work required to remedy the breach. Having outlined the specific issue that required remediation, Taharoto was entitled to leave

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9 *Fox v Jolly*, above n 6, at 23.

Ritz to determine how to remedy the breach.[10] I therefore find that the notice is valid as regards the breach concerning the swimming pool.

[25] The notice is also valid as regards the liquidation clause. Ritz was in liquidation. This was plainly in breach of cl 9.1.

[26] Where, as here, a notice is sufficiently specific with regard to one covenant but not definitive enough with regard to another, it is not settled as to whether the notice as a whole is valid.[11] In *McConnell v McCormick* Smith J expressed the view that if a notice is framed by a lessor so as to group breaches together, then the notice must be regarded *in globo*.[12] Here however, the defective parts of the notice (being those that relate to the alleged assignment and the general maintenance and repair obligations) were distinct from the valid clauses relating to the swimming pool and liquidation. I do not therefore consider the notice can be viewed *in globo*. Taharoto is entitled to rely upon those parts of the notice.

[27] As to the five-day period specified in the notice, I agree with Ritz that this is insufficient. This is particularly so in light of the COVID-19 lockdowns and the consequential delays and limitations on the availability of labour and materials. I agree with Ritz that, considering cl 9.1 and the circumstances generally, at least 30 days' notice was required, arguably longer in the case of the pool where it seems the appropriate course of remediation is complicated. However, in terms of s 246(2)(c), a sufficient period (well exceeding 30 days) has elapsed since the notice of intention to cancel. Ritz has received more than reasonable time to remedy.

[28] Further, although I agree with Ritz that, contrary to the notice, the breaches were capable of remedy, Ritz does not suggest that Taharoto's erroneous statement renders the notice invalid. I do not address it further.

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10 *Piggott v Middlesex County Council* [1909] 1 Ch 134 at 137.

11 DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at [11.237(g)].

12 *McConnell v McCormick*, above n 8, at 567.

Issue two: is Ritz still in breach of the lease?

[29] I have already found Ritz is not in breach of the non-assignment clauses.

[30] Clearly, Ritz is no longer in liquidation. That breach has been remedied.

[31] In terms of the swimming pool, there is no dispute that this breach is outstanding. Ritz therefore remains in breach of cls 5.1 and 5.5 due to the unremedied issue with the pool.

Issue three: should Ritz be granted relief?

[32] Section 243 of the Act provides that relief against cancellation may only be granted in accordance with ss 253–264. Section 256 states:

> **256 Powers of court on application for relief**
>
> (1) In determining an application for relief against the cancellation, or proposed cancellation, of a lease, under section 253, a court may grant—
>
> (a) the relief sought on any conditions (if any) as to expenses, damages, compensation, or any other relevant matters that it thinks fit; and
>
> (b) an injunction restraining any similar breach in the future.
>
> (2) The court may grant relief against the cancellation, or proposed cancellation, of a lease even though—
>
> (a) the cancellation is for a breach of an essential term of the lease; or
>
> (b) the breach is not capable of being remedied.

[33] A non-exhaustive list of factors relevant to an application for relief was set out by Hammond J in *Studio X Ltd v Mobil Oil New Zealand Ltd.*[13] Those relevant to this application are:[14]

> (a) Whether the breach was advertent, inadvertent, or entirely beyond the tenant's control.

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13 *Studio X Ltd v Mobil Oil New Zealand Ltd* [1996] 2 NZLR 697 (HC) at 701.
14 At 701.

(b) Whether a tenant has made or will make good the breach of the covenant and is able and willing to fulfil his or her obligations in the future.

(c) The landlord's conduct.

(d) Gravity of the breach.

(e) Whether a breach has occasioned lasting damage to the landlord.

(f) Proportionality: whether whatever damage is said to have been sustained by the landlord can truly be said to be proportionate to the advantages he or she will obtain if relief is not granted. There has to be an interest in "keeping an even hand".

[34] While *Studio X* pertained to the repealed Property Law Act 1952, those principles are equally applicable to the exercise of the Court's discretion under ss 253 and 256 of the Property Law Act 2007.[15]

[35] Taking these factors into account, I have concluded relief should be granted.

[36] First, I have found there was and is no breach of the lease with regard to assignment or subletting. That was never a valid basis for the notice.

[37] Second, the liquidation has been remedied and came about through a misunderstanding. Taharoto was aware of this at the time it issued the PLA notice, having been advised of the error immediately following the liquidation order.

[38] Third, the only remaining breach upon which Taharoto can rely is the outstanding issue regarding the swimming pool. However, I am satisfied that the issue with the pool derived directly or indirectly from COVID-19 restrictions when Ritz was required to close the pool, and was not the result of an advertent breach by Ritz. I accept that Ritz is willing to rectify this issue.

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15 *Neglasari Farms Ltd v Brakatin Holdings Ltd* (2010) 11 NZCPR 643 at [81]; and *Pike River Coal Ltd (in rec) v O'Malley Farming Ltd* HC Wellington CIV-2011-418-66, 14 October 2011 at [45].

[39] While in some cases the fact of a previous PLA notice may suggest against relief, I do not consider the 2021 PLA notice points against relief here. Ritz completely remedied that breach. This is not a case involving recidivist breaches of, for example, clauses requiring payment of rent or outgoings.

[40] I agree with Ritz that cancellation would be a disproportionate remedy. There are strong grounds for relief. Taharoto says it is left with a bad lessee but I consider the fact that there was no recorded breach of the lease until 2020 suggests to the contrary. Also, to some degree, Taharoto has overplayed its hand, acting with speed following the mistaken liquidation. Relief will not cause any lasting damage to Taharoto. Taharoto remains within its right to serve valid notices upon Ritz should Ritz commit any further breaches of the lease.

[41] I exercise my discretion to grant relief under s 256 of the Act.

Conclusion

[42] The PLA notice of 18 May 2023 was valid in respect of the breach of cl 9.1 (the liquidation clause), and cls 5.1 and 5.5 (regarding the swimming pool).

[43] Ritz remains in breach of cls 5.1 and 5.5 due to the outstanding maintenance issue regarding the swimming pool.

[44] While Taharoto is prima facie entitled to an order for cancellation, relief against cancellation is granted under s 256 of the Property Law Act 2007.

[45] If the parties are unable to agree costs, then Ritz is to file a submission of not more than five pages within two weeks of the date of this judgment and Taharoto to file submissions in reply within a further two weeks.

Hinton J