Equity Division
Supreme Court
New South Wales

Case Name:	MIR Holdings Pty Ltd & Anor v Marina Square Retail Pty Ltd
Medium Neutral Citation:	[2020] NSWSC 1418
Hearing Date(s):	13 October 2020
Date of Orders:	14 October 2020
Date of Decision:	14 October 2020
Jurisdiction:	Equity - Duty List
Before:	Stevenson J
Decision:	Relief against forfeiture refused
Catchwords:	EQUITY – equitable remedies – relief against forfeiture – third party rights – where new lessees are in possession of the premises EQUITY – equitable remedies – relief against forfeiture – Retail and Other Commercial Leases (COVID-19) 2020 Regulation – whether breach during the prescribed period
Legislation Cited:	Conveyancing Act 1919 (NSW) Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)
Cases Cited:	New Dragon Investments Pty Limited v Morgan & Banks Development Pty Ltd [2006] NSWSC 1139 Wilkinson v S & S Gikas Pty Ltd [2006] NSWSC 1314
Texts Cited:	B Edgeworth, Butt's Land Law (7th ed, 2017, Thomson Reuters)
Category:	Procedural and other rulings
Parties:	MIR Holdings Pty Ltd (First Plaintiff) SKRG Pty Ltd (Second Plaintiff) Marina Square Retail Pty Ltd (Defendant)

Representation:	Counsel: T Alexis SC with C Palmer (Plaintiffs) R Angyal SC (Defendant) Solicitors: Strathfield Law (Plaintiffs) Eakin McCaffery Cox (Defendant)
File Number(s):	2020/287386

JUDGMENT

1 The plaintiffs, MIR Holdings Pty Ltd and SKRG Pty Ltd, were the lessees of retail premises in a shopping centre known as Marina Square at Wentworth Point. The defendant, Marina Square Retail Pty Ltd, was the lessor.

2 By registered leases, the plaintiffs operated restaurants from premises known as RT 414 and RT 412/413.

3 The leases were for nine and eight years respectively, commencing on 21 November 2018.

4 On 11 September 2020 Marina Square served on MIR Holdings a Notice of Breach of Covenant pursuant to s 129 of the *Conveyancing Act 1919* (NSW) reciting that MIR was in default under specified provisions the relevant lease by reason of non-payment of the following amounts:

Relevant period	**Type of charge**	**Amount**
Up to 31 March 2020	Rent	$33,615.50
Up to 31 March 2020	Lessee's Contribution to Outgoings	$50,319.13
Up to 31 March 2020	Marketing Fund Contribution	$3,577.83
Up to 31 March 2020	Tradewaste Charges for the period 21/11/2018 to 31/3/2020	$525.08
Up to 31 March 2020	Water Usage Charges for the period 06/04/2019 to 31/01/2020	$882.82
Subtotal		$88,920.36
GST payable on outstanding charges above		$8,892.03
Total		**$97,812.39**

5 The notice required MIR to pay the amount of $97,812.39 there specified within 14 days and stated that unless that amount was paid, the defendant would:

(a) terminate the lease; and/or

(b) re-enter, occupy and resume possession of the premises.

6 On the same day, the defendant sent a like notice to SKRG save that the amount of the default was specified as:

Relevant period	**Type of charge**	**Amount**
Up to 31 March 2020	Rent	$7,698.80
Up to 31 March 2020	Lessee's Contribution to Outgoings	$17,413.84
Up to 31 March 2020	Marketing Fund Contribution	$743.36
Up to 31 March 2020	Tradewaste Charges for the period 21/11/2018 to 31/3/2020	$226.51
Up to 31 March 2020	Water Usage Charges for the period 06/04/2019 to 31/01/2020	$391.04
Subtotal		$26,473.55
GST payable on outstanding charges above		$2,647.35
Total		**$29,120.90**

7 The default alleged related to rent and other payments due to 31 March 2020. There is no dispute that these amounts were then due.

8 The plaintiffs did not pay the amounts referred to in these notices and, on 1 October 2020 the defendant served on each of the plaintiffs a Notice of Re-entry and Termination stating:

> "TAKE NOTICE that as a consequence of the Lessee's failure to comply with a Notice of Breach of Covenant dated 11 September 2020, the Lessor has RE-ENTERED and taken possession of the Premises, ejected the Lessee therefrom and terminated the Lease today, 1 October 2020, with the intent that the Lease is determined with immediate effect. The re-entry and termination of the Lease is without prejudice to the Lessor's rights, including, *inter alia*, the Lessor's rights to claim damages for breach of the Lease and the re-entry and termination."

