

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2020-404-2071  
[2021] NZHC 177**

BETWEEN TRILOGY BAR AND EATERY  
Applicant  
AND SAMSON CORPORATION LIMITED  
Respondent

Hearing: 12 February 2021  
Counsel: B Norling and C J Lin for Applicant  
H G Holmes for Respondent  
Judgment: 16 February 2021

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**JUDGMENT OF WHATA J**

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*This judgment was delivered by me on 16 February 2021 at 4.00 pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Solicitors: Norling Law, Auckland  
Keegan Alexander, Auckland

[1] This is an application for interim injunction pending the hearing of an application for relief from cancellation and forfeiture. The applicants, Trilogy Bar and Eatery Limited (Trilogy) are the lessees of a commercial premise located at Shop No 3, Level 1, 150 Karangahape Road (the Leased Premises). The respondents, Samson Corporation Limited (Samson), are the lessors of the Leased Premises. Trilogy and Samson are parties to the Deed of Lease dated 13 December 2013 (the Lease). A dispute has arisen between Trilogy and Samson about whether Trilogy is in breach of the Lease.

[2] On or about 3 August 2020, 6 August 2020 and 11 September 2020, Samson served three Property Law Act Notices (the Notices) on Trilogy pursuant to ss 244-246 of the Property Law Act. Two of these Notices claim that Trilogy has not used the Leased Premises in accordance with the terms of the Lease and subsequently is in breach of the Lease. In the Notices, Samson claims that Trilogy is operating as a 'nightclub' rather than a 'café' or 'restaurant' per the terms of the Lease. The other Notice claims that Trilogy owes outstanding rent and outgoings under the Lease and has consequently breached the Lease.

[3] The parties were unable to settle their disputes. On 27 October 2020, Samson re-entered the Leased Premises by changing the locks and hiring security persons to stop Trilogy staff from entering the Leased Premises.

[4] On 29 October 2020, Trilogy filed an urgent without-notice interlocutory application for an interim interim injunction and an on-notice interlocutory application for an interim injunction to re-enter the Leased Premises subject to the Lease pending further decision of the Court. I granted the without-notice application on a *Pickwick* basis on 30 October 2020 and listed the application for further consideration in the Duty Judge list the following week. On 4 November 2020, Campbell J extended the interim interim orders pending the determination of the on-notice application for interim injunction to be heard on 12 February 2020.

[5] Trilogy is seeking an interim injunction order to support its continuing occupation of the Leased Premises. Samson does not oppose Trilogy's continuing

occupation but asked that relief be granted subject to conditions on how Trilogy operates its business.

[6] By the time the matter reached the hearing, the parties had resolved all conditions except one. There was ongoing disagreement about whether Trilogy should pay disputed amounts for rent and OPEX. I resolved that it should pay the rent, but that the disputed OPEX could be paid into an independent solicitor's account. After the hearing, counsel filed a memorandum detailing the conditions (attached as Appendix A) which I have adopted. I make orders to their effect accordingly.

[7] These are my reasons. They narrate some of the background for context but also to assist in terms of the assessment of costs, which I have reserved to the substantive proceedings because their resolution requires an assessment of the merits of the respective positions taken by the parties.

### **Specific orders sought**

[8] Trilogy applied for the following orders:

- (a) An interim injunction requiring Samson to allow Trilogy to re-enter the Leased Premises pending determination of the applicant's originating application or further order of this Court;
- (b) An interim injunction allowing the Lease to operate on its usual terms pending determination of the applicant's originating application or further order of this Court;
- (c) An interim injunction preventing Samson from exercising cancellation rights under the Lease and/or entering the Leased Premises, pending determination of the applicant's originating application or further order of this Court; and
- (d) That Samson pay the costs of and incidental to this application and that of the interim interim injunction.

