IN THE DISTRICT COURT
AT AUCKLAND

CIV-2009-004-000997

BETWEEN	ARCUS SPRINGS LIMITED Plaintiff
AND	STEPHANIE BETH JEFFREYS TIMOTHY WILSON DOWNES Defendants

Appearances: C Lucas for the Plaintiff
J Stafford for the Defendants

Judgment: 17 September 2009

ORAL JUDGMENT OF JUDGE DAVID J HARVEY

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[1] This is an application for summary judgment by the defendants seeking judgment against the plaintiff because, according to the defendants, the plaintiff's claim is unsustainable.

[2] The background to the matter is this. The defendants are liquidators of a company known as Overland Transport Limited. They were appointed liquidators on 30 October 2008. The ANZ Bank is the first secured general security holder in respect of Overland Transport Limited. In the course of their liquidation activities the liquidators came across a lease agreement between Arcus Portable Buildings, which is the trading name of Arcus Springs Limited. This document was dated 16 July 2008.

[3] The document referred to three mobile units, which were found on the premises of Overland Transport Limited when the liquidators were appointed. The liquidators looked at the document and concluded that it was for an indefinite term at the election of the company.

[4] Consequently a search of the personal properties securities register was carried out and no security interest was registered in respect of the units in favour of Arcus Springs Limited. The liquidators came to the conclusion that the lease was for a term of more than a year as defined in s 16 of the Personal Properties Securities Act 1999. The lease was therefore a security interest pursuant to s 17 of the Act and because Arcus did not secure its interests in the units by registration, the liquidators could sell the units in favour of ANZ Bank as the first registered general security holder.

[5] Arcus disputed that, which is why we are here. They say the lease was not for more than a year, it was not therefore a security interest and the goods were the property of Arcus and Arcus filed proceedings directing the liquidators to return the units to Arcus, or alternatively for judgment in the sum of $61,000 being the alleged value of the units.

[6] The issue for determination is whether or not the lease was correctly categorised by the liquidators as a lease return with more than one year. It is therefore proper to turn to the lease itself.

[7] The document is dated 16 July 2008 and is headed up Hire Agreement between Arcus Portable Buildings (the company) and Overland Transport Limited (the client). It sets out some 16 conditions. Nowhere in the agreement does it say that the term of the hire or lease is defined. It does not say it is for a year or for two years. It does not say it is for six months. It does contain a clause, clause 4, which relates to a reduction in rent if after six months there are no damages to the particular unit and thereafter reduced to $250 a week after one year on the same condition.

[8] Basically the hire agreement as characterised by Mr Lucas is of an indefinite term. Clause 1 reads:

> The company grants the client right to use the mobile unit for weekly rent until two weeks' notice given by the client.

[9] Now as far as Ms Stafford and the liquidators are concerned that is the agreement. As far as the plaintiff is concerned there is an addition to that agreement. It is a page headed up Arcus Portable Buildings with a post office box address and phone numbers and it starts:

> By signing the attached hire agreement the client acknowledges if the portable buildings are bigger than 10 square metres, or if they are connected to sanitary plumbing then they are subject to the Building Act 2004.

[10] The grammatical style of this document would indicate that it was not drawn by a lawyer but nevertheless it is quite clear what it is all about. It has been stated that the reason for the document was to ensure compliance with Manukau City Council Building Act requirements and to comply with that there had to be a limitation of the term for six months. If the term was going to be longer than six months there would have to be an application for a building consent and sometimes for a resource consent and Arcus was prepared to lodge such applications for a fee plus costs. If that was to happen confirmation had to be given in writing from the beginning of the agreement.

[11] The territorial authority could cancel the agreement but after the consent had been granted the agreement would be replaced with a long-term lease agreement. Mr Lucas seized upon that when he referred to the agreement as a hire agreement, which it is described as in the heading to the document, and for the anticipated subsequent agreement to be the lease agreement. He said that conceptually the documents were quite different.

[12] Ms Stafford's argument essentially is this. Whatever the position, the document was just the first page. It is an indefinite lease and therefore can be registerable. Even if the second document is incorporated as part of the agreement, and I note that it has not been signed nor referred to in any way, shape or form, in the first page of the agreement, it still does not change the character of the agreement as an indefinite agreement. What is important in terms of the nature of these agreements is the potential, rather than the actuality and even if there are conditions to be fulfilled, it is the potential that is important.

[13] Mr Lucas' argument essentially is that there are disputed issues of fact and there are also difficulties as far as interpretation is concerned what was said by the parties, when these agreements were concluded. An issue of course that brings into play the Parallel Evidence Rule.

[14] Ms Stafford has presented to me some pages from the third edition of Burrows, Finn and Todd's text Law of Contract in New Zealand and refers to the Parallel Evidence Law page 156 paragraph 6.2.1(a).

