IN THE SUPREME COURT OF NEW ZEALAND

SC 72/2010
[2011] NZSC 49

	BETWEEN	GRAEME JOHN INGRAM AND ELIZABETH KNEE First Appellants
	AND	KIP INVESTMENTS LIMITED Second Appellant
	AND	PATCROFT PROPERTIES LIMITED Respondent

Hearing: 22 March 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: D W Grove for Appellants
D G Collecutt for Respondent

Judgment: 10 May 2011

JUDGMENT OF THE COURT

A The appeal is allowed and the orders made by the High Court are restored.

B The appellants are awarded costs of $15,000 together with their reasonable disbursements to be fixed if necessary by the Registrar.

C The costs order made by the Court of Appeal is reversed. Any outstanding questions concerning interest and costs should be determined by the High Court.

REASONS

(Given by Blanchard J)

Introduction

[1] This case is about the consequences of the actions of a lessor of commercial premises in prematurely re-entering, impounding the lessees' fixtures, fittings and chattels and preventing the lessees from accessing the premises by changing the locks. Those actions are accepted to have been in breach of the lease contract at the time when they occurred because, although the lessees had previously failed to pay some rent when it fell due, the lease terms postponed the lessor's ability to exercise its right of re-entry on that account for 14 days and the re-entry occurred one day before that period had ended.

[2] The lessees could immediately have accepted the lessor's repudiation of the lease contract by giving notice of cancellation. But they did not do so.

[3] The next day the rent became 14 days overdue. The lessees still did not pay it. Nor, other than remonstrating with the lessor and pointing out the unlawfulness of its actions, did the lessees attempt to regain possession. Matters did not come to a head for nearly a year until the lessor, still treating the lease as validly terminated, claimed damages. The lessees retaliated with their own damages proceeding based on the lessor's breach. It is accepted that, if the lease remained on foot, the bringing of that proceeding constituted a notice of cancellation by the lessees.

[4] The lessor claimed, however, that it had enjoyed and exercised a right to cancel the lease contract once the 14 days had expired and that it had then, by its conduct in continuing to exclude the lessees, cancelled the lease in reliance on the lessees' continuing default in paying the rent. It is common ground that no rent payments were made after the invalid re-entry.

[5] The High Court found in favour of the lessees and awarded them damages for the loss of their businesses.[1] The Court of Appeal, by majority, reversed that decision and set aside the High Court's orders for payment of damages by the lessor.[2]

Facts

[6] It is necessary to describe what occurred in greater detail. There were in fact two lessee claimants in respect of separate portions of the premises. The lessor of the land and building at 26 Lorne Street, Auckland City was the respondent, Patcroft Properties Ltd. A predecessor of Patcroft leased part of the building to the first appellants, Mr Ingram and Ms Knee, for a 12-year term from 1 April 1996 with a right of renewal. Mr Ingram and Ms Knee operated a backpackers' accommodation business there. There was a bar in the basement which they sublet to the second appellant, KIP Investments Ltd. KIP was 50% owned by Mr Ingram and Ms Knee and 50% owned by a Mr Pearce. The High Court found, and it is not in dispute, that (as the law then stood prior to the commencement of the Property Law Act 2007) the sublease took effect as an assignment of the basement because it was for the same term as the lease out of which it was created. So both Ingram/Knee and KIP were lessees directly from Patcroft. It is not in dispute that Patcroft had consented to the sublease/assignment.

[7] Certain provisions of the lease are of importance in the present appeal. Clause 2(a) required punctual payment of the rent by calendar monthly payments in advance "without set off or any deduction whatsoever". Clause 2(c) provided for payment of operating expenses. The prohibition on set-off or deduction did not appear to apply to operating expenses but nothing turns on that point in view of the amount of rental unpaid at the relevant time.

[8] Clause 26 said that if "at any time during the occupation of the premises by the Lessee" (inter alia) any rent or other moneys payable by the lessee are "in arrear for the space of fourteen days after the same shall have become due" then it should

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1 *Ingram v Patcroft Properties Ltd* (2009) 10 NZCPR 426 (HC) per Allan J.

2 *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681 per O'Regan and Ronald Young JJ, Priestley J dissenting.

be lawful for the lessor or any other person duly authorised by it to "re-enter upon the premises or any part thereof in the name of the whole and thereby determine the estate of the Lessee".