[9] In its synopsis of submissions, Samson did not oppose an order permitting Trilogy's continued occupation of the Leased Premises pending substantive determination, subject to the following conditions:

- a) Trilogy must observe its obligations in relation to the limits on the occupancy of the demised premises;
- b) Trilogy pay its rent and OPEX in full unless otherwise agreed by Samson;
- c) Trilogy is to ensure that its use is limited to the area of the demised premises – that is to say it may not utilise the courtyard area of the building for business purposes without permission;
- d) Trilogy must meet the costs of commercial cleaning on the common area (though it is acknowledged that such a requirement should be contingent on trilogy having actually used the Courtyard);
- e) Trilogy may keep its regular hours but must ensure it does not cause excessive noise in accordance with clause 4.16 of the lease and sections 16 and 326 of the Resource Management Act 1991;
- f) Trilogy must otherwise fully comply with its covenants under the lease and Samson be permitted to enforce any such covenants in the ordinary manner;

[10] Samson opposed the application for an order to prevent Samson from exercising their cancellation rights under the Lease and the application for costs.

[11] Trilogy in its submissions accepted the conditions sought by Samson except:

- (a) The occupancy limit applies to the interior of the Leased Premises;
- (b) Disputed amounts of rent and OPEX should be paid to an independent solicitor; and
- (c) It will meet the costs of commercial cleaning of the common area only if Samson gives it permission to use the common areas.

[12] As noted above, at the hearing, I was advised that agreement had been reached on all matters, except the issue of whether Trilogy should pay the disputed sums to Samson and costs on the application.

## **Disputed rents and OPEX**

[13] Trilogy has agreed to pay the rent and OPEX it says is due and owing, but it disputes, and reserves the right to dispute, the payment of rent and or OPEX that it says is not properly due and owing. Instead, it says, these disputed sums should be paid to an independent third party. In this regard, Samson has calculated the disputed amount in arrears as at 27 October 2020 as rent to pay of \$20,405.01 and OPEX to pay of \$12,712.26 and a total in arrears of \$33,117.27.<sup>1</sup> The alleged rent arrears relate to non-payments of rent as early as April 2020 and that Trilogy has been in catch up mode ever since, with subsequent payments applied to rent arrears first. Full payment of rent is then said to have only occurred after the first, 6 August 2020 PLA notice.

[14] Mr Ashish Siddiqui's evidence is that the disputed rents relate to lost access due to Covid-19. He says that relief from rent for loss of access is envisaged by the Lease per cl 15.8, which states:

If there is an emergency and the Lessee is unable to gain access to the premises to fully conduct the Lessee'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 or cordon applying to the premises;
- b. prohibition on the use of the premises pending the completion of structural engineering or other reports and appropriate certification 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 portion of the rent and outgoings shall cease to be payable for the period commencing from the date when the Lessee became unable to gain access to the premises to fully conduct the Lessee's business from the premises until the inability ceases.

[15] Mr Ashish Siddiqui also refers to emails on 4 February 2020 seeking an opportunity to discuss incorrect OPEX invoices and where invoices had not been completed for months. He also refers to letters, dated 21 August 2020 and 25 August 2020, where additional cleaning and security costs, among others, are disputed and a complaint is registered in relation to operating expenses. The amounts set out in the

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<sup>1</sup> Counsel advised that the amount of disputed rent needed to be adjusted to take into account a subsequent payment by Trilogy. This is reflected in the sum to be paid as set out in the annexure.

August PLA notice are also addressed in a solicitor's email, dated 5 October 2020. Trilogy also submits that Samson is protected in the interim because the disputed sums will be paid to an independent solicitor and an undertaking as to damages has been given.

[16] Against this, Samson does not accept that the Lease provision allows for relief for all the Covid-19 lockdowns, noting, among other things, that the alleged relief includes periods where there was public access, namely during Covid level 1.5. It also says that Trilogy gave no notice of its claimed rent relief for these periods until after the PLA notice was served. It is accepted that the claims in relation to the OPEX and other costs are arguable, but that it should have the benefit of the disputed sums, which it can repay if Trilogy is ultimately successful.

