IN THE COURT OF APPEAL OF NEW ZEALAND

CA98/05

	BETWEEN	MISSION BAY PHARMACY LIMITED Appellant
	AND	DRIVE HOLDINGS LIMITED Respondent

Hearing: 13 March 2006

Court: Chambers, Ronald Young and Allan JJ

Counsel: G J Thwaite for Appellant
A R Galbraith QC and M A Gilbert for Respondent

Judgment: 29 June 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay to the respondent the respondent's costs in respect of this appeal, calculated on an indemnity basis in accordance with clause 11.01(b) of the lease. Liberty to apply to this court in the event of a dispute as to quantum and the parties cannot agree on who should resolve such dispute.

REASONS OF THE COURT

(Given by Chambers J)

Lease of a pharmacy

[1] Mission Bay Pharmacy Limited, the appellant, held a lease of commercial premises in Auckland. The landlord was Drive Holdings Limited, the respondent. The lease was due to terminate on 30 April 2005.

[2] On 12 January 2005, Drive wrote to Mission Bay advising that, prior to termination of the lease, Mission Bay would have to remove all partitions, fixtures, fittings and signage, in accordance with clause 5.8 of the lease.

[3] In February 2005, Mission Bay advised Drive that it did not intend to deliver up vacant possession of the premises on 30 April 2005. That was because, it said, the parties had entered into a binding agreement to enter into a new lease, pursuant to which Mission Bay was entitled to occupy the premises until 30 September 2011.

[4] Drive disputed that there was any such agreement. Drive then commenced a proceeding in the High Court at Auckland, seeking, among other things, an order requiring Mission Bay to deliver up vacant possession of the premises by 30 April 2005. Drive utilised the summary judgment procedure pursuant to the High Court Rules.

[5] The application for summary judgment came before Cooper J on 27 April 2005. He delivered a reserved judgment a month later: HC AK CIV 2005-404-00829 27 May 2005. His Honour held that there was no agreement to enter into a new lease. He required Mission Bay immediately to deliver up vacant possession of the premises and to remove all partitions, alterations, additions, signs and other forms of advertisement installed or made by Mission Bay and to make good any damage caused by such removal. He also awarded judgment in Drive's favour with respect to certain monetary sums payable under the lease. A cross-application for summary judgment by Mission Bay, based on the alleged agreement to lease, was dismissed.

[6] Mission Bay has now appealed against that judgment.

Issues on the appeal

[7] The principal issue on this appeal is whether the judge was right to hold that Mission Bay and Drive had not entered into an agreement to lease, as alleged by Mission Bay. Because this was an application for summary judgment, Drive had to satisfy the court that Mission Bay had no defence to its claim. In the circumstances of this case, that meant it had to establish that Mission Bay's assertion of an agreement to lease was unarguable.

[8] If it was arguable that there was an agreement to lease, then Drive raised other issues as to why such agreement was not enforceable. Because of the view we take on the principal issue, we do not need to consider the subsidiary issues.

Agreement to lease?

[9] Mr Thwaite, for Mission Bay, submitted that Mission Bay and Drive had entered into an agreement to lease on one or other of the following dates:

(a) 20 November 2003 – an oral agreement;

(b) 20 November 2003 – a written agreement;

(c) 16 August 2004;

(d) 1 September 2004;

(e) 6 October 2004.

[10] The mere fact that Mr Thwaite had to pitch the argument with so many possible agreements is, of course, not a good sign for Mission Bay: how can there be a sufficiently certain agreement if the party alleging it is so uncertain as to when it was made? Further, as Mr Thwaite acknowledged, the terms of the agreement would be different depending on which date one plumped for.

[11] We shall look at each alleged agreement date in turn to see whether any of the agreements are fairly arguable.

20 November 2003

[12] Before we turn to what happened on 20 November 2003, we need to provide some essential background.

[13] The evidence shows that the parties had been in dispute over various matters since about June 2001. Mission Bay had a number of complaints, many arising from work Drive was undertaking to redevelop the complex of which the leased premises formed part. There were a number of discussions between representatives of the parties: generally these were between Bhaskar Musuku, a director of Mission Bay, and Darryl Henry, at the time general manager of Retail Holdings Limited, Drive's parent company. Among the matters under discussion was the possibility of Mission Bay taking a new lease of the premises once they were extended as part of the redevelopment plans. Undoubtedly, however, Mission Bay's main concern was to receive compensation from Drive for what Mission Bay said was Drive's breach of the covenant as to quiet enjoyment in the lease. Mission Bay asserted that, because of the building work, it had not had the use of toilets to which it was entitled under the lease. Its business had been disrupted in other ways as well. In February 2002, Mr Musuku had sought compensation of over $150,000.