9 The following day, 2 October 2020, the plaintiffs commenced these proceedings seeking relief against forfeiture both on an interlocutory and final basis.

10 The plaintiffs' application for interlocutory relief was heard and dismissed by Rein J sitting as Duty Judge on 2 October 2020.

11 The plaintiffs renewed their application for interlocutory relief before me as Duty Judge on 13 October 2020.

12 The particular orders sought before me were:

(1) Upon each of the plaintiffs, by their Counsel, giving the Court the usual undertakings as to damages, and:

(a) each plaintiff respectively paying to the defendant by bank cheque or electronic funds transfer into its nominated bank account, all rent and outgoings that are currently outstanding under Lease AP483601W of premises at RT 414 (**414 lease**) and Lease AP363386T of premises at RT 412/413 (**412/413 lease**) at Marina Square, 5 Footbridge Boulevard Wentworth Point (collectively, the **premises**);

(b) the first plaintiff providing to the defendant a replacement bank guarantee in accordance with clause 23.3 of the 414 lease;

(c) the second plaintiff providing to the defendant a replacement bank guarantee in accordance with clause 23.3 of the 412/413 lease; and

(d) the plaintiffs consenting to an order to pay the defendant's costs of this Notice of Motion as assessed or agreed,

order that the defendant take all steps as are necessary forthwith, to restore possession of the premises to the first plaintiff under the 414 lease and to the second plaintiff under the 412/413 lease, until further order.

(2) The defendant by itself, its employees and agents be restrained from interfering with the plaintiffs' possession of said premises, until further order.

(3) The plaintiffs pay the defendant's costs of this Notice of Motion as assessed or agreed.

13 Mr Angyal SC, who appeared for the defendant, submitted that the plaintiffs' application was incompetent for a number of reasons.

14 The first was that Rein J had already dismissed the plaintiffs' 2 October 2020 application.

15 The second was that it is not possible to obtain interlocutory relief against forfeiture and that only final relief could be sought. In *New Dragon*

Investments Pty Limited v Morgan & Banks Development Pty Ltd[1] Brereton J expressed a less dogmatic view.[2]

16 I reserved my position on those questions and marked the notice of motion seeking the relief set out at [12] as "MFI-1" and allowed argument to proceed.

Decision

17 I am not prepared to grant the plaintiffs the relief sought in MFI-1.

18 Accordingly, I propose to grant the plaintiffs leave to file in Court the Notice of Motion a copy of which is marked "MFI-1" and dismiss that motion.

Third party rights

19 The Court will generally not grant relief against forfeiture where a third party has acquired rights over the property. However, if the third party knew of the relevant circumstances, and had notice of the lessee's claim to seek relief, relief may be granted.

20 Thus, it is stated in *Butt's Land Law*:

> "The mere fact that, since the forfeiture, the landlord has re-let the premises to a third party is not, of itself, a bar to granting relief against forfeiture. Nevertheless, as a matter of discretion, the court will generally decline to grant relief where a third party has acquired rights over the property without notice of the tenant's claim. But if the third-party knew of the circumstances surrounding forfeiture of the lease, then he or she may be taken to have notice of the tenant's claim to seek relief and will take subject to that claim. The consequence of granting relief and reinstating the lease will then be to make the third-party a concurrent lessee, interposed between the landlord and the restored tenant..."[3]

21 There are now new lessees in possession of the premises: Chicken V Property Management Pty Ltd in RT 414 and Kyoto Cuisine Pty Ltd in RT 412/413 ("the New Lessees").

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[1] [2006] NSWSC 1139.
[2] At [39] "And I would not deny the possibility that injunctive relief might be granted in aid of an application for relief against forfeiture, though normally such relief is granted only on a final basis".
[3] B Edgeworth, *Butt's Land Law* (7th ed, 2017, Thomson Reuters) at [7.1890].

22 The New Lessees entered into Agreements for Lease with the defendant on 31 August 2020 and 21 September 2020 respectively.

23 Clause 2 of the Agreements for Lease provides that the agreements are subject to and conditional upon the defendants securing "Vacant Possession" of the premises. "Vacant Possession" is defined to mean:

> "…the existing tenant has vacated the premises on terms and in a condition to the satisfaction of the Lessor (at its absolute discretion)."[4]

24 Clause 7.2 of the Agreements provides that if the agreements are not terminated "before the Commencing Date" then:

> "On the Commencing Date, the Lessor must grant and the Lessee must take a lease of the premises…"

25 "Commencing Date" is defined to mean the earlier of the end of the "Fitout Period" and the date when the Lessee commences to trade.

