EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2013-044-000235
[2016] NZDC 20368

BETWEEN	AIL INVESTMENTS LIMITED Plaintiff
AND	GRAEME LANSLEY LEE First Defendant
AND	ANDREW MALCOLM KERSLAKE Second Defendant
AND	CAROL ROSE HANCOCK Third Defendant

Hearing: 19, 20, 21 April and 29 June 2016

Appearances: N A Farrands and C Wilson for the Plaintiff
N Campbell QC for the First and Second Defendants
S Carey for the Third Defendant

Judgment: 02 November 2016

RESERVED DECISION OF JUDGE P A CUNNINGHAM

Introduction

[1] This case is about the liability of all three defendants as guarantors in relation to the lease of premises owned by the plaintiff landlord at 124 Penrose Road, Mt Wellington, Auckland to two companies that operated a business there from 2007-2012.

[2] A Deed of Lease was entered into between Affiliated Industries (2001) Ltd ("AIL") and Affiliated Industries (NZ) Ltd ((AI (NZ) Ltd)) on 11 April 2007. The tenancy was for an initial period of six years with the first renewal date being

1 March 2013. Mr Lee and Kerslake guaranteed the obligations of the tenant AI (NZ) Ltd under the Deed of Lease.

[3] In April 2009 AI (NZ) Ltd wanted to assign its interests under the lease to Sligo Properties Limited ("Sligo") which company purchased the business of AI (NZ) Ltd. The expiry date on the Deed of Assignment of Lease document was 28 February 2011. Sligo was not given a copy of the Deed of Lease dated 11 April 2007 until after that expiry date, indeed it appears to have occurred around April 2012. The expiry date of the first term under the Deed of Lease was 28 February 2013.

The claim and defences to it

[4] The Amended Notice of Claim stated that Sligo defaulted on its obligations to pay rental and operating expenses under the lease in the sum of $94,657.88. The plaintiff seeks this amount plus legal fees and interest payable under the Deed of Lease from all three defendants. On the basis that the first and second defendants guaranteed amounts owed to the plaintiff under the Deed of Lease. And that the third defendant guaranteed Sligo's obligations under the Deed of Assignment of Lease.

[5] Without going into the detail of the defences, the position is that during the case there was a considerable focus on legal issues relating to whether or not the Deed of Assignment of Lease is binding, either as a deed or as a contract. The plaintiff maintains that it is.

[6] The position of all defendants is that the Deed of Assignment is not binding even as a contract. The first and second defendants go further and say that after the plaintiff allowed Sligo into occupation of the premises at 124 Penrose Road that the Deed of Lease was surrendered by operation of law. Thus releasing the first and second defendants from their guarantee under the Deed of Lease.

The Deed of Assignment

[7] There are a number of reasons why each party says the Deed of Assignment is or is not binding.

[8] The defendants say the Deed of Assignment is not binding because:

(a) the Deed of Assignment was not delivered to the other parties;

(b) when it was, it was altered by the plaintiff and without the consent of all other parties.

[9] For reasons that will I hope become clear, my first task has to be to decide whether the Deed of Assignment is effective including as a contract. At the point at which the various defences arise, those will be discussed and decided on.

Is the Deed of Assignment binding?

[10] Mr Michael Malcolm is the sole director of the plaintiff company. The plaintiff owns the business of AIL and is the landlord of the subject premises.

[11] Affiliated Industries – ceramic and glass printing plant was a business that AIL operated from the premises of 124 Penrose Road. Mr Malcolm and Mr Kerslake were friends. They shared an interest in sailing and had holidayed together. They discussed a possible sale of Affiliated Industries.

[12] AIL sold the business to Mr Lee and Mr Kerslake (the first and second defendants) as trustees for a company to be formed for a sum of $450,000.00. This was recorded in an agreement for sale and purchase of the business. The sale settled on 1 March 2007. There was a turnover warranty of $330,000.00 per annum (including GST).

[13] Almost from the time that the purchaser took over the business, the sales were less than the sales warranted by the vendor. Despite efforts to increase the sales and profitability of the company, particularly by Mr Kerslake, the picture did not

change. Mr Kerslake said that from August 2007 onwards he raised his ongoing concerns about this with Mr Malcolm a number of times.

