IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

APPLICATION: 495/19

UNDER	Declaratory Judgments Act 1994
IN THE MATTER OF	MAII 12C, NGATANGIIA
BETWEEN	JANINE KAUVAI Applicant
AND	REFLECTIONS OF ROMANCE LTD trading as RUMOURS OF ROMANCE Respondents

APPLICATION: 317/20

UNDER	Section 118, Property Law Act 1952
IN THE MATTER OF	MAII 12C, NGATANGIIA
BETWEEN	REFLECTIONS OF ROMANCE LTD trading as RUMOURS OF ROMANCE Applicant
AND	JANINE KAUVAI Respondent

Hearings: 7 and 10 October 2019
8 October 2020 (via video link)

Appearances: T Moore for J Kauvai
L Rokoika for Reflections of Romance Ltd

Judgment: 11 November 2020

JUDGMENT OF JUSTICE P J SAVAGE

Copies to:
T Moore, Land Court Services, Ngatipa, Rarotonga.
L Rokoika, Rokoika Law, PC, Paradise Cove Road, Rarotonga.
T Arnold, (new counsel for Reflections of Romance Ltd)

Introduction

[1] This decision concerns a lease over part of Maii 12C, Ngatangiia, held by the company Reflections of Romance Ltd, trading as Rumours of Romance ("the Company"). On 30 August 2019, Janine Kauvai applied for a declaratory order that the lease was forfeit, following the failure of the Company to cure breaches of the lease. The Company initially resisted the application and later applied for relief against forfeiture.

[2] The matters were last heard via video link on 8 October 2020, where I declared the lease forfeit in accordance with the concession of the Company. I also declined to grant relief against the forfeiture, with reasons to follow.

[3] Accordingly, this decision now addresses the reasons for declining the application for relief against forfeiture.

Background

[4] On 8 September 2003, the owners of Maii 12C, Ngatangiia, entered into a lease over part of the land with a company named The Point Ltd. The lease was for a term of 60 years. The annual rent payable was to be the greater of either: a base rental; or a sum equal to 2.5 per cent of the lessee's gross land income. The base rental for the first two years was set at $10,000 per annum, followed by an annual rental of $20,000 for the succeeding five years. Thereafter, for each succeeding period of five years, the annual rental was to be agreed between the lessor and lessee or, failing that, by arbitration. The lease also made detailed provision for the calculation of the land income and for the lessee to keep and provide access to full and complete records of that land income.

[5] On 7 July 2004, The Point Ltd ("the head lessee") assigned part of the lease to the Company. The area of the head lease was 6,846 square metres, with the area assigned to the Company being 2,643 square metres. M2

[6] On 12 December 2007, Justice Hingston issued an order per s 492 of the Cook Islands Act 1915, which amended an earlier order issued in 2003 directing payments of the land rentals. The 2007 order directed the continued payment of the relevant share of the land

rentals to the Kauvai family fund in respect of the issue of John Kauvai, with the balance of the landowners' rental to be paid to the Court.

[7] On 17 November 2014, the Company entered into a sale and purchase agreement with ABVentures for sale of the assets of its business premises, allowing ABVentures to carry on business at the premises pursuant to a management agreement. The management agreement is dated 7 April 2015. Former counsel for the Company applied for approval of that agreement to the Leases Approval Tribunal. However, the Leases Approval Tribunal concluded that it did not have jurisdiction to deal with the management agreement.

[8] According to the written document supplied by the Company dated 2015, Willie Kauvai as the authorised landowner representative under the lease, confirmed that he had been advised of the "disposition" by the Company by way of management agreement, under which the managers would have a non-exclusive licence to occupy and manage. Mr Kauvai confirmed the owners' consent to the disposition and the waiver of their first right of refusal. He also stated that, having taken independent legal advice, he was satisfied that it was not an assignment and transfer consideration was not payable under the lease. What authority he had to act for the balance of the landowners outside of the issue of John Kauvai, is not explained in the evidence.

[9] The management agreement with ABVentures was terminated sometime in 2019.

[10] A notice of forfeit was served on the lessees on 19 August 2019 on the grounds that the lessees had failed to cure breaches of the lease set out in three earlier property law notices served on 18 April 2017, 25 October 2017 and 8 August 2019. The breaches complained of were failure to provide true and accurate summaries of the yearly land income; failure to conduct base rental reviews in 2010 and 2015, and failure to pay the base rental or percentage of income due, transfer consideration and interest. The notices required the breaches to be cured within seven to 14 days of those notices.