[9] There was also a statement in cl 27 that the failure to pay rent or other moneys on the due date was a breach going to the essence of the lessee's obligations under the lease. But it has been found below that the effect of that provision was postponed by cl 26, and that finding rightly is not challenged on this appeal.

[10] In 2001 there was a problem over rental payments and Patcroft re-entered. Relief against forfeiture was, however, granted by the High Court. There continued to be ongoing difficulties between the parties. In 2005 there was another problem. Rent and operating expenses of $36,783.75 fell due on 1 June. A balance of $2,249 was already owing in respect of the rent payment which should have been made on 1 April. On 1 June the sum of $10,191 was paid. At trial Patcroft conceded that it could not rely on any right of re-entry for any sum owing prior to 1 June. The Court of Appeal refused to allow that concession to be withdrawn and observed that, in any event, the lessees would then have been entitled to rely on the presumption in *Clayton's Case*[3] in that respect. In other words, the payment on 1 June must be taken to have discharged the April balance.

[11] The 14 days under cl 26 did not expire until the end of 14 June, that is, the right of re-entry was not exercisable until 15 June. A further payment of $4,000 was made on 13 June. There was then $22,592.75 still owing for the June rental and operating expenses.[4] As it happened, Mr Ingram and Ms Knee had a cross-claim against Patcroft for $36,597.55 because, as was common ground in the High Court, they had earlier overpaid their obligations in respect of operating expenses for lift maintenance. But they were nevertheless obliged to pay the outstanding rent "without set off or any deduction."

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3 *Devaynes v Noble* (1816) 1 Mer 572, 35 ER 781 (*Clayton's Case*).

4 Or $24,841.75 if the payment on 1 June was in part applied to discharge the April arrears.

[12] It was the evidence of Mr Ingram, which the Judge accepted,[5] that he had intended, on 14 June, to bring the rental payments up to date and that, if need be, his sister, who was a successful business woman in Australia, could have provided funds at a few hours' notice, as she had done for him in the past.

[13] On the morning of 14 June Mr O'Donnell of Patcroft, evidently miscalculating by one day, entered the premises, changed the locks and posted near the entrance three notices:

(a) A notice of re-entry stating that the lease had been terminated;

(b) A trespass notice addressed to Mr Ingram, Ms Knee and Mr Pearce;[6] and

(c) A notice of distraint on the chattels in the premises.

[14] The High Court held, and there was no appeal on this point, that the distraint was unlawful because it was preceded by the re-entry.[7]

[15] On the same day the lessor's solicitor, Shean Singh, wrote to legal advisers acting for Mr Ingram and Ms Knee advising that his client had "today re-entered and terminated the lease" and stating that any attempt to seek relief against forfeiture would be defended.

[16] On 17 June solicitors acting for Mr Pearce wrote to the lessor's solicitor reserving KIP's position relating to the lawfulness of the re-entry and also complaining that distraint was not available because of the prior re-entry. This letter produced a reply on 20 June referring to the "now defunct lease" and claiming, inaccurately, that the distraint had preceded the re-entry.

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5 At [76].

6 This notice warned the addressees that entry would be an offence under s 4(1) of the Trespass Act 1980 carrying a penalty upon conviction of a fine of up to $1,000 or imprisonment for a term not exceeding three months.

7 At [50]. Under the Distress and Replevin Act 1908 the landlord/tenant relationship had to exist at the time of the distraint: *Dovey Enterprises Ltd v Guardian Assurance Public Ltd* [1993] 1 NZLR 540 (CA) at 545. But, if the re-entry was invalid, it is arguable that the distraint may have been valid. Distraint was subsequently abolished in relation to commercial premises by s 265 of the Property Law Act 2007.

[17] On 21 June it was pointed out to the lessor's solicitor that the re-entry had occurred on the 13th day after the rent was due, in clear breach of the lease. The attitude of the lessor, as exhibited by correspondence from its solicitor, remained unchanged. There the position rested for over a year, until 11 September 2006, when the lessor's solicitor notified a claim for damages against all the appellants, who responded with their own claims.