[14] Ms Carol Hancock the third defendant was employed by AI (NZ) Ltd. Ms Hancock purchased one third of the shares of that company for $150,000.00.

[15] By late 2008 Mr Kerslake was keen to sell the business, he explored several options including a proposal that Mr Malcolm repurchase an interest in the business. He put this to Mr Malcolm. Mr Malcolm declined.

[16] Ultimately Mr Kerslake's and Mr Lee's interest in the business was sold to Ms Hancock around April 2009. She gave evidence that she could not afford to lose her earlier $150,000.00 investment. She formed a company Sligo Properties Limited ("Sligo") which became the tenant of 124 Penrose Road.

[17] An Assignment of Lease from AI (NZ) Ltd to Sligo was to be part and parcel of the sale of the business. Mr Malcolm indicated that he would consent to the assignment.

[18] Mr Kerslake instructed his solicitor Mr Norris to prepare the Deed of Assignment document. This was on 4 May 2009. Mr Kerslake's evidence was that the earlier date of termination of 20 February 2011 in the Deed of Assignment came about as a result of his instruction to his lawyer. There was also a lease variation releasing Andrew Malcolm Kerslake and Graeme Lansley Lee as guarantors.

[19] Mr Malcolm gave evidence that prior to this date Mr Kerslake had raised the issue with him of Mr Kerslake and Mr Lee being released as guarantors to which he had said no.

[20] Mr Kerkslake's position was that the earlier date of expiry in the Deed of Assignment of Lease and the release of himself and Mr Lee as guarantors were proposals by him and Mr Lee for consideration by Mr Malcolm. Mr Kerslake's evidence was he had not discussed either matter with Mr Malcolm before the document was sent to the plaintiff for signing.

[21] The third defendant Ms Carol Hancock guaranteed the obligations of Sligo in the Deed of Assignment of Lease document.

[22] On 7 May 2009 Mr Norris sent the Deed of Assignment in the form earlier referred to, to Mr Malcolm's lawyer Mr Sargent at Morrison Kent.

[23] A letter from Mr Norris to Mr Sargent dated 8 June 2009 refers to a telephone discussion four days earlier. That letter says:

> Further to our telephone discussion of 4 June 2009, I am instructed by my client that by mutual agreement your client landlord the lease variation releasing Andrew Malcolm Kerslake and Graeme Lansley Lee as guarantors is to be deleted.
>
> Could you please made (make) the necessary deletion and in due course forward the Deed of Assignment of Lease, together with a note of your fee.

[24] The effect was that the plaintiff declined to release Mr Kerslake and Mr Lee as guarantors and they agreed their obligations as guarantors would continue.

[25] There is a further letter from Mr Norris to Mr Sargent dated 21 July 2009 which said as follows:

> Further to my correspondence of 8 June 2009 and our subsequent telephone discussions, I note that the Deed of Assignment of Lease is yet to be returned to the writer.
>
> Please note that your client's delay in providing Landlord's consent to the Assignment of Lease is delaying the settlement being completed.
>
> My clients instruct that if there are any financial consequences as a result of your client's delay they will look to your client to reimburse them any loss they suffer as a result of the delay.
>
> I trust this action will not be necessary and the Deed of Lease will be signed as a matter of **urgency**.

[26] On 27 July 2009 Mr Sargent wrote to Mr Norris by facsimile and the letter said:

> We refer to your fax of 21 July which we have discussed with our client. Whilst all arrears of outgoings have been met there are a couple of issues that have arisen during the course of the tenancy that need to be resolved with your client. We understand that our client will be liaising with your client over these issues with the intention of achieving result. We note your

various comments however we consider that our client is acting in an appropriate manner having regard to the issues.

[27] The Deed of Assignment of Lease was not returned and still has not been returned to AI (NZ) Ltd or the first and second defendants. A copy was given to Ms Hancock by Mr Malcolm in April 2012 following a number of requests of him by her.

Delivery of the Assignment of Lease – is physical delivery required?

[28] All three defendants contend that the plaintiff has not complied with the requirement that a deed must be delivered.