Procedural History

[11] The application for a declaratory order was originally filed by landowner Janine Kauvai on 30 August 2019, following the notice to forfeit dated 19 August 2019 served under the Property Law Act 1952. The application was later amended, and a second amended

application filed on 9 October 2019. That application narrowed the grounds and simply sought a declaration that the lease was at an end.

[12] The Company filed a notice disputing the claim along with an application to strike out the proceedings.

[13] A hearing was held on 7 and 10 October 2019 and the Court heard from the parties regarding the second amended application for declaratory orders. At the hearing, the Company gave an undertaking to comply with the provisions of the lease and provide the applicant access to the records and accounts. At the conclusion of the hearing, I adjourned the application sine die and dismissed the strike out application filed by the Company.

[14] On 8 September 2020, the Company filed an application seeking relief against forfeiture, which was then amended on 16 September 2020. An affidavit in support of that application was filed by company director, Matthew Reilly, dated 21 September 2020. The application for relief was opposed by Ms Kauvai who filed a notice of opposition and submissions dated 25 September 2020. A further affidavit of Mr Reilly, together with submissions, were filed on 2 October 2020.

[15] A final hearing was then held on 8 October 2020. Early in the proceedings, counsel for the respondent conceded that the lease was forfeit and the remainder of the hearing addressed the application for relief against forfeiture. At the conclusion of the hearing, I declared the lease forfeit in accordance with the application and the concession made. I also declined to grant relief against forfeiture, with reasons to follow. Those reasons now follow.

Submissions for the Company

[16] The Company submitted that it would be adversely affected by the forfeiture of the lease and applied for relief on the basis that:

(a) It has cured the breaches of the lease complained of, by allowing access for the inspection of the pertinent documents in relation to its land income; and

(b) It has reached out to the head lessee to commence negotiations with the landowners for rent review, as mandated by the lease.

[17] Counsel for the Company, Ms Rokoika, referred to the notice of forfeit dated 19 August 2019, which sought re-entry on the basis that the following demands had not been met:

(a) Production of the land income summary;

(b) The filing of a rent review application;

(c) Payment of $80,000 for base rental from 2007 to 2016;

(d) Production of the book of accounts for ABVentures;

(e) Production of the management agreement with ABVentures; and

(f) Payment of a transfer consideration for the management agreement

[18] Counsel addressed each of these matters in turn. She submitted that several documents have been supplied for inspection by the lessors and several other documents have been disclosed and retrieved by the lessors. Those documents included annual reports, trading accounts, statements of financial performance, financial position and movement in equity, along with balance sheets, income statements and cash flow statements. The management agreement and the agreement for sale and purchase of the management rights were also provided. Counsel submitted that the Company has accordingly fulfilled its obligations in respect of the demand for a land income summary. As to the book of accounts for ABVentures, Ms Rokoika advised that a request has been made to the legal counsel of ABVentures, who had yet to respond to the request.

[19] In an earlier affidavit dated 11 May 2020, Mr Reilly advised that at no time has the Company ever refused access to information requested by Ms Kauvai's land agent. The only exception was when the VAT returns and management agreement were not immediately available, although these were subsequently made available. He referred to communications with Ms Kauvai's agent and authorised representative, noting the difficulties in getting confirmation from them as to a suitable time to access the documents. Mr Reilly noted that the Company's previous dealings were with Willie Kauvai, who acted for the landowners. Mr

Kauvai would attend the Company's premises to access the books on a date agreed, and such access was always cordial.

[20] Ms Rokoika further submitted that the Company has reached out to the head lessee to commence negotiations with the landowners for rent review. The Company has also started negotiations with the land agent who acts for the landowners and the tribe as a whole. Counsel noted that the rent review clause in the lease provides for annual rentals to be agreed upon by the lessor and lessee and, failing that, to be fixed by arbitration. Counsel submitted that, given the commencement of negotiations and the fact the head lessee has reached an agreement with the landowners, it is envisaged that the parties could reach a similar agreement and file an application by consent.

