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of these still operate largely manual systems. LINZ will continue to work with those TAs to assist where it can in onboarding them.

For those with transactions in the Auckland region please note that Watercare is automatically notified by Auckland Council of the new owner's details. That is not yet the case for Veolia customers. LINZ is working with Auckland Council and Veolia to automate the notifications to Veolia. In the interim, separate notification will still be required.

It is worth repeating an excerpt from my previous article as some have been unaware of the consequences of not ensuring the NoC is saved as 'Ready to Send'.

> *The NoC in Landonline must have been saved as final and 'Ready to Send' BEFORE submitting. Flagging the status on the NoC as 'Ready to Send' is typically done by the seller's representative, once the purchaser's representative has completed all the information. At the time of submitting, the submitting party will receive a pop-up message if that has not been done.*

If the dealing is submitted and successfully registered that dealing of course disappears from 'Workspace'. That means if the NoC was not 'Ready to Send' you will then need to prepare a manual one outside of Landonline.

Accordingly, if you receive that message when submitting it is in all party's interest to ensure the NoC is updated as 'Ready to Send' prior to submitting.

If you are unsure if they are using the system, simply check to see if the 'NoC' button is active on the bottom right of the prepare screen beside the '*Tax Details*' button. If it is, then that council is using the system. ■

COMMERCIAL LEASES

A load of rubbish? Recycling site tenancy breaches, renewal by text, cancellation and re-entry

BY **MICHELLE HILL** AND **LUNA ARANGO**

Introduction

Cases involving claims seeking relief against cancellation or seeking to enforce cancellation of a lease demonstrate that the cancellation of a commercial lease can pose both legal and practical difficulties, if not approached with care.

The following case illustrates the importance of parties being aware of the processes and requirement for either seeking to cancel or to retain a lease. Relationships between tenants and landlords at the cancellation stage of disputes can become strained. The case also illustrates issues which would have resolved with clear and active communication with the parties.

MZ Ventures Ltd v Millbank [2021] NZHC 1964

In this case, MZ Ventures Ltd (Landlord) leased an industrial and commercial site to Millbank (Tenant). The Tenant used the premises as a recycling site. The Tenant had agreed with the former landlord for a term of two years commencing on 24 November 2018 with two rights of renewal for a further two years each. No deed of lease was signed but, as an agreement to lease had been entered into by the parties, the lease was effective as if it was signed in accordance with established principles.

The Tenant had discussed surrendering the lease with the previous landlord. The previous landlord thought an agreement had been reached in which the Tenant would surrender the lease on 31 October 2020. Although the tenor of the Tenant's response to the Landlord's offer of surrender was once of acceptance, his response referred to vacating by 31 October 2021 (a year later than the Landlord's offer). The Landlord argued that this was a typographical error but the Tenant succeeded in claiming that no agreement had been reached because his email provided a counteroffer (not acceptance) to the Landlord's offer of surrender of lease.

In August 2020, the Tenant texted the Landlord purporting to give notice of his intention to renew the lease. It is interesting that there was no argument over whether a lease can be validly renewed by text message. The Court held that notice

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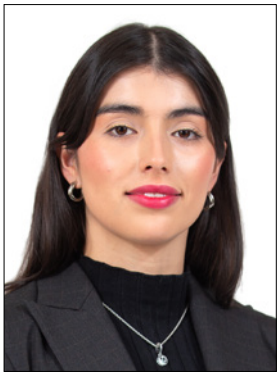


Luna Arango

to renew had been validly given.

On 9 September 2020, the Landlord gave the Tenant notice requiring the Tenant to comply with the obligation under the lease to keep the property in good and proper repair and remove rubbish from the site. The Landlord also provided notice of its intention to inspect the property on 21 September 2020. The relationship between the parties deteriorated when the Tenant denied the Landlord entry to inspect and instead, served a trespass notice.

On 25 September 2020, the Landlord served a notice of intention to cancel the lease if the breaches of the lease were not remedied under s 246 of the Property Law Act 2007 (PLA). The Landlord relied on and notified the Tenant of the failure to permit inspection, keep and maintain the premises in a clean and tidy condition, and failure to remove rubbish from the site.

As the Tenant neglected to respond to the notice, on 21 October 2020, the Landlord cancelled the lease and re-entered the premises.

After breaking in and being removed by police the day prior, the Tenant once again broke the locks on the front gate of the premises and entered on 27 October 2020. Since then, Tenant had remained on the premises.

Are the parties' actions valid or invalid?

Much of the decision focused on considering the validity of the parties' actions. In particular, whether the Landlord's cancellation and re-entry were valid and whether the Tenant had either agreed to surrender the lease or given valid notice to renew the lease. The broader question was whether the Tenant was entitled to relief against the Landlord's cancellation or the refusal to renew.