[29] Section 9(1) and (9) of the Property Law Act 2007 say:

> **9 Deed must be in writing, executed, and delivered**
>
> (1) A deed must be—
>
> (a) in writing; and
>
> (b) executed in accordance with this section; and
>
> (c) delivered in accordance with this section.
>
> …
>
> (9) A deed is binding when—
>
> (a)
>
> delivered by—
>
> (i) the person to be bound by it; or
>
> (ii) another person having express or implied authority to deliver it on behalf of the person intended to be bound by it; and
>
> (b) either—
>
> (i) it is apparent from the circumstances that the person to be bound by the deed intended to be bound by it; or
>
> (ii) if the binding force of the deed is subject to the fulfilment of 1 or more conditions, when each condition is fulfilled.

[30] In *Ryan v Mason*[1] Andrews J rejected the submission that an act that evinced an intention to be bound amounted to delivery. Andrews J said:

> The submission, however, appears to conflate sub-paragraphs (a) and (b) of s 9(9) of the Property Law Act. Sub-paragraph (a) requires delivery, and sub-paragraph (b) requires the demonstration of an intention to be bound. They are separate requirements, and both must be met for the deed to be binding. Mr Mason's conduct is better seen as meeting the separate requirement under sub-paragraph (b)(i), rather than the delivery requirement under sub-paragraph (a)(i).

[31] Section 10 of the PLA 2007 says:

> **10 When deed comes into force**
>
> A deed that has been delivered comes into force,—
>
> (a) if the deed specifies a date for that purpose, on that date; or
>
> (b) if the deed does not specify a date for that purpose,—
>
> (i) on delivery, if the deed is delivered unconditionally; or
>
> (ii) on the occurrence of the circumstance in which the person bound by the deed contemplated that it would come into force, if the deed is delivered subject to conditions.

[32] The PLA 2007 does not define the word "delivery". Taking into account sections 9 and 10 PLA and what Andrews J said in *Ryan v Mason,* in my view delivery means that actual physical delivery is required. Delivery did not occur.

[33] In any event, on the facts of this case actual delivery was what was contemplated by all the parties. This is evidenced by the correspondence between the parties' solicitors referred to in paragraphs [18] to [27] herein.

[34] In a notice of response, following the filing of a response by the defendants raising the issue of delivery, the plaintiff contended that there had been delivery. In his closing submissions Mr Farrands did not elaborate this, rather he argued that the Deed of Assignment was binding as a contract prior to it being delivered.

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[1] [2012] NZHC 3015 at para [39].

Is the Deed of Assignment binding as a contract?

[35] The plaintiff's submission was that there was a clear binding contract assigning the lease for the following reasons:

(a) AI (NZ) Ltd was given permission by the landlord to assign the lease;

(b) The landlord permitted the assignee (Sligo) to carry on business from the premises;

(c) AI (NZ) Ltd ceased paying rent and Sligo commenced paying rent;

(d) The above steps enabled the sale and purchase of the business to occur.

[36] Further the plaintiff submitted that there had not been any variation of the Deed of Lease.

[37] Clause 6 of the Deed of Assignment of lease provided:

> The landlord consents to the assignment but without prejudice to the landlord's rights, powers and remedies under the lease. If any lease variations are specified in the First Schedule the Landlord, the Assignor, the Assignee and the Guarantor agree that as from the date of Assignment the lease is varied as set out in the lease variations.

[38] In the First Schedule under the heading "Expiry of Date of Current Term" the date was 28 February 2011. The date of expiry of the current term in the Deed of Lease was 28 February 2013.

[39] The First Schedule has on the same page as the expiry date heading, another one dealing with "Lease Variations". It was beside this that the following had been inserted by the first and second defendants' solicitor Mr Norris.

> The landlord agrees that from the date of assignment the Guarantors Andrew Malcolm Kerslake and Graeme Lansley Lee are released from their obligations as Guarantors PROVIDED HOWEVER that their liability remains in place in respect of any breach of the covenants conditions prior to the date of assignment.

[40] The plaintiff's position on the two variations proposed by the defendants' solicitor and in the Deed of Assignment of Lease is:

(i) In relation to the expiry date of 28 February 2011 that it was wrong and was not a variation of the lease;

(ii) In relation to the release of Mr Kerslake and Mr Lee as Guarantors, this was not consented to (see para [23] herein).

