IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-404-386
[2021] NZHC 1535

UNDER	Sections 244 and 251 of the Property Law Act 2007
BETWEEN	SIMON RHYS MOUNTFORT, CATHERINE ANNE MOUNTFORT AND PAUL KENNETH FOSTER Applicants
AND	SOKUNTHEA (RACHEAL) CHEAM Respondent

Hearing: 20 May 2021

Appearances: G S A Morrison for the Applicants
M Robson for the Respondent

Judgment: 25 June 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 25 June 2021 at 4:00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The applicants own commercial premises in Ellerslie. They lease those premises to the respondent (Ms Cheam) under a deed of lease dated 1 October 2015. Ms Cheam operates a bakery from the premises.

[2] From March 2020 Ms Cheam's business was affected by the lockdowns and other measures imposed by the government in response to the COVID-19 pandemic. In June 2020 the parties agreed to a reduction of the rent payable by Ms Cheam under the lease. That agreement covered the period until 31 October 2020.

[3] The applicants allege that Ms Cheam failed to pay all the rent that was due on 1 October 2020 and 1 November 2020. Based on those alleged shortfalls, on 17 December 2020 the applicants served on Ms Cheam a notice under the Property Law Act 2007 (PLA) of their intention to cancel the lease.

[4] Ms Cheam has, on two grounds, refused to pay the amount the applicants allege is outstanding. First, the amount is based (in part) on a rent increase of 3.5 per cent from 1 April 2020. Ms Cheam disputes that increase. Secondly, Ms Cheam says that in October and November 2020 she was entitled to an abatement of rent for the effects of the government's COVID-19 restrictions.

[5] The applicants apply under s 244 of the PL A for an order for possession (and therefore cancellation), based on Ms Cheam's failure to comply with the PLA notice. Ms Cheam resists the application. She says there was no shortfall in her rent payments, the PLA notice was therefore invalid, and the applicants thus have no right to cancel the lease. Alternatively, she applies under s 253 of the PLA for relief against cancellation.

[6] Two issues arise. The first is whether Ms Cheam failed to pay all the rent due on 1 October 2020 and 1 November 2020. If Ms Cheam did fail to pay all the rent, the second issue is whether I should grant Ms Cheam relief against cancellation. To determine those issues, I first must set out the background.

Background

[7] Although the deed of lease is dated 1 October 2015, the term of the lease commenced on 1 April 2014. Ms Cheam is obliged to pay rent by monthly payments in advance on the first day of each month.

[8] Between November 2019 and March 2020, Ms Cheam was often late in paying her rent. The applicants did not take any action, as Ms Cheam eventually paid.

[9] On 9 March 2020, Ms Cheam emailed the first-named applicant, Mr Mountfort. She said she had spoken to her accountant to discuss her position "in terms of continuing the lease or to cease it completely". She told Mr Mountfort that in 2019 she had "lost 400 customers coming to Ellerslie … due to the fact the ANZ had moved all of their contact centre staff to Sylvia Park". She noted that her business would be affected by COVID-19. She concluded: "The sooner we can get this lease out of the way, the better for all of us."

[10] On 25 March 2020, New Zealand was placed into a COVID-19 Alert Level 4 lockdown. That lockdown lasted until 27 April 2020. During that lockdown Ms Cheam was unable to access the premises to carry on her business.

[11] The applicants say that, on 1 April 2020, the rent payable under the lease increased by 3.5 per cent. The applicants say this was a fixed and automatic increase. Ms Cheam disputes the increase.

[12] After the lockdown was imposed, Ms Cheam did not pay any rent until 24 June 2020. The applicants initially made demands on Ms Cheam for unpaid rent. Ms Cheam responded by relying on cl 27.5 of the second schedule of the lease. Clause 27.5, which I will examine later, provides for an abatement of rent when the tenant cannot access the premises as a result of certain emergencies.