The High Court decision

[18] The High Court addressed whether the lessor's repudiation of the lease by its premature and therefore unlawful re-entry precluded it from claiming to have cancelled on or after 15 June on the ground of the lessees' continuing failure to pay the balance of the June rent. Having made a determination that the re-entry on 14 June was unlawful,[8] Allan J considered whether that re-entry could have become lawful simply by expiration of time and continued non-payment, and whether in that circumstance, as the lessor argued, a fresh additional right to terminate the lease arose on 15 June. The Judge concluded that, had the lessor physically withdrawn from the premises and handed back possession, both of the premises and the businesses, to the lessees, it would on or after 15 June have been entitled to re-enter for a second time,[9] provided that the lessor's repudiation had not already been accepted. He obviously meant by this proviso that a purported withdrawal and second re-entry would have been legally ineffective if, before the lessor's withdrawal from the premises, the lessees had given notice of cancellation on the ground of the unlawful re-entry. But, the Judge said, that had not occurred.[10]

[19] Mr Collecutt had evidently made a submission for the lessor, as he did in this Court, that withdrawal from the premises by the lessor was unnecessary, citing *London and County (A & D) Ltd v Wilfred Sportsman Ltd*[11] but Allan J rightly considered that case to be readily distinguishable, pointing out that there the

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8 At [55].

9 Later in his reasons Allan J rejected evidence from Mr O'Donnell of Patcroft that he would have rendered up possession had the rent been brought up to date, saying that this evidence was contradicted by the advice from the lessor's solicitor that any application for relief against forfeiture would be opposed: at [90].

10 At [59].

11 *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764 (CA).

defaulting lessee had voluntarily given up possession: "The lessee had effectively abandoned the lease. Here, the lessee was dispossessed. The cases are quite different."[12]

[20] Allan J said that it was arguable that the case fell within s 8(1)(b)(ii) of the Contractual Remedies Act 1979 as it was a situation where the lessor could not reasonably expect to receive notice of any cancellation by the lessees. But in his view nothing turned on that question. Over time the lessees' right to make an application for relief against forfeiture would have been lost by reason of delay. The loss of that entitlement "would amount to a de facto acceptance by the [lessees] of the [lessor's] repudiation of the lease"[13] and ultimately the issue of the present proceeding, seeking damages for the lessor's repudiation, constituted express notice to the lessor of acceptance of the repudiation of the lease.[14] The Judge also held that the lessees were not obliged to mitigate their losses by making an application for relief against forfeiture.[15]

The Court of Appeal decision

[21] The focus of the reasons given by the majority in the Court of Appeal was on the fact that the lessees had not cancelled the lease on 14 June. As a result, the majority said, the contract remained alive until at least 15 June. On that date the lessees were in breach of their obligations to pay the rent and that failure entitled the lessor to cancel under clause 26. The majority considered that "the [lessor's] continual [sic] refusal to allow the [lessees] access to the premises was a re-entry and thereby a termination of the lease by virtue of cl 26". Thus on 15 June Patcroft had, in the majority's view, lawfully brought the lease to an end.[16]

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12 At [58].
13 Citing *Governors Ltd v Anderson* CA94/04, 16 August 2005 at [25].
14 At [61].
15 At [72].
16 At [55].

[22] Priestley J, dissenting, did not accept this analysis which he considered to be both artificial and unreal. He took the view that Patcroft's actions and stance demonstrated that on 15 June it was not ready and willing to perform the contract "which is normally a prerequisite if a party wishes to cancel".[17] He said that Patcroft remained "totally unrepentant so far as its illegal actions on 14 June were concerned".[18] He had difficulty in seeing how the s 8 cancellation rules could come into play in a situation where both parties to a lease were alleging the other was in breach. Patcroft had done absolutely nothing to backtrack or remedy the situation. The lessees for their part failed to pay the rental arrears but reserved their rights for relief against forfeiture and damages. Priestley J rejected the view that Patcroft's conduct on or after 15 June evinced an intention to cancel, because it was not a response to a breach by the lessees. Rather, he said, it was a "stand-alone repudiation which was deliberately continued".[19]

[23] Priestley J observed that at common law a party who wished to cancel had first to be ready and willing to perform the contract. He said it was not totally clear whether this approach had survived the passage of the Contractual Remedies Act. That issue had been left open by the Court of Appeal in *Kriletich v Birnam Investments Ltd*[20] but in *Noble Investments Ltd v Keenan*[21] that Court had assumed to the contrary, albeit with little discussion. In *Noble Investments* the Court had considered that the purpose of the common law rule was to ensure that a party did not benefit from its own wrong. Priestley J noted the evidence in the present case that, but for Patcroft's breach, Mr Ingram would have had recourse to a family loan to pay the rent. Yet, the Judge said, Patcroft's stance effectively precluded such an outcome.[22] He would have dismissed Patcroft's appeal.

