IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-001493
[2024] NZHC 1030

UNDER	Section 244 of the Property Law Act 2007
BETWEEN	TAHAROTO MOTELS LIMITED Applicant
AND	RITZ ENTERPRISES LIMITED Respondent
	Cont'd …

Hearing:	On the papers
Counsel:	S McAnally for Applicant in 1493 proceeding and Respondent in 1982 proceeding A Ho for Respondent in 1493 proceeding and Applicant in 1982 proceeding
Judgment:	20 May 2024

JUDGMENT OF ANDERSON J

This judgment was delivered by me on 20 May 2024 at 12.00 pm
pursuant to r 11.5 of the High Court Rules 2016.

……
Registrar/Deputy Registrar

Solicitors: Keegan Alexander, Auckland
ACS Law, Auckland

CIV-2023-404-1982

UNDER	Section 253 of the Property Law Act 2007
BETWEEN	RITZ ENTERPRISES LIMITED Applicant
AND	TAHAROTO MOTELS LIMITED Respondent

Introduction

[1] This application for costs came to me as Duty Judge. It relates to the decision of Hinton J granting relief against cancellation of a lease to the applicant, Ritz Enterprises Ltd.[1]

[2] Ritz is the lessee of a motel premises owned by Taharoto Motels Ltd.[2] On 18 May 2023 Taharoto served on Ritz a notice of intention to cancel the lease under s 246 of the Property Law Act 2007 alleging various matters justifying the notice. On 26 June 2023 Taharoto then applied for cancellation of the lease. Ritz applied for relief from cancellation.

[3] On 15 March 2024 Hinton J held:[3]

(a) The notice was invalid as it related to alleged breaches of non-assignment clauses and in alleging insufficiently specific breaches of general maintenance and repair obligations.

(b) The notice was valid (in part) insofar as it was based on liquidation of Ritz and breaches relating to maintenance and repair of the swimming pool.

(c) Ritz remained in breach of cls 5.1 and 5.5 of the lease for outstanding issues with the swimming pool.

(d) Taharoto was therefore prima facie entitled to cancellation of the lease; but,

(e) relief from cancellation was granted under s 256 of the Property Law Act.

---

1 Ritz.
2 Taharoto.
3 *Taharoto Motels Ltd v Ritz Enterprises Ltd* [2024] NZHC 560.

[4] Taharoto says it is entitled to its costs and disbursements in the proceeding pursuant to an indemnity in cl 11.1.3 of the lease. It claims $33,767.50 in costs for its legal fees and disbursements of $1,480.75.

[5] Ritz submits that this "is a case of a landlord seeking to abuse its position". It submits that the PLA notice relied upon by Taharoto was largely defective and that it was fortuitous that Taharoto was able to rely on a breach in respect of the swimming pool and nothing else. In these circumstances, Ritz submits that it, not Taharoto, is entitled to costs, or alternatively, that costs should lie where they fall.

The law

[6] All matters of costs are at the discretion of the Court.[4] Generally, the party who fails with respect to a proceeding should pay costs to the party who succeeds.[5] This discretion is qualified by rr 14.6–14.17 of the High Court Rules 2016. Two such qualifications are relevant:

(a) A successful party may be refused costs or receive reduced costs where they have been granted an indulgence.[6]

(b) A court may make an order for the actual costs or disbursements incurred by a party if, inter alia, the party claiming costs is entitled to indemnity under a contract.[7]

[7] These qualifications to the normal principle in the context of relief from cancellation were referred to in *Roses are Red Ltd v Board of Administration of the Methodist Church of New Zealand*.[8] The Court of Appeal dismissed an appeal by a lessee who had succeeded in its application for relief and had been ordered to pay 2B costs to the lessor.

---

4 High Court Rules 2016, r 14.1.
5 Rule 14.2(1)(a).
6 Rule 14.7(g).
7 Rule 14.6(4)(e).
8 *Roses are Red Ltd v Board of Administration of the Methodist Church of New Zealand* [2009] NZCA 237, (2009) 19 PRNZ 369 at [40(a)].