[13] After some correspondence and negotiation, in June 2020 the parties agreed to a reduction in the rent for the period 1 April to 31 October 2020 (the June 2020 agreement). For that period, the parties agreed the monthly rent would be based on the pre-1 April 2020 monthly rent (that is, before the 3.5 per cent increase asserted by

the applicants). Moreover, Ms Cheam would only have to pay the following percentages of that monthly rent:

(a) No rent for April 2020.

(b) 40 per cent for May 2020.

(c) 50 per cent for June 2020.

(d) 60 per cent for July 2020.

(e) 70 per cent for August 2020.

(f) 80 per cent for September 2020.

(g) 90 per cent for October 2020.

[14] As can be seen, the parties had agreed a graduated scheme, lasting until 31 October 2020. There was no agreed reduction beyond that date. Ms Cheam, in her affidavit filed in opposition to the application, said she agreed that the payments in the June 2020 agreement were to allow her to "slowly build back towards paying full rental until 01 November 2020".

[15] The applicants incurred legal costs of $2,357.50 enforcing their right to recover rent (including issuing a letter of demand). On 30 June 2020, the applicants' lawyers invoiced Ms Cheam for that amount.

[16] Auckland returned to Alert Level 3 from 12 to 30 August 2020. During that time, Ms Cheam was able to access the premises and operate her business, albeit at a reduced level. The parties agreed to a further reduction in rent. They agreed that Ms Cheam would pay, for the month of September 2020, 50 per cent of the pre-1 April 2020 monthly rent (rather than the 80 per cent in the June 2020 agreement).

[17] Ms Cheam's payment for October 2020 was less than the amount the parties had agreed in the June 2020 agreement. The shortfall was $1,940.26.

[18] On 21 October 2020, the applicants' property manager, Bayleys, sent a letter to Ms Cheam. Bayleys set out the amounts payable each month from April to October 2020 according to the June 2020 agreement. Bayleys noted the shortfall in Ms Cheam's October 2020 rent payment, and asked her to pay by 30 October 2020. The letter also said that, from 1 November 2020, Ms Cheam was required to pay 100 per cent of the rent, at the post-1 April 2020 rate (that is, with the asserted 3.5 per cent increase).

[19] Ms Cheam responded to Bayleys' letter on 30 October 2020. She said she understood that the parties would meet each month while the effects of COVID-19 were still at play, to assess and review "what would be a fair rent based on my ability to pay". She said that the parties had not set a date as to when the contract could return to pre-COVID-19 terms. She denied she was in arrears for the 1 October 2020 rent.

[20] The next rent was payable on 1 November 2020. Ms Cheam paid that rent two days late. Her payment was $2,166.63 less than the post-1 April 2020 monthly rent.

[21] Though Ms Cheam did not explain this at the time, for October 2020 she had paid 60 per cent, and for November 2020 she had paid 70 per cent, of the pre-1 April 2020 monthly rent. She was treating the further agreement to reduce the rent for September 2020 (to 50 per cent) as "resetting" the graduated scheme. Over the next three months her monthly rent payments were 80 per cent, 90 per cent and then 100 per cent of the pre-1 April 2020 monthly rent.

[22] On 10 November 2020, Bayleys wrote to Ms Cheam about the rent outstanding for October and November 2020. Bayleys again set out the amounts payable each month from April to October 2020 according to the June 2020 agreement, and stated that from 1 November 2020 Ms Cheam was required to pay 100 per cent of the rent at the post-1 April 2020 rate.

[23] Ms Cheam's solicitor responded to that letter on 17 November 2020. He said that Ms Cheam accepted the amounts set out in the 10 November 2020 letter as being the amounts to which the parties had agreed "to August 2020". He referred to COVID-19 restrictions that applied from 12 August to 7 October 2020. He asserted that under

cl 27.5 of the lease Ms Cheam was entitled to further abatements of rent for those restrictions.