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17 At [72].
18 At [79].
19 At [88].
20 *Kriletich v Birnam Investments Ltd* CA214/90, 27 February 1991.
21 *Noble Investments Ltd v Keenan* [2006] NZAR 594 (CA) at [44]–[45].
22 At [89].

Discussion

[24] The lessor's action in unlawfully excluding the lessees from the premises on 14 June by purporting to exercise a right of re-entry and changing the locks constituted a repudiatory breach of the lease contract.[23] It prevented the lessees from carrying on their businesses, which was the very purpose of the lease. Undoubtedly it gave rise immediately to a right of cancellation on the part of the lessees under s 7(4)(b) of the Contractual Remedies Act. As long as the lessor's repudiatory stance was unchanged it would be a continuing breach capable of acceptance and cancellation by the lessees under that Act.

[25] But, of course, the lessees did not proceed to accept the repudiation and were themselves already in breach of their obligation to make payment of the balance of the rent and operating expenses due on 1 June. And then, on the next day, 15 June, the restriction in cl 26 of the lease no longer applied.[24]

[26] From then on, subject to any disqualifying effect of the lessor's continuing repudiation, it was open to the lessor to bring the lease to an end by the valid exercise of its cl 26 right or by a cancellation under s 7(4)(a) for breach by the lessee of an obligation (to pay the rent) which was expressly made essential by cl 27.

[27] In *Hirst v Vousden*[25] the Privy Council considered a case which in material respects was very similar to the present case. It does not appear to have been drawn to the attention of the courts below. In *Hirst v Vousden* the lessees were in possession and operating their business. They were, as it was held, entitled to a lease for a term of three years plus rights of renewal. The lessor had all along denied that

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23 The lessor could not have been proceeding on the basis of an anticipatory breach by the lessees because it was not then clear that they did not intend to perform their obligation to pay the rent, nor has the lessor ever asserted that its re-entry was justified under s 7(2) of the Contractual Remedies Act. The High Court's finding, to which reference is made in [12] of these reasons, and by Priestley J, puts that beyond all doubt.

24 On a literal reading of cl 26 the rights of the lessor under that clause would still not be exercisable because, as a result of Patcroft's actions, there was no longer an occupation of the premises by the lessees. Arguably, however, the expression "during the occupation of the premises" in cl 26 should be read as an equivalent of "during the term of the lease" for otherwise, on the literal reading, the lessee might be able to deprive the lessor of the right of re-entry under the clause by ceasing to occupy the premises.

25 *Hirst v Vousden* [2004] UKPC 24, (2004) 6 NZCPR 135.

there was any such entitlement. The lessees had cross-claims against the lessors for earlier actions taken by the lessors with respect to the premises which had adversely affected the business. In that situation the lessees had suspended payment of the rent for some months. The lessors, without changing their stance about the non-existence of the lease, proceeded to evict the lessees, claiming that they had the right to do so because of the non-payment of rent. The Court of Appeal had held that this action was unlawful despite the failure to pay the rent and the existence of a "no set-off" provision. In a passage quoted by the Privy Council, the Court of Appeal had said:[26]

> ... the [lessors] were disentitled from taking the point against the [lessees] because they themselves were denying the existence of any continuing contract and thereby repudiating it. How can it be said that lessees are obliged to keep making rental payments *pursuant to a contract* (i.e. not merely because they are holding over or are in possession at the sufferance of the lessor) when the lessors are refusing to acknowledge the existence of the lease contract? And how can a purported cancellation of the lease on that ground then be valid? Thus, even if the [lessees] were not entitled to assert a setoff or to seek a rent reduction or to cease rental payments, the [lessors] had disentitled themselves from relying on that point. The eviction was therefore unlawful.

