IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2022-425-000077
[2023] NZHC 1623

BETWEEN	ACTION HELICOPTERS LIMITED Applicant
AND	VAN ASH VENTURES LIMITED Respondent

Hearing: 30 May 2023

Appearances: T J Mackenzie for the Applicant
M Corlett KC, M R Walker and B B Gresson for the Respondent

Judgment: 28 June 2023

JUDGMENT OF GENDALL J

Introduction

[1] This proceeding relates to a dispute concerning a lease (the hangar lease) of an aircraft hangar (the hangar) at Queenstown Airport between the respondent van Asch Ventures Limited (VAVL) as landlord and owner of the hangar and the applicant Action Helicopters Limited (Action) as tenant. Action applies here for relief from a notice of cancellation of the hangar lease issued by VAVL. That application is brought under s 253 of the Property Law Act 2007 (PLA).

[2] Also before the Court is a related interlocutory application brought by VAVL seeking to have a part of the evidence ruled as inadmissible for being privileged.

Background facts

[3] Action operates a commercial helicopter business, running its business from the hangar it leases from VAVL at Queenstown Airport. The hangar lease was entered into on 8 June 2021.

[4] The hangar lease contained a condition at cl 58 which stated broadly that Action was to lease a helicopter from VAVL for 240 hours per year for the duration of the hangar lease. It is useful to set out the terms of cl 58 in full:

> 58. **Helicopter Rental**
>
> 58.1 The Tenant agrees to lease a helicopter **(the Helicopter)** from the landlord for a minimum of 240 hours per annum from the Commencement Date until the expiry of this lease.
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> 58.2 Subject to the Tenant's business use requirements, the Tenant agrees that the Landlord may use the Helicopter for personal use with agreement from the Tenant. Should the Landlord wish to arrange a commercial use of its Helicopter then the Landlord agrees that this shall be arranged through the Tenant.

[5] Consistent with the hangar lease, Action, perhaps through its related company Hidden Lakes (2008) Limited (Hidden Lakes)[1] had been leasing a 2008 Eurocopter Airbus AS350B2 helicopter, registration ZK-HYA (ZK-HYA) from VAVL's predecessor since November 2016. This arrangement simply continued after commencement of the hangar lease both in 2021 and 2022. It had long pre-dated the commencement date of the hangar lease, the ZK-HYA lease having started in about November 2016. The parties did not use a new written lease for ZK-HYA in 2021. The hourly rate was simply the original rate of $1,300 per hour plus GST. There were no further charges, no guarantees, and no security deposit.

[6] On 26 August 2022 VAVL contacted Action by email and noted what appeared to be the lack of a written helicopter lease for ZK-HYA. VAVL indicated one would be provided, and that there would be a price increase from 1 September 2022 where the price for ZK-HYA would lift to $1,450 + GST per hour.

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[1] Mr Nicholson, a director of Action, as I understand it, was the sole director and majority shareholder in Hidden Lakes.

[7] It seems the suggested new helicopter lease never arrived from VAVL. The earlier (unwritten) helicopter lease arrangement and Action's use of ZK-HYA continued uninterrupted. VAVL charged, and Action paid, however, rental at the rate of $1,450 per hour in September 2022. This perhaps confusingly was followed by a return by VAVL (with it issuing tax invoices from October 2022 at the lower rate) to a rental of $1,300 per hour required for the remainder of this ZK-HYA helicopter lease.

[8] On 3 November 2022 VAVL then emailed Action again. This email noted that the "offer to lease" at the new rental rate (from the 26 August 2022 email) was withdrawn because there had not been a response and that it was likely that new leases will be offered. This was despite the parties operating on the $1,450 per hour basis that VAVL had sought, and this new rental rate being paid by Action, at least for September 2022.