> If the contract is in writing its interpretation is exclusively within the jurisdiction of the Judge. In exercising this function the Judge has traditionally been bound by what is known as the Parallel Evidence Rule. This rule provides the exclusion of extrinsic evidence to add to, vary, or contradict a written document. The parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement.

[15] Of course that rule is subject to exceptions and where there are difficulties of interpretation, or the meaning of the document is not entirely clear, contextual evidence may be admitted.

[16] But in such a case there have to be difficulties of interpretation and Ms Stafford had drawn my attention to the comments of Hammond J where it will be presumed that a document which looks like a contract is to be treated as the whole contract.

[17] The authors of Burrows, Finn and Todd go on to say at page 157:

> A good recent New Zealand example is *TAK & Co Inc v AEL Corp Ltd* (1994) 7 PRNZ 432(HC) where Hammond J said that the invoice document for the sale of animals constituted the entire contract. This document looks like a contract; it was prepared by AEL. It sets out all the necessary and essential terms. It is hard to think of a clearer illustration of the appropriateness and application of the Parallel Evidence Rule.

[18] Ms Stafford's argument therefore is that this document is clear. It contains everything that is necessary. Even if I were to accept that the second page had come out, it would still be sufficient to constitute the entire contract.

[19] Mr Lucas concedes that were it not for the additional document, he would be in some serious difficulty, but he emphasises that the agreement is not an entire agreement. There is some question about whether or not both documents were handed to Mr Guthrie and of course the way in which the Building Act Notice (if I can call it that) is to be interpreted would seem to make the agreement less than a year, in fact one for six months only.

[20] On the other hand, the issue of a lease for more than one year has been dealt with in Geddy Cumming QC & Wood Personal Properties Securities in New Zealand, paragraph 16.1.3(1) and 17.3.3.

[21] Ms Stafford has summarised in her written submissions the import of the comments of the learned authors. She says the definition of lease for a term of more than one year includes all leases that have a term of more than one year, but also covers leases that have the potential to extend beyond one year. The definition of lease for a term of more than one year contained in s 16 brings within the definition leases that depending on events occurring after the execution might or might not otherwise have been leases for a term of more than one year.

[22] Under paragraph (b)(i) of the definition a lease of indefinite duration, even though it may be terminated within a year, falls into the definition. For the purposes of paragraph (b)(i) of the definition, it is not significant that in a particular case the lease has not in fact become a lease for a term of more than one year. It is the potential term that is important.

[23] I believe that the matter can be resolved on the basis of the interpretation of the documents, as I have said. I believe that the Parallel Evidence Rule does apply, and I believe that an interpretation of the documents, be it one or two, arrives at the same result.

[24] The hire agreement on its own as a single page is clearly an indefinite agreement. The company grants the client the right to use their mobile unit for weekly rent until two weeks' notice given by the client. There is no fixed term, it goes on indefinitely. That falls within the definition of a lease for a term of more

than one year. Indeed, the anticipation that the agreement will continue is set out at paragraph 4 which relates to rent reductions, as long as the property is kept in good condition.

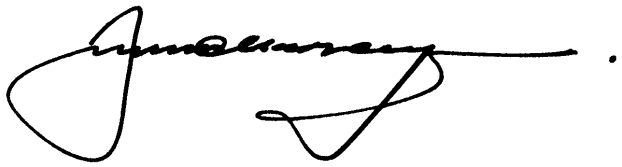
[25] If I look at the documents together, that is both pages, as I have said I arrive at the same result. The starting point is that the portable buildings are subject to the Building Act 2004. That is really the essence of the second document and it was put together, it is alleged, by the plaintiff, because they had previously encountered difficulties of this nature. They have stated that the maximum length of hire under the agreement is six months, which is the maximum discretionary time allowed by a territorial authority to apply for building consent, and that is clear. But then there are a number of conditions that follow.

[26] Two clauses starting with the word "if" are dead give-aways. It is anticipated that "if those conditions are fulfilled, that is keeping the buildings longer, you have to apply for a building consent and we (says Arcus) will help you do that and if you want us to do that, you have got to tell us five months from the beginning of the agreement."

[27] Now that means that what started as essentially a six month, or potentially a six-month agreement, potentially has a longer term to run. The clauses change that limitation of six months to potentially a longer term, thus bringing back into play clauses 1 and 4 of the hire agreement.

[28] For those reasons therefore, I am satisfied that the defendants have established that what they did was within the Law. In the absence of registration, which should have taken place, the liquidators were entitled to sell the particular storage units and to reimburse the first security holder.

[29] I am prepared to allow summary judgment under these circumstances and the application for summary judgment is granted. There will be judgment for the defendant applicant. Costs will be fixed.



David J Harvey
District Court Judge