[24] There was further correspondence between the parties' representatives. No resolution was achieved. On 17 December 2020, the applicants served a PLA notice on Ms Cheam. The notice claimed that Ms Cheam was in breach of the lease in two respects:

(a) She had failed to pay rent of $4,106.89 (being the shortfalls asserted by the applicants for October and November 2020).

(b) She had failed to pay the legal costs for which she had been invoiced on 30 June 2020, in the sum of $2,357.50.

[25] The PLA notice expired without Ms Cheam making any payment of the rent or costs specified in the notice. Ms Cheam has continued to refuse to pay any of those amounts.

[26] Moreover, Ms Cheam has continued to pay rent based on the pre-1 April 2020 monthly rent. She disputes that the rent increased by 3.5 per cent on 1 April 2020. In addition, Ms Cheam paid only a portion of the pre-1 April 2020 monthly rent for the months of December 2020 (80 per cent), January 2021 (90 per cent), and March 2021 (75 per cent). For those months she asserts an entitlement to abatements of rent under cl 27.5, based on COVID-19 restrictions.

[27] On 23 February 2021, the applicants attempted to re-enter the premises peaceably. They say that Ms Cheam interfered with their attempt. Ms Cheam denies this. She says the applicants had no entitlement to re-enter, peaceably or otherwise.

[28] Having failed to re-enter the premises, the applicants filed this application for possession on 8 March 2021.

The parties' respective cases

[29] Under cl 28.1(a) of the lease the applicants are entitled to cancel the lease if the rent has been in arrears 10 working days after any rent payment date. That entitlement is subject to Ms Cheam having failed to remedy that breach after service of a notice in accordance with s 245 of the PLA.

[30] The applicants' application for possession is based on the rent payable on 1 October 2020 and 1 November 2020 being in arrears for 10 working days, and Ms Cheam failing to remedy that breach after service of the PLA notice on 17 December 2020. The applicants say that the rent payable on 1 October 2020 was the reduced amount that had been agreed in the June 2020 agreement, and that the rent payable on 1 November 2020 was the post-1 April monthly rent, without any reduction.

[31] Ms Cheam has, in her notice of opposition, raised several grounds for her refusal to pay the shortfalls claimed by the applicants for the October 2020 and November 2020 rent. First, for November 2020 the shortfall is based (in part) on the rent having automatically increased by 3.5 per cent from 1 April 2020. Ms Cheam disputes that increase. Secondly, Ms Cheam says that for each month she is entitled to a further abatement of rent under cl 27.5 for the ongoing effects of the government's COVID-19 restrictions. Thirdly, Ms Cheam says the applicants are estopped from claiming the lease is cancelled.

[32] There is no dispute that, apart from the three grounds raised by Ms Cheam, the PLA notice was valid. So, if the applicants overcome those three grounds, they are entitled to cancel the lease.

[33] In that event, Ms Cheam says that the Court should grant her relief against cancellation under s 253 of the PLA. The applicants oppose any relief, primarily on the ground there are serious concerns about Ms Cheam's ongoing ability to pay rent.

The issues

[34] The issues are:

(a) Did Ms Cheam fail to pay all the rent due on 1 October 2020 and 1 November 2020? This raises two sub-issues:

(i) Did the rent increase by 3.5 per cent from 1 April 2020?

(ii) In October and November 2020 was Ms Cheam entitled to an abatement of rent for the ongoing effects of the government's COVID-19 restrictions?

(b) Are the applicants estopped from cancelling the lease?

(c) If the applicants are entitled to cancel the lease, should Ms Cheam be granted relief against cancellation?

