

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 82/2017  
[2017] NZSC 153**

BETWEEN                      PETER BRENT HOME HUBBARD  
   AND HARLEY HAYNES  
   First Applicants

   OCEANIC PALMS LIMITED  
   Second Applicant

AND                              KIWIRAIL LIMITED  
   Respondent

Court:                      William Young, Glazebrook and O'Regan JJ

Counsel:                      First applicants in person  
   M L Campbell and B F Fenton for Respondent

Judgment:                      6 October 2017

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**JUDGMENT OF THE COURT**

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- A      The application for leave to appeal is dismissed.**
- B      The application for a stay is dismissed.**
- C      Costs of \$2,500 are awarded to the respondent.**
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**REASONS**

**Background**

[1]      The applicants seek leave to appeal against a judgment of the Court of Appeal dated 4 July 2017, and a stay of execution of that judgment pending determination of the application for leave.<sup>1</sup>

[2]      The application for leave concerns an application for relief against forfeiture of a lease between Oceanic Palms Limited (Oceanic) and KiwiRail Limited

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<sup>1</sup>      *Hubbard v KiwiRail Ltd* [2017] NZCA 282 [CA judgment] (Miller, Gilbert and Katz JJ).

(KiwiRail). Oceanic operates its business from the leased land and exercised its right of renewal on 1 March 2015. KiwiRail's position was that the rent being paid under the initial term of the lease was below market rent. It gave notice on 9 December 2014 that it had determined the market rent as being \$123,200 per annum. Each side engaged valuers and, after consultation, the valuers made a joint recommendation in June 2015 that the rent be fixed at \$100,000 for the renewed term. This was not accepted by Oceanic, which continued to pay the original rental amount. KiwiRail then gave notice in September 2015 it intended to cancel the lease.

[3] The High Court rejected Oceanic's application for relief against forfeiture under s 253 of the Property Law Act 2007.<sup>2</sup> However, Oceanic was given an opportunity to avoid cancellation of the lease by, within one calendar month from the date of delivery of the judgment, paying KiwiRail the arrears of rent and disputing the rent formally so that it could be submitted to arbitration.<sup>3</sup> Oceanic took neither of these steps.

[4] The Court of Appeal found no proper basis for the Court to grant relief against forfeiture. It said that:<sup>4</sup>

Such relief is generally only appropriate in circumstances where the Court can have reasonable confidence that the lease terms will be complied with if relief is granted. That is not the case here. If relief against forfeiture were to be granted, that would effectively require KiwiRail to accept the initial concessionary rental agreed in 2005 for the entirety of the lease. That would be contrary to the parties' agreement and neither fair nor equitable.

[5] The Court of Appeal rejected the allegations made of bad faith.<sup>5</sup> It also rejected the contentions that KiwiRail had acted unreasonably and not in accordance with the State-Owned Enterprises Act 1986.<sup>6</sup> The Court also said that Oceanic's particular circumstances were irrelevant and its frustration arguments misconceived.<sup>7</sup> Finally, it held that any possible issues with the valuers' assessment of a market

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<sup>2</sup> *Hubbard v KiwiRail Ltd* [2016] NZHC 1061 (Fogarty J).

<sup>3</sup> At [65].

<sup>4</sup> CA judgment, above n 1, at [43].

<sup>5</sup> At [25]–[27].

<sup>6</sup> At [28]–[31].

<sup>7</sup> At [32]–[33].

rental (which may have been relevant in an arbitration) did not invalidate KiwiRail's trigger notice stipulating the new rent.<sup>8</sup>

### **Our assessment**

[6] The proposed appeal relates to the particular circumstances of this lease. It therefore raises no issue of general or public importance. Nor has anything been raised to suggest the Court of Appeal decision may be wrong. In the circumstances the application for leave to appeal is dismissed. The stay application is therefore also dismissed.

Solicitors:  
Russell McVeagh, Wellington for Respondent

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<sup>8</sup> At [34]–[42].