[8] The Court noted that where an application for relief against forfeiture is made following a breach of a lease, the tenant is seeking an indulgence. The tenant who has breached may well be in a somewhat different position from other "winners".[9] Where it is plain that it was fortuitous for the tenant to be granted relief against forfeiture, the tenant can expect to pay costs.[10] However, where a landlord is seeking to obtain some sort of commercial advantage or is somehow pressuring the tenant so as to improve its position, the usual rule that costs follow the event will apply.[11]

[9] In *Roses are Red*, there was an indemnity clause in the lease. In awarding only scale costs, the High Court Judge had commented that if the lessor wished to enforce that clause it could take proceedings to do so.[12] The Court of Appeal referred to authority for the principle that where a contract makes provision for payment of indemnity costs, there is an entitlement to costs on that basis and characterised this as a "relevant consideration" to a costs award in the present context.[13] At the least, it is clear that the Court retains a discretion to deny recovery of indemnity costs on public policy grounds or if the costs claimed are not objectively reasonable. [14]

[10] Ritz referred me to *Cunningham v Butterfield* on the discretion as to costs, and specifically as it relates to refusal to award costs for an indulgence.[15] There the Court of Appeal emphasised that there is no general rule that costs will be granted in favour of a lessor who has unsuccessfully opposed an application for relief against cancellation:[16]

> … what is required is a principled application of the rules. In cases such as this that may require an analysis of the facts to see what has given rise to the litigation, taking into account the conduct of the parties and whether one of them has contributed to its costs or engaged in other conduct that should influence the costs decision.

---

9 At [40(a)].
10 At [41].
11 At [41] citing *Ponsonby Mall Trust Ltd v New Zealand Food Industries Ltd* HC AK CIV-2005-404-3631, 8 March 2006 at [18].
12 See also *Taste of Asia Ltd v Hillcrest Properties Ltd* [2020] NZHC 3245 at [15]–[17].
13 *Roses are Red Ltd v Board of Administration of the Methodist Church of New Zealand*, above n 8, at [40(c)] citing *IBA Ltd v Stanley's Nightclub Ltd* [2007] NZCA 60 and *Bishop v Financial Trust Ltd* [2008] NZCA 170.
14 *Synlait Milk v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657 at [200].
15 *Cunningham v Butterfield* [2014] NZCA 213, (2014) 22 PRNZ 521.
16 At [57].

Indemnity costs

[11] It is convenient to address the issue of indemnity costs first.

[12] Taharoto claims to be entitled to full indemnity costs on the basis of cl 11.1.3 of the lease. This provides:

> The Lessee shall pay… all expenses (including all legal costs on a solicitor and own-client basis) for which the Lessor shall be liable in consequence of any breach by the Lessee of any of the covenants of the Lease.

[13] Ordinary principles of contractual interpretation apply to such clauses.[17] I make the following comments on interpretation of this clause:

(a) This clause is significantly less expansive than a common clause featuring in other case law under which the lessee is to pay the costs "of and incidental to the enforcement of the Landlord's rights remedies and powers under this lease". [18]

(b) The clause is engaged only by expenses in consequence of "any breach … of any of the covenants". The lease gives a right to cancel in certain circumstances. Some of these, like liquidation, are not a breach of a covenant.[19]

(c) The clause applies where there is a breach, not simply an asserted breach.[20]

(d) The clause applies only to expenses the lessor is liable to pay "in consequence of any breach" of the lease by Ritz. Where the lessee has been successful in its application for relief including on a number of its arguments concerning the validity and scope of the Property Law Act

---

17 *Synlait Milk v New Zealand Industrial Park Ltd,* above n 17 [192].

18 See for example *Patel v Macleod* [2017] NZHC 990.

19 I note that Hinton J referred to liquidation as a "breach" that was remedied but nothing turned on that characterisation, as it does in the present context.

20 Compare *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, above n 17, at [199], where an indemnity clause which was engaged by "enforcement" did not extend to "attempted enforcement".

notice, a hard look is appropriate as to whether the expenditure is incurred in consequence of the breach identified.

[14] To consider the application of the clause, it is necessary to set out in more detail the notice on which Taharoto sought to rely and Hinton J's findings.

[15] The PLA notice alleged several breaches:

(a) Using part of the premises as long-term residential accommodation in breach of non-assignment provisions.

(b) Failing to keep the interior and exterior of the premises in good condition and failing to maintain a swimming pool.

(c) Ritz was in liquidation, giving rise to an immediate right to re-enter the property and terminate the lease.

[16] Hinton J held that Ritz was not in breach of the non-assignment conditions.[21] She held that some of the alleged breaches of the maintenance provisions were insufficiently described.[22] In those respects, the notice was invalid.

[17] The notice was valid with regards only as it related to the breach regarding the swimming pool and liquidation clause. While Ritz was no longer in liquidation, the issues with the swimming pool remained outstanding and Ritz therefore remained in breach of the lease. Taharoto was prima facie entitled to cancel the lease.

[18] However, Hinton J granted Ritz relief against forfeiture. She did so because:

(a) Ritz was no longer in liquidation and the liquidation had came about through a misunderstanding of which Taharoto was aware. Ritz had paid the sum sought in the statutory demand to Taharoto's solicitors but to a different account. Taharoto was advised of this immediately but still issued the Property Law Act notice.