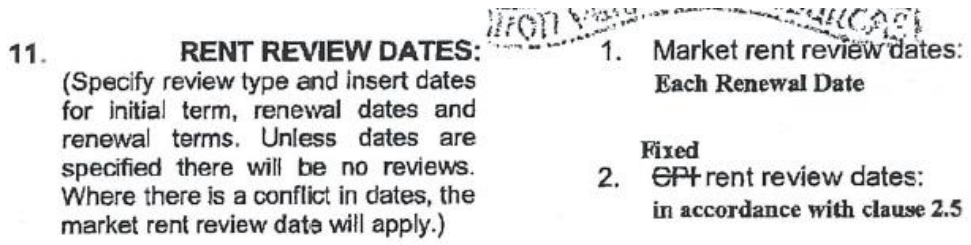
Did Ms Cheam fail to pay all the rent due on 1 October 2020 and 1 November 2020?

Did the rent increase by 3.5 per cent from 1 April 2020?

[35] Whether the rent increased by 3.5 per cent from 1 April 2020 depends on the terms of the lease.

[36] The lease is in the Auckland District Law Society's (ADLS) standard form for a deed of lease, sixth edition 2012 (2). It is for a term of 10 years commencing 1 April 2014, with two rights of renewal of five years each. The renewal dates are therefore 1 April 2024 and 1 April 2029.

[37] Clause 11 of the first schedule specifies rent review dates:



11. **RENT REVIEW DATES:**
(Specify review type and insert dates for initial term, renewal dates and renewal terms. Unless dates are specified there will be no reviews. Where there is a conflict in dates, the market rent review data will apply.)

1. Market rent review dates:
Each Renewal Date

Fixed
2. ~~CPI~~ rent review dates:
in accordance with clause 2.5

[38] The ADLS standard form of lease provides for market rent reviews (governed by cls 2.1 to 2.4 of the second schedule) and CPI rent reviews (governed by cls 2.5 and 2.6). Clause 11 of the first schedule indicates that there are to be fixed rent reviews instead of CPI rent reviews. That is reflected in the second schedule, where standard cls 2.5 and 2.6 have been struck out, and the following bespoke cl 2.5 has been added:

Fixed Rent Review

2.5 Two yearly beginning on the second anniversary of the Commencement Date the annual rental payable shall increase by a fixed rate of 3.5% of the annual rental payable for the 24 month period immediately preceding the fixed rent review date. This fixed rent review shall apply during the initial term of the lease and any renewed term of this Lease.

[39] Despite the clarity of these provisions, Ms Cheam's position was that the 3.5 per cent increase under cl 2.5 was not automatic. She said that it could be "challenged by the tenant". Mr Robson, counsel for Ms Cheam, described the applicants as having "unilaterally imposed" the 3.5 per cent increase. He submitted that the fixed rent review under cl 2.5 was subject to determination in accordance with cls 2.1 to 2.4.

[40] I reject that submission. The effect of cl 2.5 is clear. Every two years from the commencement date the rent "shall increase" by 3.5 per cent. The increase is mandatory, and does not depend on either party taking any steps. In short, an increase of rent under cl 2.5 is automatic. Moreover, the increase is not subject to a determination of market rent under cls 2.1 to 2.4. Clauses 2.1 to 2.4 apply only to market rent reviews, which occur (in accordance with cl 11 of the first schedule) only on renewal dates.

[41] I conclude that the rent increased by 3.5 per cent on 1 April 2020.

In October and November 2020 was Ms Cheam entitled to an abatement of rent for the ongoing effects of the government's COVID-19 restrictions?

[42] Ms Cheam says that in October and November 2020 she was entitled to an abatement of rent under cl 27.5. This provides:

No Access in Emergency

27.5 If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises

> because of reasons of safety of the public or property or the need to prevent reduce or overcome any hazard, harm or loss that may be associated with the emergency including:
>
> (a) a prohibited or restricted access cordon applying to the premises; or
>
> (b) prohibition on the use of the premises pending the completion of structural engineering or other reports and appropriate certifications required by any competent authority that the premises are fit for use; or
>
> (c) restriction on occupation of the premises by any competent authority.
>
> then a fair proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the Tenant became unable to gain access to the premises to fully conduct the Tenant's business from the premises until the inability ceases.