[9] On that same day, 3 November 2022, and despite VAVL's suggestion of a new helicopter lease for ZK-HYA, Todd & Walker Law, solicitors acting for VAVL issued a formal written notice of cancellation of the ZK-HYA helicopter lease. This notice, which was addressed to the Directors of Hidden Lakes was nevertheless sent to Mr Nicholson of Action. It also gave 30 days' notice of cancellation which it seems was in accordance with the original November 2016 agreement Hidden Lakes had for the lease of the helicopter.

[10] In his evidence before me, Mr Nicholson for Action says that the ZK-HYA lease cancellation was not a complete surprise (as he was under the impression that Mr van Asch of VAVL wished to resume full personal use of the helicopter), although the method of cancellation was.

[11] On 30 November 2022 VAVL then offered a new helicopter lease for ZK-HYA. The terms were significantly higher than the earlier lease, or even those of the 26 August 2022 suggestion (of $1,450 + GST). VAVL now sought $1,950 per hour (+ GST), extra start and torque cycle fees[2] (beyond two per hour), two personal guarantees, and a $100,000 escrow fund. As I understand the position, no specific mention had been made by VAVL at this point that they considered a helicopter lease

[2] As I understand it, a torque cycle occurs when a helicopter lands and takes off again.

to be a vital "pillar" of the hangar lease, or that a failure to conclude a helicopter lease agreement would see a notice of termination being issued for the hangar lease.[3]

[12] On the same day, 30 November 2022, Action immediately declined VAVL's offer. Mr Nicholson, from Action, in his evidence explained that the combination of costs in that offer could take the hourly rate over $2,000 per hour and probably see a loss to Action when using the helicopter ZK-HYA. Specifically in his 9 December 2022 affidavit before the Court, Mr Nicholson addresses the offer of those new helicopter lease terms and deposes:

> 21. These terms were and are completely outside of normal market rates for a B2 [ZK-HYA] and I wondered if VAVL was even serious in making the offer or was just trying it as some sort of wind up. None of this had gone before, none of this was in clause 58 of the hangar lease, and none of our other leases had those rates or terms.
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> 22. Later that afternoon on 30 November 2022, we advised VAVL's solicitor Mr Todd via our counsel Mr Mackenzie that the offer was not accepted. That occurred via email:
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> …
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> 23. At this time I was aware of clause 58 of the [hangar] lease. However I was also aware that it was not specific about what sort of helicopter had to be leased (as VAVL owns several, including helicopters that would attract a lower rate), what term the lease should be for, or what price it would be for. Plus there was the earlier advice in August from VAVL of $1,450, the fact that Henry [Mr van Asch] had been wanting his helicopter for his own use, and that VAVL were the ones to cancel the existing lease (Even though they had already suggested the price was going up to $1,450 which was the market rate).
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> 24. Between all of that, I never thought that VAVL would try and say it was a breach of this clause to not agree to the (very high) terms they had sought, so I was quite comfortable in not agreeing to them and leaving it be. Unfortunately VAVL had different intentions.

[13] On 5 December 2022 VAVL then declared and gave notice to Action that it was in breach of clause 58.1 of the hangar lease because Action was not leasing a helicopter from VAVL. VAVL served the formal Notice to Cancel the hangar lease and re-enter, giving Action five working days to remedy the breach. The remedy proposed by VAVL was simply for Action to lease a helicopter from VAVL.

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[3] Later, Mr van Asch, the sole director and shareholder of VAVL, in his 28 February 2023 affidavit before the Court deposes: "[7].…The helicopter lease is a fundamental pillar of the overall bargain for the hangar lease."

[14] On 7 December 2022 Action then offered to lease a helicopter namely ZK-HYA, at a price it said it considered reasonable — $1,450 per hour (plus GST) for year one with that rental increasing to $1,550 (plus GST) in the second year. Two personal guarantees (from the two directors of Action) were also offered, along with a number of other conditions.

[15] On 7 December 2022 VAVL declined Action's offer. It seems VAVL then again offered Action a ZK-HYA helicopter lease on much the same terms as its offer of 30 November 2022. On 8 December 2022 that offer was again declined by Action.

