

**IN THE DISTRICT COURT
AT NORTH SHORE**

**CIV-2017-044-001364
[2018] NZDC 11623**

UNDER	THE DEED OF LEASE
IN THE MATTER OF	BREACH OF “END OF LEASE” OBLIGATIONS
BETWEEN	ROBERT REILLY on behalf of THE PORTAGE TRUST Plaintiff
AND	FLAGMAKERS LIMITED Defendant

Hearing: 11 June 2018

Appearances: No appearance for the Plaintiff
Ms SA Hawkins for the Defendant

Judgment: 12 June 2018

RESERVED JUDGMENT OF JUDGE N R DAWSON

[1] The Plaintiff in this matter is the landlord of commercial premises that were leased by the Defendant pursuant to a Deed of Lease dated 14 August 2008 (“Lease”) and subsequent renewals of that Lease. At the conclusion of the Lease the Plaintiff claimed the sum of \$49,601.78 (ex GST) plus interest and costs incurred for repairs and maintenance to the building that the Plaintiff says are payable by the Defendant pursuant to that Lease.

[2] The Defendant has made an application for the stay of these proceedings on the basis that they are in breach of the arbitration clause in the Lease and in reliance on the Arbitration Act 1996. They also seek costs of and incidental to this proceeding.

[3] The Lease between the parties is on the standard Auckland District Law Society Lease 5th Edn 2008. In that Lease cl 44 reads:

- 44.1 Unless any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision then relating to arbitration.
- 44.2 ...
- 44.3 The procedures prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default prescribed in cl 28.1 hereof.

[4] Clause 28.1 of the Lease entitles the landlord to apply to the Court for an order if the rent should be in arrears by 10 working days after any of the rent payment dates and the tenant has failed to remedy that breach within 10 working days after service of a notice on the tenant. It also entitles the landlord to claim for a breach of any other covenant or agreement on the tenant's part. It is submitted by the Defendant that cl 28.1 of the Lease covers rent plus any proportions of outgoings or default interest or such other liquidated amounts of that type pursuant to the Lease. It does not cover matters that are in dispute.

[5] The claim by the Plaintiff is disputed by the Defendant. The only way to ascertain the amount payable, if any, is through a formal proceeding. Article 8(1) of the First Schedule of the Arbitration Act 1996 provides:

8 Arbitration agreement and substantive claim before court

- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

[6] In the case of *Zurich Australian Insurance v Cognition Education* (2015) 1 NZLR 383 the Supreme Court held that:

- [52] Under Article 8(1)(i) a stay must be granted unless the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed or it is immediately demonstrable either that the

defendant is not acting bona fide in asserting that there is dispute or that there is, in reality, no dispute.

[7] It cannot be said that the amount claimed by the Plaintiff is able to be regarded as “other monies payable hereunder” in cl 44.3 of the Lease as they are matters in dispute. In the case *Hi-Tech Investments Limited v World Aviation Systems (Australia) Pty Limited* CIV-2006-404-3579 Abbot AJ said:

[18] I do not understand either counsel to contend other than that cl 44.3 must be read in its entirety, and so as to be consistent with the other clauses in the lease.

[19] As I construe cl 44.3, it applies to both rent and other monies which are “payable”. ...

[24] For these reasons, I construe cl 44.3 as allowing proceedings for recovery of rent or other monies for which liability has been established under the lease or (if necessary) by the arbitration procedures in cl 44.1.

[8] In this case liability has not been established for the amount claimed by the Plaintiff and a formal procedure will be required in order to do so. The parties are contractually bound by the arbitration clause in the Lease and pursuant to cl 44.1 are required to submit this matter to arbitration if it is to proceed.

[9] This Court orders that:

(a) These proceedings are stayed and the Plaintiff is restrained from continuing Court action with respect to this claim until these matters are resolved by arbitration in accordance with cl 44.1 of the Lease.

(b) Costs of an incidental to this application for a stay are granted to the Defendant on a 2B basis with disbursements to be fixed by the Registrar.

N R Dawson
District Court Judge