[41] In relation to the date of 28 February 2011 the plaintiff made submissions on a number of points. The first was that there must be consideration for there to be a variation of a lease. Relying on McMorland & Sim, Chapter II at 11.172, Goodall and Brookfield "Conveyancing" 22.21 and *Machirus Properties Ltd v Power Sports World (1987) Ltd* (1999) 4 NZ Conv C 193, 066.

[42] Secondly that in interpreting the document, the Court should have consideration to:

(i) giving a business-like meaning to a commercial lease;

(ii) have regard to the matrix of facts when considering what meaning to ascribe to the contractual provisions;

(iii) background information can be considered for example communications between the parties which may assist in determining what the contract was to cover.

[43] Mr Campbell QC, of counsel for the first and second defendants argued that not only was the Deed of Assignment of Lease not binding as a deed, it was not binding as a contract.

[44] Mr Campbell referred to Mr Sargent's letter of 24 July 2009 in which he said the plaintiff would be liaising with the first and second defendants in an attempt to reach resolve. It follows that the parties were still negotiating, which means a concluded agreement was never reached.

[45] If there was no effective assignment of lease, Sligo took possession of the leased premises in late April or early May 2009. The plaintiff accepted rent from Sligo and sent a perpetual invoice for rent. The question then arises as to the basis upon which this happened.

[46] The submission was made on behalf of all three defendants that there was an informal lease between the plaintiff and Sligo. At the same time there was an implied surrender of the original lease. This occurs when the conduct of the parties is inconsistent with the continuation of the lease (see Hinde McMorland and Sim "Land Law in New Zealand" Lexis Nexis, Wellington 11.261). An implied surrender requires some unequivocal act which has the effect of stopping the parties from assenting that the lease is still extant.

[47] Mr Campbell submitted that in this case, the lessor had leased the premises to a third party (Sligo) on the lessor's (plaintiff's) own account relying on *Henry B Norcross (Holdings) Ltd v Rankin* (1992) 2 NZ ConvC 191,217 at 191,227-191,228 and *Wildeboer v Carter* (1995) 3 NZ ConvC 192,022 at 192,025-192,026.

[48] That once the lease was surrendered there was no further obligation on AI (NZ) Ltd to pay rent and therefore guarantees given by Mr Lee and Mr Kerslake could not be called upon.

[49] The plaintiff's response was:

(i) that there has been no variation of the lease;

(ii) that the chain of correspondence shows the underlying contract;

(iii) further, that if there is any ambiguity about the expiry date of the lease, 28 February 2013 or 28 February 2011, then that ambiguity should be resolved in favour of the landlord relying on the contra proferentum rule. The onus is on the person seeking the protection of the clause, the Court should resolve any ambiguity against the party who proffered the phrase.

Discussion

[50] Clause 6 of the Deed of Assignment document is set out in para [37] herein. Clause 5 of the same document said:

> The Assignor, the Assignee, the Landlord and the Guarantor all acknowledge that the lease expires on the Expiry Date of the Current Term set out in the First Schedule and the Rent is the Annual Rent set out in the first schedule.

[51] The two differences between the First Schedule of the assignment document and the Deed of Lease were:

(a) the expiry date of the Current Term (28 February 2011 and 28 February 2013); and

(b) the typed written variation purporting to release Messrs Lee and Kerslake as guarantors.

[52] Dealing with the latter first, the evidence establishes that Messrs Lee and Kerslake wished to be released as guarantors under the Deed of Lease. And that the landlord did not agree. The letter from Mr Norris to Mr Sargent dated 8 June 2009 (referred to in para [23] herein) makes it clear that Mr Malcolm on behalf of the plaintiff on the one hand and Messrs Lee and Kerslake on the other hand agreed the guarantees given under the Deed of Lease would continue.

[53] Ms Hancock was not aware of this until a long time later. The agreement reached on this issue between the landlord and Messrs Lee and Kerslake did not affect her position detrimentally as she agreed to guarantee the obligations of Sligo in the Assignment document which purported to release Messrs Kerslake and Lee as guarantors.

[54] The date issue is more complex. Firstly, there was no prior discussion about bringing the date forward by two years as between Mr Malcolm and Messrs Lee and Kerslake. Mr Kerslake's evidence was this was an offer for Mr Malcolm to consider. Mr Kerslake saw this shorter term as a benefit the landlord might consider given the fact the business turnover was not what had been warranted.