[16] Action maintains that despite VAVL having been reasonably prompt during the unsuccessful lease negotiations I have outlined above, it was not clear at this point whether VAVL would hold off from carrying out the cancellation and re-entry. And Action says that, as VAVL had chosen in the lease cancellation notice to give only five working days to remedy, Action was then forced to seek an injunction, which it did.

[17] On 9 December 2022 Action obtained from this Court on a without notice basis an Interim Injunction prohibiting VAVL from carrying out the hangar lease cancellation pending further order of this Court.

[18] Since that time Action has continued to occupy the hangar as a tenant paying rent to VAVL to await the outcome of this substantive proceeding.

[19] Without prejudice discussions and negotiations between the parties it seems continued for a time too but, as will appear later, I am satisfied evidence and material regarding those matters is privileged and not to be taken into account in considering this dispute over the hangar lease. I proceed on that basis.

Applicable law

[20] The issue to be determined here is whether relief, under s 253 of the PLA, is to be granted against VAVL's purported cancellation of the hangar lease on the ground of Action's alleged breach of cl 58.

[21] In order to determine the issue of relief, I must first decide whether VAVL's purported cancellation of the hangar lease was valid under the PLA. If so, the question of relief is to be considered second and involves a broad inquiry of whether relief is warranted.

[22] A lease may be cancelled by the lessor because of a breach by the lessee of a covenant or condition in the lease. A "condition" has a meaning wider than that of a mere covenant and means:

(a) A covenant, condition, or power expressed or implied in the lease; and

(b) Is an act or omission of the lessee or the occurrence of a specified event (other than expiration of the term) which, in either case, is expressly or impliedly a ground for the cancellation of the lease.

[23] A lessor's right to cancel arises only under the PLA, in particular ss 244-252, the Act being a code governing cancellation of leases.[4] The three step approach that applies is as follows: first, s 243(1) provides that a lease may be cancelled only in accordance with ss 244-252; second, s 243(2) provides that relief against a cancellation may only be given in accordance with ss 253-264; and, finally, s 243(3) prevents contracting out of the PLA as far as cancellation is concerned.

[24] It is useful to set out the relevant sections in full:

> **243 Sections 244 to 264 to be code**
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> (1) A lease may be cancelled only in accordance with sections 244 to 252.
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> (2) Any relief against any of the following things may be given only in exercise of the powers conferred by sections 253 to 264:
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> (a) the actual or proposed cancellation of a lease; or
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> (b) the refusal to extend or renew a lease; or
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> (c) the refusal to enter into a new lease; or
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> (d) the refusal to transfer or assign the reversion expectant on a lease.

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4 PLA, s 243. See *Sibrad Co Ltd v Kanters* (2008) 9 NZCPR 356 at [10]–[14].

(3) Any term expressed or implied in a lease or in any other instrument has no effect if it—

(a) provides that the lease is automatically cancelled by breach of a covenant or condition of the lease; or

(b) is otherwise inconsistent with this section or with sections 244 to 264; or

(c) has the purpose or effect of avoiding the need for compliance with this section or with sections 244 to 264.

244 Cancellation of lease for breach of covenant or condition: general

(1) A lessor who wishes to exercise a right to cancel a lease because of a breach by the lessee of a covenant or condition of the lease may—

(a) apply to a court for an order for possession of the land; or

(b) re-enter the land peaceably (and without committing forcible entry under section 91 of the Crimes Act 1961).

(2) However, subsection (1) is subject to sections 245 and 246.

……

246 Cancellation of lease for breach of other covenants

(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:

(d) the effect of section 247(1) and (2):

(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.

Parties' positions

[25] The applicant, Action's initial position is that cl 58 lacks certainty and is therefore unenforceable. An unenforceable condition cannot be breached.