[21] In terms of the base rental, Ms Rokoika submitted that during the period from 7 July 2004 to September 2020, the company has always paid its annual rental. Most recently on 16 September 2020, the Company paid $15,006.57 to the landowners, a quarter of which was paid directly to the Kauvai family, with the balance of $11,817.68 paid to the Court. This was confirmed by Mr Reilly in his affidavit dated 2 October 2020. Counsel pointed out that the landowners receive the base rental *or* 2.5 per cent of any commercial gross turnover, whichever was the greater. The 2.5 per cent has always been the greater, hence the payment of that percentage to the landowners.

[22] Regarding the transfer consideration for the management agreement, counsel noted that the Company's former counsel applied to the Leases Approval Tribunal ("LAT") for approval of the management agreement. The LAT was of the view that the management agreement did not amount to a disposition and therefore they did not have any basis for approving the agreement. Counsel also highlighted that Willie Kauvai, who was the authorised representative of the landowners from 2004 until approximately 2017, confirmed in writing that the landowners had consented to the management agreement, had waived their first right of refusal, and were satisfied that the management agreement did not amount to an assignment and therefore no transfer consider was payable under the lease.

[23] On the matter of relief, counsel referred to a decision of the High Court in *Taakoka Villas Ltd v Tupangaia* and the other authorities cited in that decision, which set out the

factors to be taken into account by the Court when considering a grant of relief.[1] She noted that while there is a sum of costs outstanding by the Company in relation to the strike out application, instalment payments have been arranged on a monthly basis and it is not a deliberate attempt to disregard the orders of the Court. The instalments were arranged as the Company has not received income during the COVID-19 pandemic, however, Mr Reilly has confirmed that the Company is solvent. Ms Rokoika argued that the instalment arrangement will not cause lasting damage to Ms Kauvai or the other lessors and that the gravity of the breach (being the outstanding sum of costs) is disproportionate to the value of the assets of the Company.

[24] In summary, Ms Rokoika submitted that the Company is willing and able to pay the outstanding sum of costs and to fulfil its obligations in the future. There will be no lasting damage to the lessors and it is equitable for relief to be granted because of the proportionality of damage.

Submissions for Ms Kauvai

[25] Ms Kauvai opposed the application for relief on the following grounds:

(a) Save for a part compliance, the breaches complained of in the series of property law notices have not been cured;

(b) The Company is in breach of a costs order dated 11 June 2020, in relation to the related application for declaratory orders that the lease is at an end;

(c) There is evidence that the Company cannot meet its obligations as they fall due and accordingly appear to be in a parlous financial state;

(d) It appears the Company has not paid the landowners the annual rent due on 1 September 2020; and

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1 *Taakoka Island Villas Ltd v Tupangaia* HC Cook Islands, OA5/04, 3 February 2006.

(e) It is unjust for the landowners to have inflicted on them a tenant who has failed for almost three and a half years to cure the breaches complained of, and who appears unable to meet its obligations as they fall due.

[26] Mr Moore, as agent for Ms Kauvai, submitted that the Company has only part cured the breaches and has only addressed two of those breaches in its application for relief. Mr Moore argued that the breaches of the lease have been deliberate, and there is no evidence the Company has any intention of curing those breaches unless forced to do so.

[27] Mr Moore submitted that, despite the Company's assertions to the contrary, the Company has not cured its breach with regard to access to the books. He noted that the Company only provided partial copies of books of account for eight financial years, along with copies of the management agreement and agreement for the sale and purchase of the management rights, shortly before the present applications were to be heard. The Company has also not provided the books of account for ABVentures Ltd, being the entity that managed the property for four years. During that time, ABVentures collected the gross income of the tourist accommodation, upon which the Company is required to pay a percentage to the landowners as lessors.

[28] Mr Moore further submitted that the books of account that have been provided, are problematic to say the least. The books are a compilation of accounting for both the tourist accommodation relating to the present lease and the tourist accommodation on a sister block up the beach, with altogether different landowners. In other words, the books of account provided are a co-mingling of the income of another tourist accommodation under a different lease. How the landowners are to audit the gross income to determine the percentage of income due under the lease, is a question that needs to be answered and Mr Moore submitted that the Company is the only one capable of separating those co-mingled accounts. Mr Moore says that the Company's position is that it is up to the landowners to ascertain the relevant information from the consolidated documents, as the engagement of an independent accountant to do this work proved too expensive. Mr Moore argued therefore that the Company is deliberately in breach of its obligation under the lease to provide full and unfettered access to the books of account.