[28] Their Lordships said that this reasoning and conclusion could not be faulted. There had been a repudiation by the lessor and by the time of the trial at the latest it had been accepted. The eviction had been unlawful and the lessees were entitled to damages for it.[27]

[29] In the present case there is one matter which, the appellants say, distinguishes it from *Hirst v Vousden*. There, it is said, the unpaid rent all fell due at a time when the lessors were already denying that there was any lease, that is, they were already repudiating the contract. Here, in contrast, the unpaid rent fell due on 1 June and thus before Patcroft's repudiatory breach. We cannot see that this should make any difference. The ongoing repudiation by the lessor prevented it from claiming a right to cancel for non-payment of rent.[28] Its purported cancellation was entirely inconsistent with its stance that the lease no longer existed (as from 14 June). Because of that repudiatory act the lessees could not operate their businesses. In that circumstance they could no longer be expected to pay arrears of rent while the

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26 *Hirst v Vousden* CA25/02, 20 June 2002 at [27] per Blanchard J (original emphasis).
27 At [16]–[17].
28 Under cl 26 or the Contractual Remedies Act.

lessor's denial of the existence of any lease continued, all the more so rent for the monthly period interrupted by the unlawful eviction.

[30] The non-payment of the rent was justified by the re-entry. Mr Ingram was not effectively challenged on his evidence that the overdue rent "could and would have been paid on 14 June 2005 if Patcroft had not terminated the lease". It was entirely justifiable for the lessees not to make the payment where the lessor was taking the position that the lease would not be reinstated in any event.[29] This was implicit in the indication from its solicitor to Mr Pearce that any application for relief against forfeiture would be contested, for the lessees would in connection with such an application have had to demonstrate a readiness and willingness to pay all outstanding rent. The lessor was in effect representing that any such payment would be futile.

[31] Those, in brief, are the reasons why we would allow this appeal. We must, however, explain how our conclusions can be squared with the well-known dictum of Asquith LJ than an unaccepted repudiation is a "thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind".[30] Professor Carter, whose views have been influential in Australia, has describes it as a misleading, unhelpful and gross oversimplification of the law.[31] He points out that even before a repudiation is accepted it may have legal consequences for the parties, not confined to the obvious consequence that the innocent party has a right to cancel because of it. Carter opines that the precise scope and effect of an unaccepted repudiation depends upon the particular circumstances of the case and mentions several "principal possibilities". Two are germane to the present case. The first is that a repudiation may prevent the repudiating party (whom the author terms "the promisor") from exercising rights under the contract, on the basis that a party cannot claim to exercise rights under the contract while repudiating the contract to a material extent. It would of course be difficult to think of a more material breach by a lessor than an unlawful

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29 That being so, it is unnecessary to consider the "no set off" clause but it cannot have been intended to apply in a situation where the lessee was unlawfully excluded from the premises and the lessor treated the lease as at an end, any more than it would have done after the expiry or valid termination of the lease when accounts were being settled between the parties, including claims which each might have against the other for breaches of the lease.

30 *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (CA) at 421.

31 JW Carter *Carter on Contract* (looseleaf ed, LexisNexis Butterworths) at 88,396.

eviction of the lessee. The second relevant possibility is that an unaccepted repudiation may absolve a promisee from the consequences which would otherwise attach to a failure on the promisee's part to discharge contractual obligations. In such a case the promisee need not tender performance, and is not liable in damages for that omission.

[32] Professor Carter supports these propositions by reference to the words of Lord Finlay LC in *Morris v Baron & Co*:[32]

> A party to a contract which imposes certain obligations and confers certain rights upon him cannot claim to exercise these rights while repudiating his obligations in material particulars.

As he observes, that statement was picked up by Priestley JA of the New South Wales Court of Appeal in his judgment in *Nina's Bar Bistro Pty Ltd v MBE Corporation (Sydney) Pty Ltd.*[33] Priestley JA dissented in that case on the particular facts but his reasoning on this issue of principle was not doubted by the majority. He admitted that what Lord Finlay had said was not part of the ratio of *Morris v Baron & Co* and had not been frequently relied on until mentioned in this connection by Professor Carter.[34] Priestley JA noted also the author's reference to a decision of the Court of Appeals of the State of Georgia in *Jinright v Russell* where it was said that a party "may not repudiate a contract and at the same time seek the advantage of a stipulation in the very contract he has repudiated".[35] We pause to say that the Court of Appeal and the Privy Council took this approach in *Hirst v Vousden*, seeing it as so obvious as to need no citation of authority.