[26] Alternatively, Action says that even if the clause were enforceable, Action did not breach it. If the Court fills in the gaps in cl 58 (using reasonable market conditions to lease a helicopter) that obligation was discharged by Action by making every attempt to comply. Action maintains it has attempted to comply by indeed offering conditions which are more favourable to VAVL even compared with previous agreements and accepted market conditions. It is the respondent, VAVL that has obstructed Action from complying with cl 58.

[27] In a second alternative, if the Court finds that the hangar lease had been breached by Action, it says that the breach was minor and was remedied in subsequent lease offers for the helicopter ZK-HYA which were themselves rejected by VAVL. In conditions where VAVL was entirely causative of the lack of a helicopter lease, cancellation of the hangar lease is grossly disproportionate and relief should be ordered against it.

[28] The respondent, VAVL's initial position is that cl 58 is a condition subsequent, giving either party the right to determine the lease if the clause remains unsatisfied. VAVL submits that the operation of a "condition subsequent" in this manner, that is, by giving either party a right to determine the lease, means s 256(1) of the PLA is not applicable. That is because s 256(1) is triggered only upon a breach, but, if cl 58, as a condition subsequent, remains unsatisfied through no fault of either party, the right to cancel exists without being based on a breach.

[29] VAVL's second argument, in the alternative, is that cl 58 is an essential term of the hangar lease. If the term is found to be uncertain, the entire lease is void for uncertainty. However, VAVL contends overall that the term is certain and enforceable, and, by not having an agreement in place to rent a helicopter as required by cl 58, Action has breached this essential term for which relief against cancellation should not be provided. That is because granting relief would considerably re-write the bargain that was struck between the parties and deprive VAVL of the benefit of cl 58. And finally VAVL maintains that in any event it has not committed any breach or wrong here that would preclude it from enforcing its right to cancel the hangar lease.

Discussion

Privilege

[30] I deal first with the privilege argument raised by VAVL's interlocutory application. This seeks to have a part of the evidence before the Court ruled as inadmissible. VAVL submits that evidence adduced by Action of discussions between the parties relating to entering into a new lease beginning in December 2022 is privileged and inadmissible. The discussions it says were held on a without prejudice and confidential basis. Despite the content of the discussions being remedial action going to the issue of whether Action breached cl 58, VAVL maintains the remedial action was only agreed to on an interim basis and expressly conditional on those matters not prejudicing the parties' rights relating to the hangar lease dispute. Therefore, the evidence of discussions relating to lease arrangements in December 2022 and subsequent events should be ruled inadmissible.

[31] Action, in response, submits that the discussions were not taking place between the parties, but between VAVL and Mr Nicholson in his personal capacity; the communications were not aimed at settling the dispute; the completion of a lease for ZK-HYA would not itself have settled the dispute; there was no intention by either party for the December 2022 lease to be privileged; and, in any case, if the evidence does attract privilege, the Court should disallow privilege here.

[32] For present purposes, I accept VAVL's argument that this evidence is privileged and I rule the evidence inadmissible. As will be discussed below, ultimately nothing turns on this evidence that is the subject of the interlocutory application.

Cancellation of the hangar lease

[33] VAVL gave Action notice to cancel the hangar lease on 5 December 2022. This cancellation notice was advanced on the ground that Action was in breach of cl 58.1. The first issue to be determined is whether that proposed cancellation, which was halted on an interim basis by the Interim Injunction ordered by this Court on 9 December 2022, was valid.

[34] VAVL initially argued its right to cancel arose by reason of cl 58 being a "condition subsequent". In my view, VAVL's submissions on whether cl 58 is a condition subsequent, and therefore gave rise to a right to cancel, do not assist here. This is because the PLA is a code as far as cancellation of leases is concerned. Section 243, entitled "Sections 244 to 264 to be code" under the subheading "Cancellation of leases", makes clear that "a lease may be cancelled only in accordance with sections 244 to 252". Accordingly, there is no right to cancel which sits parallel to or outside the PLA. Nothing would be gained by labelling cl 58 a "condition subsequent" or otherwise. That is because the only question to be answered is whether VAVL's cancellation was in accordance with the PLA or not. The status of the clause that has been allegedly breached, upon which VAVL bases its proposed cancellation, does not change the fact that a lease may only be cancelled under the provisions of the PLA.