[29] As to the rent reviews, Mr Moore noted that, with the passage of time, there are now three rent reviews outstanding: 2010, 2015 and 2020. He pointed out that it is the responsibility of the lessee to see rent reviews are carried out. To suggest the Company has cured this 10-year breach by simply "reaching out" to the landowners, is indicative of the dismissive attitude of the Company. He also submitted that, if the reviews, when determined, result in increased rents for each five-year period, the lessors have no entitlement to interest on any resulting back rent. Consequently, the Company would have had use of the lessors' money for 10 years.

[30] Mr Moore noted that similar issues to the present case were raised in 2017 with the head lessee, where the landowners requested access to books of account, sought back rent, a percentage of gross annual income, transfer consideration and rent reviews. The response from the head lessee was immediate access to that company's books, financial controller, chief executive officer and solicitors. In June 2018, the parties executed a substantive deed of settlement in relation to those matters. Mr Moore submitted that the behaviour of the present Company is the complete opposite of the head lessee, who is a tourism accommodator directly adjacent on the same head lease.

[31] With regard to the management agreement, Mr Moore submitted that the landowners sought that agreement and the sale and purchase agreement to determine if, at law, the sale constitutes a parting of possession of the property and the resulting consequences of that under the lease, in terms of first right of refusal and transfer consideration. As the lessors have only just received the documents, they must now instruct senior counsel on this matter.

[32] Mr Moore also questioned the Company's financial state. He submitted that the Company is in breach of the costs order dated 11 June 2020, issued in the related application filed by Ms Kauvai for declaratory orders. He argued that, instead of simply paying the costs amount of $3,140.00, the Company has cited financial hardship and sought to pay the liability monthly over a year. Although the landowners denied this request, the first payment was deposited in the agent's trust account without consent. Mr Moore also pointed out that the base rental due on 1 September 2020 did not appear to have been paid, although at the hearing he accepted that the Company had in the meantime paid the sum of 2.5 per cent of the gross income, instead of the base rental. In any case, Mr Moore submitted that the Company

appears to be in a parlous financial state and there is real uncertainty as to the Company's ability to meet its ongoing liability.

[33] In summary, Mr Moore argued that it would be unfair for the landowners to have the Company inflicted on them on an ongoing basis, given the Company has committed deliberate an ongoing breaches of the lease and has for over three years treated them with disregard and disrespect. The Company has failed to cure all breaches and its application for relief only addressed two of those breaches. The application ignores the remaining breaches, being breaches which the Company has not denied. Mr Moore argued for the dismissal of the application and for the question of costs to be reserved.

The Law

[34] Section 118 of the Property Law Act 1952 provides:

> **118 Restrictions on and relief against forfeiture**
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> (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, condition, or agreement in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefore in money to the satisfaction of the lessor.
>
> (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action, the lessee may, in the lessor's action (if any), or in any action brought by himself, or by proceeding otherwise instituted, apply to the Court for relief; and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the circumstances of the case, may grant or refuse relief, as it thinks fit; and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.
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> (3) Where any such relief as aforesaid is granted, the Court shall direct a minute or record thereof to be made on the lease or otherwise.
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> (4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.
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> (5) For the purposes of this section a lease limited to continue so long as the lessee abstains from committing a breach of any covenant, condition, or agreement shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6) This section does not extend-

  (a) To a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

  (b) In the case of a lease of any premises licensed under the Licensing Act 1908, to a covenant or agreement not to do or omit any act or thing whereby the licence may be lost or forfeited.

(7) This section shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent.

(8) This section shall have effect notwithstanding any stipulation to the contrary.

[35] As noted, Ms Rokoika referred to the High Court decision in *Taakoka Island Villas Ltd v Tupangaia* which dealt with an application for relief against forfeiture.[2] That decision referred to a leading New Zealand authority, *Studio X Ltd v Mobil Oil New Zealand Ltd*, which set out several factors to be considered in exercising the Court's wide discretion to grant relief.[3] Those factors can be summarised as:

(a) Whether the breach was advertent or deliberately committed;

(b) Conversely, whether the breach was caused by inadvertence or was entirely beyond the tenant's control;

(c) Whether the breach involves an immoral or illegal use;

(d) 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;

(e) The conduct of the landlord;

(f) The personal qualifications and financial position of the tenant;

(g) Any third party interests;

(h) The gravity of the breach;

(i) Whether a breach has caused lasting damage to a landlord; and

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2 *Taakoka Island Villas Ltd v Tupangaia* HC Cook Islands, OA5/04, 3 February 2006.