26 The "Fitout Period" is defined to mean the period of four weeks after the "Handover Date" which is, in turn, defined to mean the date that the Lessor notifies the Lessee "that it may have access to the premises to commence the Fitout Works".

27 On 1 October 2020 the Agreements for Lease became unconditional because the defendant had secured vacant possession of the premises.

28 The defendant gave keys to the premises to the New Lessees and this had the effect that the "Handover Date" became 7 October 2020.

29 On 8 October 2020 the defendant gave the New Lessees "Handover Notices".

30 Thus, the New Lessees are in possession and are evidently proceeding with fitout of the premises.

[4] Clauses 2.1 and 2.2.

31 There is no evidence that the New Lessees were, or are aware of the plaintiffs' claim to be entitled to relief against forfeiture, or of the application that the plaintiffs made to Rein J on 2 October 2020, or of the application made to me on 13 October 2020.

32 It may be, as Mr Alexis SC, who appeared with Ms Palmer for the plaintiffs submitted, that I should infer that the new lessees had knowledge of the plaintiffs' registered leases.

33 But there is no evidence of what the new lessees know of the circumstances of the purported termination of those leases save that the defendant obtained vacant possession of the premises on 1 October 2020.

34 Before Rein J, the following exchange took place between Ms Palmer, who then appeared for the plaintiffs, Mr Angyal and Rein J:

> "PALMER: And we would say there's arguably a problem for the defendant, in that they seem to have represented to interested parties that those shops were available when from the lessee's perspective they certainly were not, they had not vacated nor agreed to any vacation in writing. And there is a maximum penalty of 50 penalty units.
>
> HIS HONOUR: Okay. What do you say about that, Mr Angyal?
>
> ANGYAL: I don't have anything to say about that because I really don't know what happened, but at worst it may be that my client's done something wrong but that's not going to invalidate the lease.
>
> HIS HONOUR: I think what it also highlights is that you'd probably need to join these new tenants to these proceedings, Ms Palmer.
>
> PALMER: Yes, your Honour."

35 A short time later, this exchange took place between his Honour and Ms Palmer:

> "HIS HONOUR: And then your other point is affected by these leases. I think Mr Angyal might be right, it won't help you – if the new tenants don't take any point about this then I don't think it's going to help your client, so that's a real problem. <u>So I just wouldn't be able to make the orders that you seek with the potential impact upon the new lessees. So I would decline to grant the relief that you are seeking</u>.

> But then the question is, well, how are those proceedings going to be furthered? If you are right, if there's some breach on the part of the landlord, then you would have a claim in damages, your clients would have a claim in damages.
>
> PALMER: Yes.
>
> HIS HONOUR: I'm not saying, by the way that – I mean, your clients might have to consider whether they do wish to proceed with the case in terms of some further relief, but they would have to join I think those tenants, seek to join them, and then that would be a further complication with further expense and risk I suppose and, again, undertakings as to damages in respect of them as well I suppose." (Emphasis Added.)

36 Thus the reason, or a reason Rein J declined to grant the plaintiffs interlocutory relief on 2 October 2020 was the "potential impact upon the new lessees".

37 Despite Rein J's observations the plaintiffs have not joined the New Lessees nor caused them to be given notice of their claim for relief against forfeiture or of these proceedings.

38 In circumstances where the New Lessees now have what appears to be an unconditional entitlement to occupy the premises I am not prepared to grant the plaintiffs the relief sought in MFI-1 without hearing from the New Lessees.

39 That factor alone is, in my opinion, a reason to decline the plaintiffs the relief they seek.

40 There are, however, other considerations.

Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)

41 The plaintiffs contended that the defendant's purported taking of possession was contrary to the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) ("the Regulation"), the relevant clauses of which provided:

> **5 Application of Regulation**

> This Regulation applies to the exercise or enforcement of rights under a commercial lease in relation to circumstances occurring during the prescribed period.
>
> **6 Prohibitions and restrictions relating to commercial leases**
>
> (1) If a lessee is an impacted lessee, a lessor must not take any prescribed action against the lessee on the grounds of a breach of the commercial lease during the prescribed period consisting of –
>
> (a) a failure to pay rent, or
>
> (b) a failure to pay outgoings …

42 The Regulation commenced on 24 April 2020.

43 The "prescribed period" referred to in the Regulation is the period from 24 April 2020 to 31 December 2020.

44 The plaintiffs are "impacted lessees" and the taking of possession by the defendant of the premises was a "prescribed action".