[35] Therefore, the Court's task here is to determine whether that was, in fact, what occurred in this case. Section 246 sets out the requirements for a lessor exercising their right to cancel a lease based upon a breach of a covenant or condition that is not the covenant to pay rent. The lessor is required to serve on the lessee a notice of intention to cancel and to provide a reasonable period in the circumstances in which the breach is to be remedied. The notice of intention to cancel must inform the recipient about the nature and extent of the breach complained about; if the breach is able to be remedied, what the lessee must do to remedy; and/or any compensation to

be paid that the lessor considers reasonable; the consequences of failure to remedy; and the lessee's right to seek relief against cancellation.

[36] I am satisfied the notice issued by VAVL's solicitors expressing an intention to cancel here generally meets the technical requirements of s 246. A point of contention may arise, however, as to whether the time frame of five working days provided in the notice for Action to remedy the breach by entering into a lease for a helicopter is a reasonable period in all the circumstances. While the period that is reasonable in each case is highly fact dependent, it is interesting to note that a period of three months is considered reasonable in a range of UK authorities. But it may be considerably less in special circumstances. A relevant authority is *Cardigan Properties Ltd v Consolidated Property Investments Ltd*. In that case, it was noted that 10 working days was an insufficient period to comply with an insurance covenant where negotiations and a survey of the building were required.[5] Arguably here, the period of five days given by VAVL in its notice was not reasonable in all the circumstances. Action did not raise any objection on this point, however. For present purposes therefore, I will proceed on the basis that the five days was reasonable with the effect that VAVL gave notice to cancel technically in accordance with the terms of s 246.

[37] In any event, relief against cancellation can be considered and ordered even without deciding whether the technical requirements of the notice were met. Justice French said in *Cunningham v Butterfield*:[6]

> It is well established that the Court may grant relief against cancellation even without deciding whether there has been a breach and/or whether the lessor has the right to cancel or has correctly served the statutory notice.

This also addresses in my view VAVL's tentative argument that the PLA is inapplicable here because there may be no breach by either party. Relief against cancellation as I see it may still be granted. I turn now to consider whether the present case warrants relief being ordered.

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5 *Cardigan Properties Ltd v Consolidated Property Investments Ltd* [1991] 1 EGLR 64.
6 *Cunningham v Butterfield* High Court, Timaru CIV 2011-476-400, 7 October 2011 at [73].

[38] The law on relief against cancellation is well-settled. The inquiry is a broad one with the Court enjoying a wide discretion. As Ellis J noted in *Grant v Hannay*:[7]

> Apart from the extension of the lease cancellation provisions to include cases involving breaches of the covenant to pay rent there is no other apparent legislative intent either to alter or narrow the ambit of the Court's powers and discretions in respect of cancellations under these sections which are, if anything, more general in their terms. I therefore accept that the cases cited by [counsel] in relation to the exercise of the s 118 [ie, s 118 of the repealed Property Law Act 1952] discretion continue to have relevance in relation to the discretions under ss 251 and 253 [of the Property Law Act 2007].

[39] The Court of Appeal, in *McIvor v Donald*, while noting the undesirability of the Court attempting to lay down any rigid rules as to the exercise of the wide discretion to order relief, nevertheless described some general principles:[8]

> The legislature has not seen fit to lay down rules as to the exercise of the wide discretion it has conferred on the Court and the undesirability of the Court attempting to do so was emphasised in *Hyman v Rose*. …
>
> Many of the subsequent reported cases are no more than instances of the exercise of the discretion but some point to features of general importance. Thus relief is normally granted to one who has made good the breach and is able and willing to fulfil his obligations in the future: *Earl Bathurst v Fine*; but when there are wilful breaches relief will not readily be given: *Shiloh Spinners Ltd v Harding*.