To an extent, the Tenant sought to rely on having re-entered and continued to reside in the premises after the Landlord's re-entry.

Cancellation

The Court considered whether the Tenant was in breach of the terms of the lease, as the Landlord had asserted, for failing to permit the Landlord access for inspection, failure to keep and maintain grounds, lawns and yards in a clean and tidy condition and failure to remove rubbish.

Failure to permit inspection

The Landlord only provided a notice of intention to cancel the lease after the Tenant served a trespass notice on the Landlord preventing the inspection. The Court found that refusing access was not merely a technical breach. The Tenant asserted that the Landlord did not need to enter the premises but could, instead, have inspected them from the perimeter. However the Court noted that, if the Tenant's decision to prevent the inspection was based on the misconception that it could be inspected from the perimeter, the Tenant would have remedied the breach when it had opportunity to do so.

Obligation to care for grounds

Furthermore, the Landlord relied on the Tenant's breach of the obligation to care for the grounds under clause 8.2(a). The Court indicated that this requirement needed to be applied in the context of the prescribed business use under clause 16.1 as a 'contractor yard storing or repairing of good, products, articles'. As argued by the Tenant, the Court recognised that this business use was broad. Nevertheless, the condition of the property had diminished and the miscellaneous items in the property were kept in an untidy manner considered inconsistent with storage use.

Requirement to remove rubbish

Clause 10.1 of the lease provided for the obligation to remove rubbish from the property. The Tenant used the property as a junkyard and argued that the items brought onto the site were not rubbish. As the definition of 'rubbish' was not defined in the lease, the Tenant argued that the Landlord could not dictate items to be removed merely by defining them as rubbish. The Court agreed and indicated that the items must be 'rubbish' within the context of clause 10.1 of the lease. The Court found that the Tenant had not breached the obligation under the lease to remove rubbish – despite the disorganised nature of the items on the property. Evidently, the parties disagreed about the definition of 'rubbish'.

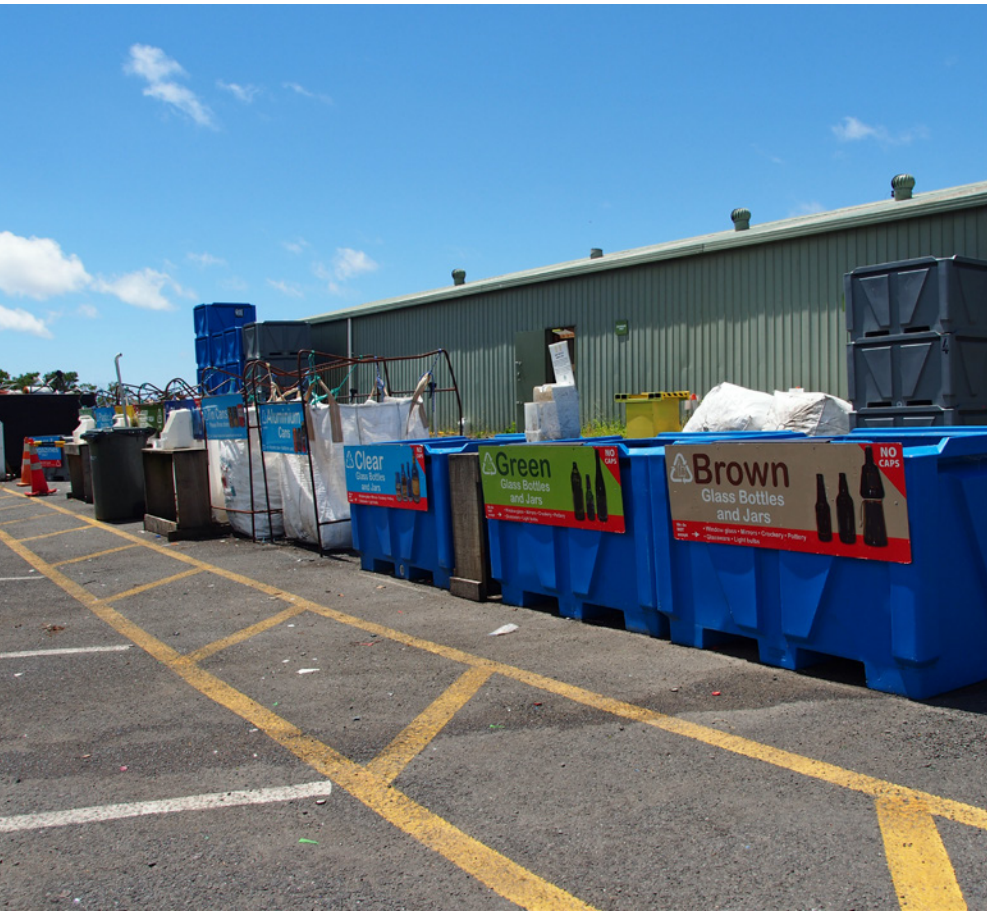
Nevertheless, the Tenant had breached the lease (requirement to permit inspection upon notice and to keep premises in tidy condition) and failed to remedy the breach upon notice of intention to cancel by the Landlord.