[33] Priestley JA recognised the inconsistency between such an approach and Asquith LJ's dictum. He said that the latter, although appropriate in some circumstances, is not universally true, as Carter had shown. He said that it had been accepted as a general proposition by the House of Lords in *White and Carter (Councils) Ltd v McGregor.*[36] Pausing again, reference to that case shows that their Lordships were not considering a situation in which there had been breaches by both

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32 *Morris v Baron & Co* [1918] AC 1 (HL) at 9.

33 *Nina's Bar Bistro Pty Ltd (Formerly Mytcoona Pty Ltd) v MBE Corporation (Sydney) Pty Ltd* [1984] 3 NSWLR 613 (CA) at 632–3.

34 JW Carter *Breach of Contract* (Law Book Co, Sydney, 1984) at 261.

35 *Jinright v Russell* 182 SE 2d 328 (Ct App Ga 1971) at 330.

36 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL) at 444.

parties to a contract and, while Lord Hodson may seem to have given Asquith LJ's dictum general approval, in a speech in which Lord Tucker concurred, the other Law Lord in the majority, Lord Reid, made no mention of it. It is plain from the dissenting judgment of Lord Keith that he at least did not regard the dictum as valid for all purposes.[37]

[34] Priestley JA said that the High Court of Australia's decision in *Peter Turnbull and Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd*[38] showed that "repudiatory conduct, although unaccepted by the innocent party will relieve him from carrying out obligations on his side which it would in the circumstances be futile to fulfill".[39] He then made the helpful observation that Lord Finlay's dictum in *Morris v Baron & Co* is explicable on the footing that:

> ... repudiatory conduct of a party at fault is a representation to the innocent party that so far as the party at fault is concerned the contract is at an end. If the innocent party thereafter takes some step to his detriment, the party at fault will not thereafter be heard to say that he is treating the contract as on foot. This is the settled law of estoppel by conduct ... [t]he mere fact of proceeding towards completion of an executory contract in the face of repudiatory conduct by the other party to a contract is in one sense a detriment to the innocent party: he continues under the burden of contractual obligation when he need not do so.

[35] More recently, the New South Wales Court of Appeal, also referring to the writing of Professor Carter and to *Morris v Baron and Co*, has appeared to accept a submission that the principle applicable to a contractual party seeking to terminate for alleged breach or repudiation when that party is itself in breach can be stated in the following way:[40]

> A contractual party B is not permitted to terminate for alleged breach or repudiation by the other party A, when that party B is itself in breach of a condition, or of an intermediate term having a serious effect which gives rise to a right to terminate, or is engaged in conduct which is repudiatory, even if the other party A has not yet elected to terminate for breach or to accept B's repudiation, **provided** (a) there is a nexus between A's non-performance and B's breach or repudiatory conduct, and (b) A's conduct does not amount to an election to affirm the contract ...

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37 At 438–439.

38 *Peter Turnbull and Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235.

39 At 633.

40 *Idameneo P/L v Ticco P/L* [2004] NSWCA 329 at [97] (original emphasis).

[36] Likewise the Victorian Court of Appeal has in *Emhill Pty Ltd v Bonsoc Pty Ltd (No 2)*[41] endorsed the following passage from *Cheshire & Fifoot*:[42]

> A party need only be ready and willing to perform the contract in substance. A party who is in breach may nevertheless have the right to terminate, so long as the breach is not repudiatory or of an essential term or such as to deprive the other party of the substantial benefit of the contract.

[37] Cases on anticipatory breach also lend support to this view, although they have tended to be expressed in terms of waiver rather than estoppel. They are discussed in Dawson & McLauchlan, who say that the cases prior to the enactment of the Contractual Remedies Act held that an unretracted repudiation was an intimation that it was useless for the innocent party to go to the trouble of incurring unnecessary expenditure in making preparations to perform.[43] The result was that, even though a contracting party had not elected to terminate a contract for wrongful anticipatory repudiation, that party was able to sue for actual breach on the date of performance without having to show readiness and willingness to perform. Equally, we would add, that party must have been able to terminate the contract on the ground of the anticipatory breach and a fortiori once an actual breach had occurred, despite not having performed its part, provided that it could show that its own non-performance was justified by the unretracted repudiation.