[40] In what has been described in this area as a leading case, *Studio X Ltd v Mobil Oil New Zealand Ltd*, Hammond J identified the following factors as relevant to exercising the Court's discretion:[9]

> - Whether the breach was advertent or deliberately committed. In such a case there are sound reasons why in the normal case relief should not be given: why should a lessor be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations?
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> - Conversely, whether the breach was caused by inadvertence or was entirely beyond the tenant's control.
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> - Whether the breach involves an immoral/illegal use. It must be wrong in principle for a lessor to be forced into improper or illegal relations, possibly even exposing the lessor himself to some form of legal sanction.
>
> - Whether a tenant has made or will make good the breach of the covenant and is able and willing to fulfil his obligations in the future.

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7 *Grant v Hannay* (2010) 11 NZCPR 283 (HC) at [32].
8 *McIvor v Donald* [1984] 2 NZLR 487 (CA) at 494 (footnotes omitted).
9 *Studio X Ltd v Mobil Oil New Zealand Ltd* [1996] 2 NZLR 697 (HC) at 701.

- The conduct of the landlord.
- The personal qualifications of the tenant.
- The financial position of the tenant.
- Sometimes the position of third parties has had to be considered. For instance the position of a contracting purchaser of the interest.
- The gravity of the breach.
- Whether a breach has occasioned lasting damage to a landlord.
- There is a proportionality concern. Under this head there has to be concern whether whatever damage is said to have been sustained by the landlord can truly be said to be proportionate to the advantages she will obtain if relief is not granted. Generally speaking, and at a greater level of abstraction, there has to be a concern with keeping an even hand. After all a lease is both an interest in land and a contract and a Court ought not to estreat an entire interest of that character simply because (for instance) the tenant fails to repair (at a cost of $50) a window the tenant's son happened to put a cricket ball though.

[41] In *Neglasari Farms Ltd v Brakatin Holdings Ltd*, it was accepted that the factors identified by Hammond J in *Studio X* "are equally relevant to the exercise of the Court's discretion under ss 253 and 256 of the Property Law Act 2007".[10]

[42] Justice Lang, in *Patel v Macleod*, after describing the *Studio X* factors, provided further assistance:[11]

> Other matters that may be relevant are the extent to which the lessor's conduct may have contributed to the situation that has arisen and whether the breach has caused lasting damage.

[43] Having reviewed these and other authorities, I am of the view that relief against cancellation should be granted here. Action's willingness to remedy the situation by confirming its continued wish and preparedness to have a helicopter lease in place on reasonable market conditions has assisted in my coming to that view. Action in my judgement has acted reasonably in its conduct in offering, at various points, to lease a helicopter from VAVL. The terms of these offers as I understand the position, have both followed and updated long-standing previous market leases of ZK-HYA. In contrast, VAVL's conduct here first, in offering a lease of the same helicopter at what

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10 *Neglasari Farms Ltd v Brakatin Holdings Ltd* (2010) 11 NZCPR 643 (HC) at [81].
11 *Patel v Macleod* [2018] NZHC 388 at [41]

seems to be significantly higher and likely uncommercial rates, well apart from general market conditions, along with the addition of other new obligations including personal guarantees and an escrow fund; secondly, cancelling other arrangements in some haste; and, thirdly, refusing altogether to respond to Action's further offer to enter into a lease despite expressing in their notice of cancellation that that was the required remedy for Action's alleged breach of the hangar lease, must all be seen as quite unacceptable. In these circumstances—where it was the landlord's conduct that contributed significantly more to the present situation than the tenant's—it would be disproportionate to allow VAVL's proposed cancellation to proceed.