[55] There is no dispute that the Landlord did not raise the issue of the 2011 expiry date until at least the end of March 2012, almost three years after its solicitor was in receipt of the Assignment document. Mr Malcolm's evidence was that he signed the Deed of Assignment of Lease without noticing the 2011 expiry date. When this happened is unclear but it seems likely it was in 2009. The plaintiff submits that this is an error which the Court should correct under the Doctrine of Rectification.

Rectification

[56] The plaintiff submitted that when there was a continuing common intention, the Court could rectify the mistaken provision, namely the date of 28 February 2011 and substitute 28 February 2013. Mr Malcolm's evidence is that he did not notice the date of 28 February 2011 and would never have agreed to a change from the expiry date in the lease of 28 February 2013. I accept his evidence on this issue including because he spent $40,000.00 remodelling the building when AI (NZ) Ltd became a tenant which alterations would need to be demolished had he needed to re-let the premises. He wanted to recoup this cost.

[57] Ms Hancock's evidence on this issue established the following:

(a) that the date of expiry in the Deed of Assignment of Lease (28 February 2011) was crucial to her for two reasons:

(i) she considered the overheads at the leased premises to be high;

(ii) she was exploring options to amalgamate with another business which would have involved a move from Penrose Road.

[58] In February 2011, she told Mr Malcolm that Sligo was going to move to different premises. He told her Sligo could not leave because the expiry date in the Deed of Lease was 28 February 2013. She insisted the expiry date was 28 February

2011. She asked Mr Malcolm for a copy of the lease. Her evidence was that in March 2011, Mr Malcolm gave her the front two pages of the Deed of Lease which showed an expiry date of 28 February 2013. She still maintained that she believed the expiry date was 28 February 2011. It was not until 30 April 2012 that she saw a copy of the Deed of Assignment document which indeed showed the expiry date of 28 February 2011.

[59] There was no evidence from Mr Malcolm that challenged Ms Hancock's evidence on this point. Indeed, he agreed that Ms Hancock had been asking him for a copy of the lease, the words he used were (p. 25 N.O.E.) "… she was screaming for it …"

[60] I accept Ms Hancock's evidence on this issue. She presented as an honest witness and no evidence from any other witness challenged her veracity. It follows that Ms Hancock's intention was that the lease expired on 28 February 2011.

[61] Mr Lee did not give evidence. Mr Kerslake did. His evidence was that 28 February 2011 was the expiry date for the current term in the Deed of Assignment of Lease as a result of his instruction to his lawyer. Mr Kerslake was not challenged on this evidence. The solicitor, Mr Norris, was asked if the date was an error. Although he could not say whether it was or not, he gave evidence that Mr Kerslake, a longstanding client, was fastidious in terms of his attention to such matters. Mr Kerslake signed the Deed of Assignment of Lease with the 28 February 2011 date on it, the inference being that if it was an error Mr Kerslake would have noticed it.

[62] I am satisfied that Mr Kerslake's intention was that the expiry date was to be 28 February 2011. It follows that the plaintiff has failed to satisfy me that there was any common intention. That being the case, there was no common intention the Court can rectify.

[63] Given my findings as to the intention of Mr Kerslake and Ms Hancock (as opposed to Mr Malcolm's intention), the Assignment of Lease document cannot be binding on anyone. This is because there was no meeting of the minds between the

parties on the crucial issue of the expiry date. Nor did Ms Hancock agree to add Messrs Kerslake and Lee as guarantors.

Is there any underlying contract to assign the lease?

[64] I turn to the plaintiff's arguments that there is a binding contract (see para [49] herein).

[65] Firstly the plaintiff submitted that there was no variation of the lease:

(a) because there had to be consideration to reduce the term by two years;

(b) there was no clear statement in the Assignment document that the expiry date of 28 February 2011 was specified as a variation from the Deed of Lease;

(c) on the matrix of facts, no variation exists as to the expiry date.

Ms Hancock's position

[66] The sale and purchase agreement required AI (NZ) Ltd to provide Sligo with a copy of the Deed of Lease which did not happen. Accordingly Ms Hancock did not know about the February 2013 date in the Deed of Lease. Mr Malcolm's view was that it was not his responsibility because of what was stated about this in the sale and purchase agreement.