---

21 *Taharoto Motels Ltd v Ritz Enterprises Ltd*, above n 3, at [21].
22 At [23].

(b) The issues with the swimming pool arose directly or indirectly from COVID-19 restrictions and were not the result of an advertent breach. Further, Ritz was willing to rectify the issue.

[19] Against that background, I am not satisfied that many of the costs incurred by Taharoto are captured by cl 11.1.3.

[20] First, as to the costs incurred in respect of the non-assignment clause, there was no breach of that clause and costs incurred for those arguments are not engaged by cl 11.1.3.

[21] Second, there was plainly considerable argument in the hearing directed at the validity of the notice. Those arguments, while arising against the backdrop of alleged breaches, cannot be said to be the consequence of Ritz's breach. Much of the cost is a consequence of Taharoto failing to adequately particularise the notice.

[22] Where, as here, Taharoto has increased the costs of the application for relief against cancellation by its own conduct, I do not see that this is expenditure that should be recoverable under this form of clause.

[23] Further, while the notice was valid with respect to the liquidation, as I have said, I do not consider that Ritz's liquidation is a "breach" of a "covenant" for the purposes of cl 11.1.3. Costs related to this aspect of the relief application are therefore not covered by cl 11.1.3.

[24] In my view, the only costs that can be said to be consequential on Ritz's breach are those associated with the breach regarding the swimming pool.

[25] Unsurprisingly, Taharoto has not set out what portion of its costs are attributable to that breach alone. I am unable to quantify what, if any, costs are recoverable under the clause. I apprehend it would be difficult to do so. Taharoto has not established an entitlement to specific costs under the clause.

[26] The circumstances here are different to those in a related proceeding where Moore J awarded indemnity costs.[23] In that instance Taharoto applied for an order for cancellation of the lease on the basis that Ritz had failed to make payments due under the lease. That application was discontinued when Ritz made the payments due.[24] Moore J awarded Taharoto indemnity costs pursuant to cl 11.1.3 on the basis that the proceedings would not have been commenced, and costs not incurred, but for Ritz's breach of the lease.[25] The circumstances here are much more nuanced with the several alleged breaches involved and notice invalidity issues.

Costs award?

[27] I now consider costs on the basis of the general discretion to award costs.[26] Ritz says it should be entitled to costs on a 2B basis. As discussed above, Taharoto says it should be entitled to indemnity costs. Accordingly, both the incidence and basis for assessing costs is in issue. On these questions, it is relevant that:

(a) Ritz is the successful party in that it has succeeded in its application for relief.

(b) There is the contractual indemnity clause in the lease. I have concluded this would likely apply to some of the costs incurred, albeit I cannot quantify them.

(c) In considering the incidence and level of costs, I take into account the conduct of the parties and whether one of them has contributed to its costs or engaged in other conduct that should influence the costs decision. Here, Hinton J found that Taharoto had overplayed its hand.[27] This does not go so far as to find improper motives on its part but has relevance.

(d) Ritz did refer me to what it says was unreasonable conduct by Taharoto. There had been no recorded breach since 2020. Taharoto arranged the

---

23 *Taharoto Motels Ltd v Ritz Enterprises Ltd* [2022] NZHC 3553.
24 *Taharoto Motels Ltd v Ritz Enterprises Ltd* HC Auckland CIV-2022-404-304, 12 July 2022.
25 At [13].
26 High Court Rules, r 14.1.
27 *Taharoto Motels Ltd v Ritz Enterprises Ltd*, above n 3, at [40].

inspection of the premises while liquidators were in possession after the premises had had to be vacated in haste upon liquidation, and when Ritz had no control over its bank account to attend to any breaches. Recall of the winding up order was opposed despite Taharoto learning of the fact that the statutory demand had been met prior to the order by payment into a different account. Although most of this conduct is outside the costs incurred on the relief application, the Property Law Act notice had been issued against that background.

(e) My analysis earlier as to what costs are the consequence of any breach demonstrate that there are several respects in which Hinton J regarded the notice as defective, and respects in which the contention for breach was not sustained. It is difficult to view the lessee as receiving an indulgence insofar as these aspects are concerned.

(f) It is relevant that relief against forfeiture is an indulgence. A breach of lease by Ritz was established but only in respect to the swimming pool. The Property Law Act notice was valid to that extent. That breach had not been remedied.

[28] In my view in all the circumstances, the appropriate course is to let costs lie where they fall.

[29] That is a broad-brush way of recognising Ritz's success but also the degree to which it is being granted an indulgence. Costs lying where they fall recognises this but also acknowledges that aspects of Taharoto's conduct and the result would otherwise justify the applicant paying costs.

Result

[30] I make no order as to costs. Costs are to lie where they fall.

Anderson J