3 *Studio X Ltd v Mobil Oil New Zealand Ltd* [1996] 2 NZLR 697 (HC).

(j) The proportionality of damage suffered by the landlord compared to the advantages if no relief was granted.

[36] In *Detour Clothing Ltd v Star Five Ltd*, the New Zealand High Court noted that while the factors set out in *Studio X* provide helpful guidance, they do not constitute a checklist that must be applied in every case.[4] Instead, the Court is required to isolate and weigh those factors that are relevant to the particular circumstances before it. However, the need for a proportionate response to any breach underpins the exercise of the Court's discretion. Ultimately, a balancing exercise is required to determine whether, and on what terms, relief should be granted.

Discussion

[37] The Company argues for relief against forfeiture of the lease on the grounds that it has cured the breaches complained of in the notice of forfeit. The Company says it has fulfilled its obligations under the lease by allowing access for the inspection of the pertinent documents relating to its land income and in reaching out to the head lessee to commence negotiations with the landowners for rent review.

[38] With regard to the records concerning the land income, the lease provides:

> **3. RECORDS**
>
> (a) The Lessee shall keep full and complete records of Land Income and shall within **SIXTY (60) DAYS** of each annual balance date of the Lessee (or failing that then of each anniversary of the commencement date) provide to the Lessor a true and accurate summary of Land Income earned in the 12 months immediately preceding such balance or anniversary date as the case may be. The Lessee shall further on request provide the Lessor with full and accurate data as to the true consideration of any sale or other transaction or activity earning Land Income for any Specified Person to enable the true Land Income to be verified. All such data provided shall be and remain confidential as between the Lessor and Lessee and their respective professional advisers.
>
> (b) The Lessee shall without prejudice to the generality of Clause 5 of this lease ensure that any sublease licence concession or other grant (including every *Minor Disposition*) to any Specified Person, to carry on any activity earning Land Income shall include a requirement whereby that Specified Person enters into a Deed of Covenant with the Lessor to keep full and complete records of that Land Income and to provide the Lessor with a summary of the same on an annual basis and to provide the Lessor with full and accurate data as to the true

[4] *Detour Clothing Ltd v Star Five Ltd* [2017] NZHC1172 at [43]-[44].

consideration of any sale or other transaction or activity earning Land Income to enable the trust Land Income to be verified.

(c) Any duly authorised representative of the Lessor or any qualified accounting agent or agents appointed by the Lessor shall have access to and the right to examine and audit any or all pertinent books, documents, papers and records of every Specified Person during the normal business hours of any working day for the purposes of determining the Land Income of the Specified Person and monitoring and compliance by that Specified Person with the obligations of that Specified Person under this deed. The Lessee shall insert a provision in all sublease licences concessions and grants (including any *Minor Disposition*) pertaining to this right of access, examination, and audit so as to preserve privity of contract between the Lessor and each Specified Person in this regard and shall make available to the said representative(s) and agent(s) all books and records of every Specified Person which may be requested or may be necessary for completion of a special audit of any or all activities or enterprises earning Land Income. If any such special audit reveals that the Lessor has been paid less that ninety five percent (95%) of the amount to which the Lessor is entitled for any reporting period covered by the audit, then the expense of such audit shall be borne by the Lessee otherwise it shall be borne by the Lessor. The acceptance by the Lessor of any money from the Lessee as Land Income as shown by any audit report furnished shall not be an admission of the accuracy of the report, or of the sufficiency of the amount of the Land Income and the Lessor shall be entitled at any time within two (2) years after the receipt of any such Land Income to question the sufficiency of the amount thereof and/or the accuracy of the audit report(s) furnished by the Lessee to justify the same, and shall have the right to examine and/or audit as hereinbefore described. Every Specified Person shall for a period of two (2) years after submission to the Lessor of any such report keep safe and intact all of the records, books, accounts and other data of that Specified Person which in any way bear upon or are required to substantiate in detail any such report and the Lessee shall insert a provision in all subleases licences concessions and other grants requiring a similar retention of records so as to preserve privity of contract between the Lessor and each Specified Person in this regard. The Lessee shall keep and maintain its accounting and bookkeeping system in accordance with the requirements from time to time of all applicable Cook Island laws.