[17] With the benefit of argument, as noted at the hearing, I came to the view Samson should receive the disputed rents, but not the disputed OPEX and other costs. On the evidence before me, Trilogy's claim to Covid-19 relief pursuant to cl 15.8 was not notified to Samson until after the corresponding PLA notice. On its face, the PLA notice was properly issued. In those circumstances, and while there is no risk that Samson will not be paid those rentals (plus interest) if it is ultimately successful, I consider the balance of convenience favours the payment of those rentals, because as far as possible, Samson should not be made worse off by an interim injunction purporting to preserve the status quo. Ordinarily rentals must be paid under the lease and usually a lessee wanting relief from forfeiture will need to have paid the outstanding rent.<sup>2</sup> While cl 15.8 appears to provide an exception to the rule that rent must be paid, a tenant that does not pay and fails to give timely notice of the reasons for non-payment, cannot really complain, in the context of an application for relief from cancellation when a landlord acts on that non-payment, issues a PLA notice and seeks payment as a condition of an interim injunction.

[18] The disputed OPEX and other disputed sums are in a different category as it appears there have been ongoing disputes about these sums. The Lease does not presuppose payment of them. Given this, I am content that the balance of convenience

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<sup>2</sup> Hinde McMorland & Sim, *Land Law in New Zealand* Loose leaf, 11.243 (f) and cases cited therein.

favours the payment of those sums into an independent solicitor's account. The undertaking also guards against other proven losses.

### **Outcome**

[19] I make orders in terms of Appendix A.

### **Costs**

[20] Trilogy submits costs should lie where they fall, given that matters have been largely resolved by agreement and the spoils evenly shared. My initial impression is that this is an accurate summary and that costs should lie where they fall. Samson, however, submits it is contractually entitled to indemnity costs under the Lease in respect of any enforcement procedure. The position is, however, complicated. As Samson has quite properly conceded, Trilogy has an arguable case that relief against forfeiture should be granted and the merits of various aspects of Samson's position remains to be resolved. I am not prepared to engage into an inquiry into those merits for cost purposes when they are due for full consideration at a later time. On that basis, I simply reserve costs on the interim application, though as matters presently stand, I would have been minded to let them lie where they fall as success has been evenly shared.

## ANNEXURE A

1. The form of the interim orders to be made is set out below.
  - (a) Trilogy may continue to occupy the premises located at Shop 3, Level 1, 150 Karangahape Road, Auckland Central, Auckland, as shown as the highlighted portion of the plan annexed to the deed of lease and agreement to lease (Leased Premises), pending a determination of Trilogy's substantive application for relief.
    - (b) Such interim relief is subject to the following conditions:
      - i. Trilogy must observe its fire safety obligations and all other legal requirements in regard to the occupancy limit throughout the Leased Premises, which, for the purpose of these orders, is 85 persons for the interior of the Leased Premises;
      - ii. Trilogy will limit its regular business use to the boundaries of the Leased Premises;
      - iii. Trilogy will keep regular hours and not cause excessive noise in accordance with clause 4.16 of the Lease and Sections 16 and 326 of the Resource Management Act 1991;
      - iv. Trilogy will comply with all covenants under the Lease, and the respondent is permitted to enforce any such covenants in full, save for the issues in dispute in this proceeding requiring determination at the substantive hearing;
      - v. Costs are reserved pending the determination of the substantive hearing;
      - vi. Leave is reserved for any party to refer any matter to Court should judicial assistance be required prior to the substantive hearing;
      - vii. Trilogy must continue to observe its undertakings in respect of its use of the premises pursuant to paragraph 3 of the minute of his Honour Whata J dated 30 October 2020 (though to the extent, if at all, such undertakings are inconsistent with these orders, these orders prevail).
  - (c) Payments:
    - i. Rent: Trilogy will pay all rent (whether disputed or not) to the respondent (including, for the avoidance of doubt, the sum of \$8,971.55 being the amount currently held by way of disputed rent);



- ii. Outgoings/Operating expenses: Trilogy will continue to set aside the balance of any disputed OPEX in its independent solicitor's trust account;
  - iii. Any payments made pursuant to order (c)(i) above which are subsequently determined by the Court or an arbitrator to have been overpayments shall be recoverable from the payee;
- (d) It is recorded that Trilogy's applications for the orders sought at paragraphs 1.3, 1.4, and 1.5 of its originating application dated 6 November 2020 are discontinued.
- (e) Leave is given to the respondent to apply for costs on that discontinuance within 10 working days of the date of the judgment.
- (f) If the respondent applies for costs, the applicant is to respond within 10 working days from the day after it is served by the respondent.