[67] That may be so, but it does not change the fact that Ms Hancock did not know the expiry date of the Deed of Lease. All he knew was that the expiry date in the Assignment document was 28 February 2011.

[68] Further Ms Hancock's intention was that she was the sole guarantor from the time Sligo took over occupation of the premises. This was incorrect.

[69] Neither Sligo nor Ms Hancock saw the terms of the Deed of Lease until March 2011. It was only at that time both persons became aware of the date of

expiry of 28 February 2013. It was not until April 2012 that Ms Hancock came to realise she was not a sole guarantor. Moreover she was never asked to consent to Messrs Kerslake and Lee remaining as guarantors.

[70] Sligo entered into occupation of the premises on the same understanding as Ms Hancock namely that the Deed of Assignment of Lease would be the governing contractual document. Given my finding that this document is not binding on anyone including Ms Hancock, it follows that there was no contractual arrangement between the plaintiff and Sligo that the Deed of Lease terms applied to Sligo's tenancy of the premises. Ms Hancock's guarantee is not enforceable.

[71] The date of expiry of a lease is a crucial component of a lease between landlord and tenant. There was no contractual arrangement with Sligo and or Ms Hancock other than a month to month lease as between the plaintiff and Sligo. Ms Hancock indicated Sligo wished to leave in February 2011, possibly earlier. That means one month's notice was given at this time.

Is there a binding contract between the plaintiff and Mr Lee and Mr Kerslake?

[72] The first and second defendants submitted that there was a delay in the landlord consenting to the Assignment of Lease.

[73] Clause 36.1 of the Deed of Lease required the tenant to obtain the landlord's written consent prior to assigning the lease.

[74] Section 226(2)(b) of the Property Law Act 2007 provides that the landlord must give consent "…within a reasonable time."

[75] The plaintiff's submission was that Sligo moved into the premises and Mr Malcolm sent a perpetual invoice for the rent. This document showed the landlord's consent.

[76] In addition to this issue there were the following issues for Mr Kerslake and Mr Lee:

(i) Messrs Kerslake and Lee believed the end of the term of the lease had been brought forward two years to 28 February 2011. It is plain from the evidence that the landlord's response to the receipt of the Assignment document was to reject the proposal to release Messrs Kerslake and Lee as guarantors. But nothing was said about expiry date of 28 February 2011. It follows that Messrs Kerslake and Lee by inference would have understood the earlier expiry date had been accepted by the landlord;

(ii) Mr Sargent's letter of 27 July 2009 (see para [26] herein) that the landlord had a couple of issues to resolve with AI (NZ) Ltd before the Assignment document would be signed and returned;

(iii) No one obtained orally or in writing the consent of Ms Hancock to the inclusion of Messrs Kerslake and Lee as continuing guarantors;

[77] My view is that issuing Sligo with a perpetual invoice is not sufficient to satisfy the requirement of s 226(2)(b) PLA particularly in a situation where a formal Assignment document is contemplated by the parties. Basic contract principles require there to be an offer and acceptance and agreed terms. On the basis of the matters referred to in paras [72] and [77] herein, no concluded contract existed as between the plaintiff and AI (NZ) Ltd and Messrs Kerslake and Lee.

[78] For the reasons set out in the preceding paragraphs I reject the notion that there was a contract to assign the lease.

[79] The position of all three defendants is that there was an informal lease between the plaintiff and Sligo. I accept that submission for the reasons set out above.

Surrender by operation of law or implied surrender

[80] All three defendants argued that it follows that the lease dated 1 March 2007 was impliedly surrendered when the plaintiff entered into an informal lease with Sligo. Once the lease was surrendered there was no obligation on AI (NZ) Ltd to pay rent and so the guarantees of Messrs Kerslake and Lee came to an end.

[81] Mr Campbell QC submitted that surrender by operation of Law, or implied surrender occurs where the owner of an estate such as a tenant, is party to a transaction that would not be valid if the estate were to continue to exist. It is based on estoppel, the circumstances must be such that it would be inequitable for the parties to rely on the fact that no formal surrender was executed. Express words of surrender are not required as long as the conduct of the parties is inconsistent with the continuance of the lease. A surrender does not depend on the subjective intention of the parties but it does require some unequivocal act which has the effect of stopping the parties from asserting that the lease is still extant. (relying on Hinde McMorland & Sim "Land Law in New Zealand ch 11.261(c)).