Peaceable re-entry

The Court found that there were no defects in the Landlord's notice that would render it invalid. In passing, the Court considered the notion put by the Landlord that given the prescriptive nature of the regime for cancellation of the lease, peaceable re-entry would cure any defect in the PLA notice.

The Court clarified that peaceable re-entry does not cure an invalid notice. The process for cancelling a lease is a code that must be followed. Peaceable re-entry is only available where a lessor has a right to cancel (s 244(1)). The right emerges when the landlord notifies the tenant of the intent to cancel the lease if a breach of lease is not remedied and the tenant does not remedy the breach.

The Court emphasised that a PLA notice must clarify and properly outline the alleged breach that gives the landlord a right to cancellation. This means that if there had been no breach then peaceable re-entry does not give the landlord a right to cancel (even if the notice of intent is complied with).



Surrender

As the Court found that the lease had been cancelled on re-entry by the Landlord, the question as to whether the Tenant had agreed to surrender the lease one the Court only considered briefly. After reviewing the evidence, the Court held the email correspondence exchanged between the previous landlord and Tenant was insufficient to support the proposition that there was a binding agreement to surrender the lease.

The lack of clarity in the parties' communications highlights the importance of clear communication in negotiating lease arrangements but also the risk posed by more informal arrangements and negotiations.

Relief – time limits

The Tenant sought relief against cancellation of the lease or relief against the refusal to renew. The time limit for seeking this relief was a key preliminary issue. The application for relief was made by the Tenant over seven months after the Landlord had re-entered the property. The time limit under the PLA is three months (s 253(4)(b)).

What the Court emphasised is that the PLA contains a code for cancellation of leases that must be followed. In this case, the process was followed and then the Landlord peaceably re-entered the property.

On proper construction, ss 253(3) and (4) of the PLA indicate that the time for the Tenant to apply for relief after peaceable re-entry is no later than three months. If the Tenant does not apply for relief against cancellation during that time frame, the peaceable re-entry is confirmed and no relief is available.

The three-month limit is intended to allow the Tenant to seek relief and not require the Landlord to forcefully enforce the re-entry. Rather if the Tenant does not apply within the required timeframe, as in this case, then no relief is available and the Landlord's re-entry is confirmed.

The Court clarified that it had no jurisdiction to grant relief against cancellation – by either indicating that the period did not apply as the Tenant had broken back into the property or by extending the time limit. Nevertheless, the merits of such an application were considered.

On balance, the Court found that if a relief against cancellation was available to the Tenant, it would have found that cancellation would be disproportionate. If the Tenant had sought relief within the three-month timeframe, the Court would have concluded that relief should be granted on the condition that breaches by the Tenant were remedied.

The decision

The Court concluded that the tenant had breached the terms of the lease and the Landlord had properly exercised the right to cancel the lease under ss 244 and 246 of the PLA. Then the Landlord validly proceeded to peaceably re-enter the property.

The Tenant sought relief against cancellation out of time meaning that the Landlord was entitled to the vacant possession of the property. However, the Court acknowledge that the Tenant must have a reasonable period of three months to vacate.

Commentary

The Tenant's conduct raises a number of issues but the reality is that the dispute between the Tenant and Landlord had a better chance of being resolved if the Tenant had engaged with the Landlord at the outset. The lack of communication and failure to address issues promptly left the Tenant in a position where he was unable to seek relief. The Tenant's failure to engage in discussion with the Landlord or later, seek relief against cancellation of the lease left him in a difficult position.

Rather than unlawfully taking possession of the premises, the Tenant could have sought relief from cancellation. Perhaps, the best approach for the Tenant would have been to remedy any breaches alleged by the Landlord at an early stage.

When it comes to commercial leasing disputes, time is of the essence in many ways. The Tenant had chances to resolve the situation within certain time frames. In particular, the three months' timeframe for the Tenant to seek relief was important. Delay in pursuing remedies poses risks.

In a situation like this one, the Court does have the discretion to grant relief against cancellation or not. The Tenant's actions would have dissuaded the Court from exercising that discretion in his favour. ■

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