[43] The lease defines "emergency" in cl 47.1(d). It includes an epidemic. It is common ground that the COVID-19 pandemic falls within the definition.

[44] Clause 27.5 applies if there is an emergency and "the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises" because of the reasons set out in the clause. The key issue is whether Ms Cheam was, during October or November 2020, unable to gain access to the premises to fully conduct her business from those premises.

[45] As to the meaning of "the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises", Mr Morrison, for the applicants, referred me to a decision of Associate Judge Bell on cl 27.5, *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd*.[1] His Honour said that under a lease the tenant has the right to occupy the premises and the right to allow and bar entry to others. To operate a business from leased premises, the tenant must have access for itself, and also for its staff, suppliers, and customers. He therefore concluded cl 27.5 could be triggered if the tenant's customers were unable to gain access to the premises.[2]

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1 *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd* [2021] NZHC 577.
2 At [28].

[46] Mr Morrison told me the applicants therefore conceded that cl 27.5 would be triggered not only if Ms Cheam was unable to gain access to the premises, but also if Ms Cheam's customers were unable to do so. I will proceed on that basis, without deciding whether the concession is correct.

[47] In March 2020, the New Zealand government introduced a 4-tier Alert Level system to help address the COVID-19 pandemic. I will summarise the restrictions placed on businesses under those Alert Levels, as relevant to Ms Cheam's business.

[48] Under Alert level 1, Ms Cheam had to display a QR code at her business. There were no other restrictions.[3] Under Alert Level 2, there were additional restrictions.[4] Restaurants and cafes could not have more than 100 customers at any one time. Customers generally had to be seated. There had to be one metre between tables, with only one worker serving any table. Under Alert Level 3, Ms Cheam's businesses could operate, but customers could not come onto her premises. Under Alert Level 4, all businesses had to close, except for essential services. Ms Cheam's business, not being an essential service, had to close during Alert Level 4.

[49] The applicants accept that during Alert Levels 3 and 4, Ms Cheam is unable to access her premises to fully conduct her business, and so cl 27.5 is triggered. But they do not accept that cl 27.5 is triggered under Alert Levels 1 and 2. The applicants point out that in October 2020, Auckland was at Alert Level 2 for seven days and at Alert Level 1 for the balance of the month. Throughout November 2020, Auckland was at Alert Level 1.

[50] Ms Cheam has a wider view of cl 27.5 She says that it is not just about access, but requires consideration of whether "because of Covid-19 restrictions and effects on trading patterns the ability to fully conduct my business has been restored". Ms Cheam complains that the applicants "were not willing to consider the ongoing effects of Covid-19".

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3 COVID-19 Public Health Response (Alert Level Requirements) Order 2020, cl 8 (as from 7 October 2020).

4 COVID-19 Public Health Response (Alert Level Requirements) Order 2020, cls 12 and 19 (as from 23 September 2020 to 7 October 2020).

[51] Ms Cheam addressed the effects of COVID-19, and Alert Levels 1 and 2, in her affidavits. She does not say that any of the restrictions that applied under Alert Levels 1 and 2 (such as the need to display a QR code, the 100-customer limit, or the requirement that customers be seated) had any effect on her ability to access her premises to fully conduct her business.[5] Rather, her evidence is that the level of custom or trade was affected by the wider effects of the COVID-19 pandemic. For example, she said that "even with Alert Level 2 … the streets did not return to the busy level of pre Covid-19 restrictions"; "for some of my regular customers the move to working from home has become permanent"; and "even with being in Alert Level 1 I have elderly customers from the nearby retirement village who have advised that they will only return when they had a vaccine".

[52] None of that amounts to Ms Cheam, or her customers, being unable to access her premises. Fewer customers are choosing to come to her business, even under Alert Levels 1 and 2, but not because of any restriction on access. Ms Cheam captured this in her first affidavit, saying:

> Covid-19 restrictions were not just about access. It was also the greatly reduced number of customers even when alert levels were lowered.