45 Nonetheless, in my opinion, the Regulation does not apply to the circumstances here.

46 The default specified in the 11 September 2020 s 129 Notice was default of paying rent and outgoings under specified clauses of the leases "up to 31 March 2020"; that is, prior to the prescribed period.

47 Clause 5 of the Regulation deals generally with the application of the Regulation as a whole and provides that it applies to the exercise of lessor's rights in relation to "circumstances" occurring during the prescribed period.

48 What those "circumstances" are is specified in cl 6 of the Regulation.

49 Relevantly, the "circumstance" to which the Regulation applies is that specified in cl 6(1)(a) and (b), namely, the taking possession from a lessee on the grounds of a breach of the lease "consisting of" a failure to pay rent or outgoings which breach occurred "during the prescribed period".

50 Clause 6(1) is thus directed to breaches of the lease occurring during the prescribed period.

51 That is consistent with cl 7(1) of the Regulation which obliges the lessor to participate in rent renegotiation prior to taking prescribed action:

> "…on grounds of a breach of the impacted lease consisting of a failure to pay rent during the prescribed period…"

52 It is also consistent with cl 9 of the Regulation, which obliges any court or tribunal making a decision concerning the recovery of possession of premises to:

> "… have regard to the leasing principles set out in the National Code of Conduct".[5]

53 The relevant "Leasing Principle" in the National Code of Conduct provides that:

> "Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period)."

54 All these provisions are directed to circumstances where a lessee fails to pay rent or otherwise comply with its obligations under a commercial lease during the COVID-19 pandemic period and, in particular, during the prescribed period.

55 The provisions are not concerned with defaults prior to the COVID-19 pandemic and prior to the prescribed period.

56 The failure by the plaintiffs to comply with the 11 September 2020 notices under s 129 of the *Conveyancing Act* was not itself a breach of the relevant leases. There is nothing in the leases requiring compliance with s 129. The

[5] The National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19.

s 129 Notice was required as a condition precedent to the defendant's entitlement to exercise its rights under the leases to re-enter.[6]

57 The 1 October 2020 Notice of Re-entry and Termination did not assert that the plaintiffs' failure to comply with the s 129 Notice was a breach of the relevant leases. Rather it said that as a "consequence of" the plaintiffs' failure to comply with the notices it had re-entered and taken possession; that is, exercised its rights under the leases to do so.

58 The "breach" upon which the defendant relied to re-enter was the plaintiffs' failure to pay rent and outgoings due prior to the prescribed period. The defendant did not rely upon a breach that occurred "during" the prescribed period.

59 For those reasons, in my opinion the Regulation does not apply to the circumstances before me.

Plaintiffs' claim in any event problematic

60 The general principles are well known and were summarised by Campbell J (as his Honour then was) in *Wilkinson v S & S Gikas Pty Ltd:*[7]

> "[23] The granting of relief against forfeiture is discretionary. In relation to a lease, the principle that is generally applied is that the power to re-enter or forfeit for non-payment of rent is regarded as being in substance security for the rent. Provided the lessor and other persons concerned can be put in the same position as before the forfeiture or re-entry, the Court will usually grant relief against forfeiture upon payment of rent, costs, interest and other expenses. If those terms are offered, it is only in a rare case that the Court would refuse relief against forfeiture. The principle on which that is done is that, once the landlord has got all that the right of re-entry was, in equity's eyes, security for, it would be unconscionable for the landlord to insist on its legal right to re-enter.
>
> [24] However, such a rare case can occur if the tenant is unable to pay future rent, or may reasonably be expected to become so. If there is a sufficiently serious risk that the tenant will not be able to perform its obligations in the future, it may be that the consequence is that it is not unconscionable for the landlord to insist on its strict legal right." (Citations Omitted.)

[6] Clause 2.2.
[7] [2006] NSWSC 1314 at [23]-[24].

61 The difficulty for the plaintiffs here is that their default under the leases was persistent and significant. I would, in any event, have hesitated to grant the relief they seek.

Conclusion

62 I grant the plaintiffs' leave to file the notice of motion that I marked MFI-1.

63 I dismiss that notice of motion.

64 On the face of things, the defendant should have its costs of the motion. If the plaintiffs contend for a different order, they should provide short submissions to my Associate by 5.00 pm on 16 October 2020. The defendant may reply by 5.00 pm on 19 October 2020. I will deal with the matter on the papers.

65 The parties should confer and agree as to what is to become of the proceedings.

66 The matter is listed in the Real Property List on 16 October 2020.

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