[44] Other considerations that support relief being granted include the lack of evidence VAVL has put before the Court to show the damage it may have suffered and been suffering as a result of Action's alleged breach. Without any such evidence, the Court can only conclude that VAVL suffered little if any damage as a result of the alleged breach. Finally, and as I will discuss below, the gravity of the breach as I see it does not justify cancellation here. I do not accept VAVL's contention that cl 58 was necessarily a key pillar of the bargain involved in the hangar lease. Rather, it is my conclusion that cl 58, although of some importance at one level, is not sufficiently significant to allow a cancellation of the complex and detailed hangar lease on the basis of its alleged breach. This would be a disproportionate response. Therefore, relief against cancellation is to be granted.

[45] I have undertaken the above analysis too, largely on the premise that there was, in fact, a breach of cl 58 committed by Action. That is by no means a settled question, however. The enforceability of cl 58 must remain to be considered. The parties before me disputed a number of matters—whether the clause is sufficiently certain so as to be enforceable; if so, the terms on which it is to be enforced; whether it was breached by Action or whether VAVL was causative of the breach; and if the clause is uncertain, whether that renders the whole hangar lease void for uncertainty or whether cl 58 is indeed severable. There is, strictly speaking, no need to answer these questions based on the conclusion I have reached here to grant relief against cancellation in any event. As I have noted above, it is well-established that the Court does not need to decide whether a breach was, in fact, committed when assessing whether relief against cancellation should be granted.

[46] However, because the issues I have described above relating to cl 58 were the subject of detailed argument before me, I will deal with them briefly.

[47] A tentative view that might be reached here is that cl 58 was a mere "agreement to agree" and therefore possibly void for a lack of certainty. I repeat my comment above that I do not agree with VAVL that it was a key pillar of the bargain such that it would render the entire hangar lease void for uncertainty here due to its inability to be severed from the rest of the contract. On the contrary, it is easily severable in my view based on the following considerations.

[48] The attention the parties and their advisers here paid to the lease of the helicopter is dwarfed in comparison to the attention paid to the lease of the hangar. While the hangar lease is the subject of a detailed agreement contained in a Deed of Lease of some 22 pages plus attachments (with three full pages of special conditions), the possible lease of a helicopter is addressed entirely in one clause (cl 58.1, occupying in total two lines). Importantly, no details about the type of helicopter to be leased, monetary considerations, inclusions and exclusions in the hourly rate, related equipment, maintenance, insurance, cancellation or general use are described in the hangar lease. If, as VAVL says, cl 58 was a significant driver of the benefit VAVL was obtaining from the hangar lease, it would be surprising to say the least that it was dealt with in such a brief and perfunctory manner. I am at a loss to understand what were obvious omissions from this clause 58.1, given the involvement of solicitors in drafting the hangar lease. The apparent lack of thought given to the lease of a helicopter can perhaps be emphasised when cl 58.1, the clause creating the obligation on both parties to have a lease in place, is compared with cl 58.2, which deals with the possibility of conflicting business use and personal use of the helicopter that is leased. Clause 58.2 shows some degree of detail, reflected in the parties' applying their minds to the question at hand, which is entirely missing in cl 58.1.

[49] There is a possible argument available too, that this lack of certainty might not be remedied by the Court through a straightforward "reasonable market conditions" gloss being applied to cl 58. This is because, as VAVL itself accepts, it is not just the hourly rate of rental that is relevant to an owner's decision to lease a helicopter. Submissions advanced before me on behalf of VAVL continue, and describe "trust and

confidence in the safe operation of the helicopter" and "full compliance with the operation, maintenance and record keeping regime applicable to the helicopter" as some of the "numerous other terms and conditions" that need to be agreed upon for a successful agreement to be concluded for the lease of a helicopter.[12] None of that was done and arguably it might not now be done for the parties by the Court, especially so in the absence of any workable objective standard or machinery for determining the many matters left open. There is a possible argument that at best here cl 58 reflects an intention between the parties that they would agree upon a helicopter lease in the future, as opposed to cl 58 creating a binding agreement as to a helicopter lease with only the precise terms to be decided upon later.[13]

[50] Rather than being a condition subsequent or an essential term, as contended for VAVL, all the above matters might also point to cl 58 being a mere agreement to agree which was included in the hangar lease in the nature of an aside with little real thought given to it. If that is so, it is arguable too that it cannot now be used as a basis for relieving VAVL's contractual obligations because for some other reason they might, for example, have become inconvenient.