[53] Indeed. But cl 27.5 *is* about access. It is not triggered merely by a general downturn in custom caused by the pandemic. I reject Ms Cheam's argument to that effect.

[54] I conclude that cl 27.5 did not apply during either October or November 2020. Ms Cheam was not entitled to an abatement of rent under that clause for either month.

Are the applicants estopped from cancelling the lease?

[55] In her notice of opposition Ms Cheam asserted that the applicants were estopped from cancelling the lease.

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5 Ms Cheam said very little about the detail of her business. It would be most unlikely for a bakery to be affected by, for example, a 100-customer limit. If there had been such an effect, I expect Ms Cheam would have said so in her affidavits. She did not.

[56] Mr Robson addressed estoppel only briefly in his written submissions, and not at all in his oral submissions. In his written submissions, he said that Ms Cheam had continued to maintain that cl 27.5 applied, while the applicants had ignored cl 27.5. That does not come close to establishing an estoppel.

[57] Mr Morrison took me to the letter Bayleys sent to Ms Cheam dated 21 October 2020. The letter records the rent reductions that had been agreed in the June 2020 agreement, and the further rent reduction agreed for September 2020. Bayleys told Ms Cheam that the applicants had declined her request for a further abatement of rent. Bayleys also told Ms Cheam that from 1 November 2020 she was required to pay 100 per cent of the monthly rent at the reviewed rate (that is, including the 3.5 per cent increase that occurred on 1 April 2020).

[58] The applicants made their position clear to Ms Cheam (and my earlier findings mean that their position was justified). There is no basis for finding that the applicants were estopped from claiming that Ms Cheam was liable to pay the full rent for October and November 2020, or from cancelling the lease when Ms Cheam failed to remedy her underpayment of that rent following service of the PLA notice.

Conclusion on applicants' entitlement to cancel the lease

[59] Given the findings above, I conclude that the applicants are entitled to possession and therefore to cancel the lease. I now turn to consider whether Ms Cheam should be granted relief against cancellation.

Should Ms Cheam be granted relief against cancellation?

[60] Section 253 of the PLA allows Ms Cheam to apply for relief against the cancellation of the lease.

Legal principles

[61] The Court's power to grant relief against cancellation is discretionary. If relief is granted, the Court may grant the relief on any conditions (including as to expenses, damages, compensation, or any other relevant matters) that it thinks fit.[6]

[62] Where the lessee's breach consists solely of a failure to pay rent, there is a presumptive right to relief on payment of the arrears and costs. It is only in exceptional circumstances that relief will be denied where the arrears and costs are paid.[7]

[63] One category of exceptional circumstances is where the lessee is hopelessly insolvent.[8] Mere suspicion of insolvency is not enough.[9] The Court needs to be satisfied that there is no realistic chance the next rental commitments can be met.[10] The mere fact that the lessee has been a poor payer in the past is not, without more, a ground for refusing relief against cancellation.[11]

[64] Mr Morrison submitted that it is well-established that for the Court to grant relief against cancellation for non-payment of rent, either the money needs to have been paid, or there needs to be a "high degree of certainty" that it will be paid.[12] I do not accept that submission. It is contrary to the approach that I have set out in the previous paragraph, which is well supported by the cases I have cited.

[65] If relief is granted, it is invariably on the condition that any arrears and costs be paid within a time specified by the Court.[13]

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6 Section 256(1).

7 *Gill v Lewis* [1956] 2 QB 1; *Mulholland* v *Waimarie Industries Ltd* (2009) 10 NZCPR 590 (HC) at [23](1).

8 *Inner City Businessmen's Club Ltd v James Kirkpatrick Ltd* [1975] 2 NZLR 636; *Mulholland v Waimarie Industries Ltd* (2009) 10 NZCPR 590 (HC) at [23](3).