[82] Examples where surrender by operation of law exists given in the text referred to above include:

(a) Where a new and valid lease is accepted by the lessee from the immediate lessor;

(b) Where the lessor leases the premises to a third party on the lessor's own account, rather than on behalf of the lessee;

(c) Where the lessee assents to the grant of a new lease to a third person and gives up possession at about the same time of the grant of the new lease;

(d) Where the lessor and lessee agree to determine the tenancy but the lessee is allowed to remain in occupation as a licensee.

(e) Where the lessee sells the freehold as a trustee, forgetting he or she also has a lease of the land.

Discussion

[83] I accept that Mr Campbell has correctly stated the law.

[84] In *Wildeboer v Carter* 15 September 1994 Hamilton High Court AP133/93 Penlington J considered a situation where the tenant vacated the leased premises during a renewed term of a lease. The landlord approached prospective purchasers and other prospective tenants who occupied the premises and paid rent but not for the full period of the renewed term. The tenant argued on appeal that there was a surrender of the lease by operation of law that became effective from the date of re-letting (either the first or second re-letting). Penlington J allowed the appeal finding there was a surrender by operation of law.

[85] In the decision Penlington J reviewed the authorities on the doctrine of surrender by operation of law, including whether it applied in New Zealand. At p. 9 of the decision Penlington J said the following:

> The onus is on the tenant to prove that the landlord has accepted that the lease has been surrendered.
>
> In *Relvok Properties Ltd v Dixon*[2] Sachs LJ said at p. 5:
>
> > The result of that and other authorities is that as the law stands it is open to a landlord whose tenant has absconded both to protect the security of his premises and the state of their repair and yet maintain his rights for rent against that tenant until a fresh one is found and he then thinks fit to enforce the forfeiture. Whether in any individual case the landlord has done more than thus protect his interests is of course a question of fact in each case. The onus lies on the tenant to prove that more has been done and thus the lease terminated. In the instant case the defendants have failed to discharge that burden.
>
> Equivocal conduct will not suffice. Both parties must have acted voluntarily and unequivocally. *Woodfall* [3] puts the matter in this way:
>
> > The conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended. There must either be

[2] (1972) 25 P & CR 1 (CA).
[3] (Supra) at para 17.020.

> relinquishment of possession and its acceptance by the landlord, or other conduct consistent only with the lesser of the tenancy…
>
> Ultimately whether there has been a surrender by operation of law is an inference to be drawn from all the facts. It is matter of fact and degree.

[86] The onus rests on Messrs Kerslake and Lee to satisfy me that the landlord has accepted that the lease has been surrendered. On the facts of this case I am unable to accept they have done so.

[87] In this case, the proposed assignment of lease was part and parcel of a desire by Messrs Kerslake and Lee to sell the business which was not doing well. A sale would mean they no longer had to pay rent for the premises. The proposed assignment to Ms Hancock or her nominee was clearly for the benefit of the existing tenant (AI (NZ) Ltd) and Messrs Kerslake and Lee.

[88] That can be contrasted with a situation where the lessee vacates the premises and the landlord re-lets them. In *Wildboer* Penlington J found that when the landlord re-let the property to a third party, the landlord voluntarily and unequivocally accepted the tenant's quitting of the premises and there was a surrender by operation of law from the time of re-letting. Importantly His Honour said at p. 18:

> …There was no evidence that the re-letting…was on account of [the tenant].

[89] I find that in this case, the landlord allowed Sligo to go into occupation for the benefit of the tenant (AI (NZ) Ltd).

[90] Moreover this sale was a transfer of business to an existing shareholder of the tenant (AI (NZ) Ltd). Ms Hancock had been managing the business of AI (NZ) Ltd for some time before the sale to her occurred.

[91] This situation is different to other cases where the tenant packs up and leaves the premises empty and the landlord re-lets the premises to a third party unknown to the vacating tenant.

[92] Very soon after the Assignment document was received by the plaintiff's solicitor, Messrs Keslake and Lee were told Mr Malcolm would not agree to release them as guarantors. They accepted that was the case as this was recorded in writing in the letter from Mr Norris dated 8 June 2009.

[93] Messrs Keslake and Lee knew their obligations under the personal guarantee they gave when they signed the Deed of Lease in April 2007 continued.