[51] If these possible arguments about the effect of cl 58 may not be sustainable however and the clause is indeed enforceable, its problems might be remedied as I see it by the Court having to imply reasonable market terms into it. The ordinary or plain meaning of the text of cl 58.1, even considering the context of the hangar lease itself, as a necessary element of the interpretive process, must lead to the conclusion it is hugely deficient in critical matters. The Court is required to construe what I view as an entirely incomplete provision and one that can only be seen as a poorly-drafted bargain. The hangar lease is a commercial contract. As such, common sense requires that, to provide business efficacy, the Court must give the provision in question an objective meaning to determine what the parties intended.[14] In addition, cl 58.1 cannot

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[12] It is interesting to note too that cl 33.1 of the hangar lease outlines the standard assignment or subletting clause included in most commercial leases in this country. It entitles Action as tenant, subject to first obtaining VAVL's consent as landlord (such consent not to be unreasonably withheld) to assign or sub-let the hangar to a respectable and responsible assignee. This clause does not require a proposed assignee to be a licenced helicopter operator. What impact this may have on cl 58(1) is confusing in the extreme.

[13] John Burrows, Jeremy Finn, Stephen Todd *Burrows, Finn and Todd Law of Contract in New Zealand* (7th ed, Wellington, LexisNexis 2022) at [3.8.4].

[14] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZSC 85 at [60] - [63]

simply be left to stand as is because that would amount to the landlord, VAVL, essentially having the ability to terminate the hangar lease at will. While there was little independent evidence before me as to market rates and other reasonable terms and conditions that apply to helicopter leases in general, the ZK-HYA helicopter had been leased effectively between the parties, presumably on commercial market terms, since at least 2016. That lease continued after the hangar lease began and it ran long into 2022. The rates of rental that applied then have been outlined above. Based on that long history, I accept that the $1,950 per hour plus rental rate proposed by VAVL along with the other new obligations of an escrow fund and two guarantees represents something beyond reasonable market conditions in the context especially of what has gone before. Rather, Action's offer of $1,450 for the first year of the lease and $1,550 for the second year seem to me to be more in line with the reasonable market conditions that would apply to a bargain of this sort.

[52] Accordingly, by its attempts to conclude with VAVL a helicopter lease on what might be considered as reasonable market conditions, Action cannot be seen as being in breach of cl 58, if it were the case that this clause is enforceable. If anything, VAVL would be the party in breach here. Nothing I have outlined in para [45] above and subsequently assists VAVL's position here. Action's application for relief against VAVL's proposed cancellation and re-entry of the hangar lease succeeds.

[53] I note too that the hangar lease contains an arbitration clause at cl 43. This obliges the parties to endeavour to resolve any dispute on the lease between them first by agreement, then by mediation and then by arbitration. Given I will be granting relief against cancellation here, the next step for the parties may well be to make use of cl 43 to give possible effect to cl 58. That is a matter for them, however.

Result

[54] There will be judgment for the applicant Action in this case. Relief against cancellation of the hangar lease is granted.

[55] An order is now made granting the applicant Action Helicopters Limited as tenant relief against the proposed cancellation and re-entry of the hangar lease between

the applicant and VAVL the respondent as landlord over the property situated at 64 Grant Road, Queenstown.

[56] Action has succeeded and is entitled to costs on this proceeding. If the quantum of those costs cannot be agreed, counsel may file memoranda sequentially (five pages maximum) in the usual way and the Court will give a decision on costs.

Gendall J

Solicitors:
RVG Law, Queenstown for the Applicant
Todd & Walker, Queenstown for the Respondent