9 *Guardsman Restaurant (Christchurch) Ltd v Victoria Square Estates Ltd* (1987) 13 NZCPR 668; *Mulholland v Waimarie Industries Ltd* (2009) 10 NZCPR 590 (HC) at [23](4).

10 *QT Hospitality Ltd v Oxford Holdings Ltd* (2007) 8 NZCPR 817 (HC) at [19].

11 *QT Hospitality Ltd v Oxford Holdings Ltd* (2007) 8 NZCPR 817 (HC) at [11]-[17], and the cases there cited.

12 Mr Morrison primarily cited *Stylo Medical Services Ltd v Hum Hospitality Ltd* [2020] NZHC 2969 at [34].

13 *Barton Thompson & Co Ltd v Stapling Machines Ltd* [1966] Ch 499 at 510. For an example, see *Guardsman Restaurant (Christchurch) Ltd v Victoria Square Estates Ltd* (1987) 13 NZCPR 668.

The parties' positions

[66] In her affidavits, Ms Cheam said she is not in any financial difficulty, and there is no basis for any concern about her ongoing ability to pay rent. At the hearing, Mr Robson told me that if relief were granted, Ms Cheam was willing to pay whatever was determined to be owing.

[67] The applicants opposed the grant of any relief. They said there is no "high degree of certainty" that Ms Cheam will pay the arrears and costs. They also said that Ms Cheam's claim about her ongoing ability to pay rent is contradicted by the statements made on her behalf by her solicitor.[14] In a letter of 15 February 2021, Ms Cheam's solicitor said she had been trading at a loss since the first lockdown, that both parties needed to come to a fair modification of the lease, and that if a reasonable rental could not be struck Ms Cheam "faces having to close her business".

Events after the hearing

[68] I heard this application on 20 May 2021. On 16 June 2021, the applicants filed a memorandum advising that Ms Cheam had not made any payment towards the monthly rent that was payable on 1 June 2021. Counsel advised that the applicants had sought an explanation from Ms Cheam, but had not received any response (or payment).

[69] On 17 June 2021, Mr Robson filed a memorandum advising that Ms Cheam had paid the rent for June 2021 that day. (As it turned out, Ms Cheam had paid rent at the pre-1 April 2020 rate.) By way of explanation for the rent being 16 days late, Mr Robson stated that Ms Cheam advised she "had been waiting for the decision of the Court before paying the rent". Mr Robson also informed me that Ms Cheam advised that once the Court had made its decision "she will enter discussions with the Applicant on payments due according to the decision of the Court".

[70] Ms Cheam's approach to her obligations under the lease, as reflected in Mr Robson's memorandum, is of serious concern. That she was waiting for my decision

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[14] Mr Morrison also relied on some other statements by Ms Cheam, but I regard them as equivocal.

did not give her any justification to withhold rent that was payable. The payments that are due under the lease, particularly once they are determined by this Court, are not a matter of mere discussion with the applicants. They are a matter of legal obligation.

Decision

[71] Ms Cheam's failure to pay rent has arisen from a dispute over the amount of rent payable under the lease. In such cases the fact that the lessee has not, at the time of the hearing, paid the disputed amount of rent should not, in itself, stand in the way of relief being granted (on condition that the rent, and other arrears, are paid). However, relief should be refused if I am satisfied that there is no realistic chance the arrears, or the next rent commitments, can or will be met.

[72] I am of the view that relief should be granted (on the conditions set out below). I am not satisfied that there is no realistic chance of Ms Cheam paying the arrears. Ms Cheam has paid late in the past, but that in itself is not a reason for refusing relief. I take into account that Ms Cheam has said she faces closing her business if a rent reduction is not agreed, and it is, as I have noted, of concern that Ms Cheam seems to regard, even after a Court hearing, her legal obligations as mere starting positions in a negotiation. But, rather than refusing relief, I prefer to address those matters through appropriate conditions.