[39] It is clear from these provisions that the Company has a duty to keep full and complete records of their land income and to provide an annual summary to the landowners as lessors. That duty is a positive duty. In addition, the Company must allow access to, and the right to examine and audit, "any or all pertinent books, documents, papers and records of every specified person" during normal business hours of any work day. These duties extend to other specified persons whom the lessee allows to carry out activities on the land which earn land income. The purpose of these provisions is to determine and verify the land income received annually and to monitor compliance with obligations under the lease.

[40] While the Company has now provided various documents, Ms Kauvai had significant difficulty throughout these proceedings in obtaining access to those documents. The

Company prevaricated and obstructed the attempts to obtain the relevant financial information. When the information was received, the accounts were co-mingled with those of other unrelated leases, making it even more difficult to ascertain the relevant land income. Perhaps the most concerning aspect however, is the absence of the books of account for ABVentures. Those books of account relate to approximately four years of income which, I understand, ABVentures were solely responsible for collecting. The landowners are entitled to view and audit those books for the purposes of verifying the income received and, as a consequence, whether the sum of rent they have received is correct. The fact that those books are not available and that the Company appears currently powerless to obtain them, represents an ongoing breach of the lease. In addition, if there is a difference in the rental paid and the rental properly due, the landowners will not have a right to any interest on those back rental amounts.

[41] As to the rent reviews, there was a brief discussion at the final hearing of an agreement being reached on to the proposed rental. That agreement was to be finalised with an application to the Court under s 409B of the Cook Islands Act 1915. Although this breach is likely to be cured shortly, the fact that three rent review dates passed before such agreement was reached, is far from reassuring that this obligation will be fulfilled in the future.

[42] The other remaining issue is the outstanding costs sum. Ms Rokoika submitted that, while the sum is outstanding, payments are being made on a monthly basis. She advised that, due to the COVID-19 situation, there is no income being produced and asked that the Court take into account these exceptional circumstances. I consider this understandable and note that the effects of COVID-19 are being felt around the world. I give no weight to this factor.

[43] Turning to the factors to be considered in determining whether relief should be granted, I consider the breaches with regard to access to the accounts to be deliberate, as demonstrated by the position the Company took throughout the course of these proceedings. This was not an inadvertent breach which was quickly remedied; it took a concerted effort on the part of Ms Kauvai to obtain any kind of access. Given this, and the fact the Company appears either unable or unwilling to obtain the books of ABVentures, I am not convinced they will be able to make good this breach and to fulfil their obligations under the lease in the future.

[44] Regarding the financial position of the trust, Mr Moore argued there was evidence that the Company cannot meet its obligations as they fall due and accordingly appear to be in a parlous financial state. In reply however, Mr Reilly confirmed that the Company was solvent. They have budgets, loan arrangements and business plans in place that will provide funds sufficient to pay all their known cash liabilities. Despite not currently generating any income, the Company was continuing to pay its ongoing operating expenses and had no other outstanding debts aside from the costs sum. He also pointed out the recent rental payment the Company made of approximately $15,000 as further evidence of the Company's solvency. I accept the evidence of Mr Reilly as to the Company's financial position.

[45] In weighing the various considerations, as I referred to in paragraph [36] of this judgment, I consider the breaches to be grave indeed. The failure to allow access to the full and complete records of the Company and, by extension, ABVentures, is a breach which goes to the heart of the lessor and lessee relationship in this case. As noted, the purpose of allowing access to those records is to verify the land income received and ensure that the rentals paid to the landowners are correct. The payment of rental under a lease is fundamental and any apparent lack of transparency undermines the central basis on which the parties have made their contract. Added to this, are the failures to promptly address rent reviews and the fact that the difficulties appear as far back as 2017, when the first property law notice was issued.

[46] I should at this stage step back and look for matters which may mitigate the breaches and assist the Company. I see little as would assist the Company. Having heard evidence on a number of days, there is clearly a pattern of the Company gaming the situation to the limit.

[47] I return to clause 3 of the lease. The first two sentences of clause 3(a) have not been, and it appears cannot be, complied with.

[48] Clause 3(b) has been breached, and the breach cannot be remedied.

[49] Clause 3(c) has not been complied with and, in my view, the Company has been actively obstructive.

[50] These are the reasons that I declined to grant relief against forfeiture.

[51] Costs are reserved.

dated at 11.45 am in Wellington , New Zealand on the 11th day of November 2020

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PJ Savage
JUSTICE