[94] The only area where there may have been a misunderstanding was as to the date those obligations would come to an end.

[95] Mr Kerslake's evidence on this point is clear, the 28 February 2011 date in the Assignment document was an offer by him, Mr Lee and Ms Hancock to end the term two years earlier than the expiry date in the Deed of Lease.

[96] That offer was not accepted by Mr Malcolm. His evidence was this was overlooked by him when he saw the Assignment document in Mr Sargent's office in or about early May 2009. I have accepted his evidence on this point.

[97] Notwithstanding that Mr Malcolm signed the Assignment document I am satisfied that he did not intend there would be an expiry term other than 28 February 2013. Having found that the Deed of Assignment document is not binding as a deed or a contract, Mr Malcolm's signature on it has evidential value only. I am satisfied that he did not notice the date of 2011 and that it was not brought to his attention by anyone when he signed it.

[98] In June 2012 Mr Kerslake received a letter from Mr Malcolm's solicitor making demand under the personal guarantee.

Findings

[99] The Deed of Lease dated 11 April 2007 was not surrendered and the personal guarantees given by Messrs Kerslake and Lee remain binding on them for any losses suffered by the landlord up to and including 28 February 2013.

Equitable set-off

[100] Mr Campbell QC submitted that there was an equitable set-off against any amounts owing to the landlord, due to misrepresentations as to turnover made by Mr Malcolm prior to the purchase of the business in March 2007. The purchaser of the business was AI (NZ) Ltd.

[101] Although this was signalled in a notice of response, no formal claim has been filed by the first and second defendants. Having said that, time was taken up in the trial by cross-examination of both Mr Malcolm and Mr Kerslake on this issue.

[102] Equitable set-off usually requires mutuality of parties. In *Hamilton Ice Area Ltd v Perry Developments*[4] the Court of Appeal said there might be a case where equitable set-off was appropriate where there is no identity of parties, but the instant case was not one of them. The *Hamilton Ice Arena* case has a very similar party arrangement to this case, yet the Court found the lack of identity of the parties was fatal to the appeal on this basis.

[103] In the *Hamilton Ice Arena* case arrears of rent were owed by Hamilton Ice to the landlord, Perry. Perry owed money to two brothers who were shareholders and directors of Hamilton Ice. This related to work they had done on another business owned or associated with Perry. The Speirs brothers were guarantors of the lease.

[104] The Court of Appeal found:

> The case falls a long way short of raising circumstances in which it would be appropriate to lift the corporate veil of Hamilton Ice and treat it and the Speirs brothers as being the same person in law.

[4] [2002] 1 NZLR 309.

[105] That is not the only difficulty. Without a structured pleading and accounting evidence, I could not make a finding on liability on the basis of what I heard. The evidence was there were many discussions and meetings about turnover as between Mr Kerslake and Mr Malcolm prior to settling the purchase price. What was misleading and why is not clear to me.

[106] In the *Hamilton Ice Arena* case the amount owed in wages was quantifiable. That was not the situation here in terms of quantum. The reasons why the business did not succeed when owned by AI (NZ) Ltd and/or Sligo was not clear to me from the evidence.

[107] The claim for an equitable set-off fails.

Result

[108] The plaintiff is unsuccessful in its claim against Ms Hancock.

[109] Judgment is entered for the plaintiff against the first defendant Graeme Lansley Lee and the second defendant Andrew Malcolm Kerslake.

[110] Two of the losses claimed in the amended notice were not challenged. They are:

(a) unpaid rental of $65,768.61;

(b) unpaid operating expenses $28,889.27.

Legal expenses and interest are yet to be quantified.

[111] If the parties cannot agree on the total judgment amount, that matter should be referred back to me within 21 days of the date of this decision.

Costs

[112] Ms Hancock is entitled to seek costs. If the parties are unable to agree, memoranda may be filed within 21 days (as above).

[113] The plaintiff is entitled to seek costs against Messrs Kerslake and Lee. I suggest it is appropriate that an award of costs should take into account that not all of the plaintiff's arguments have been successful. If the parties are unable to agree as to costs, memoranda may be filed within 21 days of settling the judgment amount.

Dated at Auckland this 2nd day of November 2016 at 4.30 pm.

P A Cunningham
District Court Judge