[73] I grant relief to Ms Cheam against cancellation of the lease on the following conditions:

(a) Ms Cheam must pay to the applicants, by 5.00pm on 9 July 2021:

(i) All arrears of rent, calculated in accordance with this judgment, subject only to [74] below.

(ii) The costs of $2,357.50 for which Ms Cheam was invoiced on 30 June 2020.

(iii) The costs of $582.50 for the PLA notice dated 14 December 2020.

(iv) The costs of $5,964.75 for which Ms Cheam was invoiced on 23 February 2021.

(b) Ms Cheam must pay to the applicants, within ten working days of the applicants providing her with a calculation of the interest (at a rate of 12 per cent per annum) that is payable by her under cl 5.1 of the lease, the interest as calculated. If Ms Cheam disputes the amount calculated by the applicants, she must still pay that amount to the applicants, but I will then resolve the dispute on receipt of memoranda from the parties.

(c) Ms Cheam must pay to the applicants, within ten working days of costs being agreed between the parties or determined by this Court, the costs of this proceeding, in accordance with [78] below.

(d) Ms Cheam must pay to the applicants, on or before the due date each month, the monthly rent payable under the lease, calculated in accordance with this judgment.

(e) If Ms Cheam fails to comply with any of these conditions, the applicants are entitled to apply, on five working days' notice, for an order for possession of the premises and cancellation of the lease.

[74] Condition (a) is subject to one qualification. In March 2021, Auckland was at Alert Level 3 for about a week. The applicants accept that cl 27.5 applied for that period. Ms Cheam paid only 75 per cent of the pre-1 April 2020 monthly rent for March 2021. That reflected her view that (i) the rent had not increased by 3.5 per cent on 1 April 2020 and (ii) she was entitled to an abatement of rent under cl 27.5. Because Ms Cheam was wrong about the 3.5 per cent increase, she must, as part of the condition in [73(a)(i)], pay to the applicants for the March 2021 rent 75 per cent of the amount by which the monthly rent increased on 1 April 2020. As to the abatement to which Ms Cheam is entitled under cl 27.5 for March 2021, if the parties cannot agree they may file memoranda.

[75] The applicants also sought costs, under cl 6.1 of the lease, for their solicitors' invoice dated 24 February 2021 and for the invoice dated 2 March 2021 from Auckland Investigations. It appears these costs arose from the applicants' attempt to re-enter the premises. I have not allowed for these costs in the conditions above. It should have been apparent to the applicants that a Court application was necessary.

Costs of the proceeding

[76] The applicants have succeeded in establishing that they are entitled to cancel the lease. Ms Cheam has succeeded in her application for relief. However, she was seeking an indulgence, and the usual rule is that a party seeking an indulgence, even when successful, should pay costs to the other party. There is no reason the usual rule should not apply. In the circumstances, it was reasonable for the applicants to oppose Ms Cheam's application for relief.

[77] The applicants are therefore entitled to recover from Ms Cheam their costs of this proceeding. The applicants seek indemnity costs under cl 6.1 of the lease. Clause 6.1 obliges Ms Cheam to pay the applicants' legal costs, "as between lawyer and client", of and incidental to the enforcement of the applicants' rights and powers under the lease.

[78] I find that the applicants' costs of this proceeding (including, for the avoidance of any doubt, the costs of opposing Ms Cheam's application for relief) are all "of and incidental to the enforcement of" the applicants' rights under the lease. In accordance with r 14.6, Ms Cheam is to pay to the applicants the actual costs and disbursements that they reasonably incurred in this proceeding. If that amount cannot be agreed, the parties may file memoranda: the applicants by 9 July 2021, Ms Cheam by 16 July 2021.

Result

[79] I find that the applicants are entitled to possession of the premises, and therefore to cancel the lease.

[80] I grant Ms Cheam relief against cancellation, on the conditions set out at [73].

[81] Ms Cheam is to pay costs to the applicants, as set out at [78].

Campbell J