[38] Dawson & McLauchlan proceed to examine whether the position remains the same under the Contractual Remedies Act, which does not overtly require of a cancelling party that it must be ready and willing to perform in all material respects.[44] They conclude that when s 7(1) provides that the section has effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may treat it as discharged for repudiation or breach, it does not affect "the waiver cases". This is because, the authors say, while the repudiation remains unaccepted by the innocent party and may still be retracted, the defaulting party is unable to treat the contract as discharged under s 7 by reason of its own breach. Where the so-called waiver rule prevents the defaulting party from

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41 *Emhill Pty Ltd v Bonsoc Pty Ltd (No 2)* [2007] VSCA 108 at [68].

42 NC Seddon and MP Ellinghaus *Cheshire & Fifoot's Law of Contract* (8th ed, LexisNexis Butterworths, Chatswood (NSW), 2002) at 943.

43 Francis Dawson & David W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) at 77–79.

44 At 79–80.

relying on a subsequent repudiation by the innocent party, then arguably s 7(1) does not apply because it is not a circumstance in which the defaulting party may treat the contract as discharged. As we understand it, this argument, which the authors favour, views waiver as excusing the other party's non-performance so that there is no breach by that party of which the repudiating party may take advantage under s 7 (unless the repudiation is first retracted and amends made).

[39] This appears to us to be a sensible construction of s 7(1) which aligns it with the general principle that if one party expressly or impliedly indicates or represents to another that performance on the other's part is unnecessary or will be of no avail, and the other party relies upon that indication or representation, the first party is unable afterwards to complain of the non-performance. So stated, the repudiating party's inability to cancel the contract on the ground of the other party's breach is the result of an estoppel, as Priestley JA thought.

[40] It would be entirely unfair if the Act produced a different outcome, and there is nothing in s 7 which requires that to be so. Despite the hesitation expressed in *Kriletich*, we are not aware that any judge or commentator has expressly taken the view that it does so require in the 30 or so years that the Act has been in force.[45] In fact Burrows, Finn and Todd treat *Noble Investments* as having settled the question and say that the rule it lays down is principled.[46] As Priestley J recorded in the present case, the Court of Appeal in *Noble Investments* was of the opinion that the purpose of the common law rule requiring that a cancelling party be ready and willing to perform the contract in all material respects was to ensure that the party in question could not benefit from its own wrong. The Court said, in a judgment delivered by Glazebrook J, that the rule survived the passage of the Act but did not apply where the cancelling party did not so benefit:[47]

> A party could be seen as benefiting from its own wrong if it seeks by cancellation to deprive the other party of the benefit of the contract in circumstances where the other party's breach is a direct result of breach committed by the party seeking to cancel the contract. ... A party could also

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45 There may have been an assumption to the contrary in *Thompson v Vincent* [2001] 3 NZLR 355 (CA) but the point is not discussed.

46 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 593.

47 At [47].

> be seen as benefiting from its own wrong where it is unable or unwilling to perform its obligations under the contract and seeks to avoid liability for its own breach by cancelling the contract on the basis of the other party's breach.

We would endorse this view.

[41] We conclude that on 15 June, because of its unretracted repudiation of the lease by its unlawful re-entry and exclusion of the lessees from the premises, the lessor was intimating that payment of the balance of the June rent would be futile, in the sense that it would not lead to the reinstatement of possession of the premises. Because of that continuing stance the lessor was precluded from cancelling the lease for non-payment of that rent. Its repudiatory attitude continued until this proceeding was issued and the repudiation was thereby accepted by the lessees.

[42] It is in these circumstances unnecessary to consider whether the lessor ever did anything which could have met the rules found in s 8 of the Act governing how cancellation can be effected.

Result

[43] We allow the appeal and restore the orders made by the High Court, with costs to the appellants of $15,000 together with their reasonable disbursements to be fixed if necessary by the Registrar. The costs order made in the Court of Appeal is reversed. Any outstanding questions concerning interest and costs should be determined by the High Court.

Solicitors:
Foy & Halse, Auckland for Appellants
Shean Singh, Auckland for Respondent