[14] On 12 March 2002, Mr Henry wrote to Mr Musuku. The penultimate paragraph of that letter reads as follows:

> Your request for compensation is a matter that arises from the relationship under the existing lease and should be considered in accordance with the existing lease provisions. We require that the request for compensation be concluded before any further discussion on the potential extension of the premises occurs. The Lessor Leasing Committee will not consider any proposals to vary the terms of the lease until after the issue of compensation is fully concluded.

[15] The reference to the Lessor Leasing Committee is important. Because Retail Holdings and its various subsidiaries own many commercial premises, negotiations with tenants of those properties have to be approved by that committee.

Mr Henry on numerous occasions after this date referred to that committee, as only it had authority to bind Drive on contractual matters.

[16] For reasons not currently relevant, the compensation dispute remained unresolved. In 2003, negotiations took place with regard to a rent review, which was due to come into effect from 1 May 2003. Rent reviews were biennial; this rent review would accordingly fix the rent to be paid for the last two years of the lease.

[17] On 12 August 2003, Mr Henry sent an email to Mr Musuku. The email contained a "without prejudice" proposal to settle the dispute between the parties. Among the terms of that proposal was an offer by Drive to grant a new lease for a six year term commencing 1 October 2003. Another term of the proposal was:

> The terms of any agreement would be included in a formal agreement and variation of lease.

[18] The proposal was not acceptable to Mr Musuku. On 11 September 2003, he made a counter-proposal. Two terms of that counter-proposal are important for current purposes:

> The terms of any agreement will be included in a formal agreement and variation of lease to grant a further lease term.
>
> All the agreed terms [have] to be proved by Mission Bay Pharmacy's solicitor.

[19] Mr Henry responded to that proposal the same day. He wanted additional terms. His email began:

> Just to clarify that agreement will only be reached when all matters are concluded and appropriate documentation signed by the Lessor.

[20] Discussions continued. The details of those discussions are not relevant for current purposes. Then, on 20 November 2003, a meeting took place at Drive's premises. Mr Henry and Alistair Prew were present on Drive's side; Mr Musuku and his brother Ravi were there representing Mission Bay. It was at that meeting that Jawahar Musuku says agreement was reached. That agreement, Mr Thwaite submits, was made either at the meeting (in which case it was oral) or was made later that day, when the parties signed a document recording the agreement.

[21] Cooper J did not consider the possibility of an oral agreement, because that had (and still has) never been pleaded. It is inconceivable that the parties intended to be bound as a result of an oral discussion. Both sides had stressed throughout their negotiations up to this time that they would not be bound until a formal agreement and variation of lease were prepared and signed. Mr Musuku was fully aware that, on Drive's side, any arrangement had to be approved by Retail Holdings' Lessor Leasing Committee. He for his part had wanted Mission Bay's solicitor to check the terms of any agreement. Importantly, nowhere in the later correspondence between the parties was there ever a suggestion that the parties became contractually bound at the 20 November meeting. The submission that an oral agreement was then reached can be dismissed out of hand.

[22] Mr Thwaite's next argument rested on the document signed later that day. The document was headed "Mission Bay Pharmacy proposal", immediately under which was printed "without prejudice". The document proposed, among other things, a new lease to Mission Bay, to be guaranteed by Mr Musuku. At the foot of the proposal, the following appeared:

> The terms of any agreement will be included in a formal agreement and variation of lease. This document is not legally binding between the parties.
>
> The Lessor records that this proposal is conditional upon formal documentation being concluded no later than the 21st November.

[23] Cooper J found Mission Bay's contention that this document created a binding agreement to lease untenable. He highlighted the clear words referred to in [22] above: at [69]. He considered that conclusion to be strengthened by reference to the factual setting, which we have set out above: at [70]. He also referred to the parties' subsequent conduct, to which we shall be coming. That conduct was inconsistent with any notion that a binding agreement to lease was entered into when the parties signed the 20 November proposal: at [74].

[24] Mr Thwaite submitted that Cooper J was wrong to find the signed proposal not legally binding. He submitted that the proposal was "a straight-forward legal document, save for three oddities". They were the phrase "without prejudice" at the top and the terms quoted in [22] above. Mr Thwaite attempted to argue away "these

oddities" in the following ways. First, if ambiguity exists in the document, the *contra proferentem* principle required an interpretation in Mission Bay's favour, Drive having drafted the proposal. Secondly, the use of the phrase "without prejudice" may simply have indicated that the "offer [was] made under a claim of privilege". Thirdly, the reference to "*this document*…not [being] legally binding between the parties" carried an "implication…that *another* document, or an *oral* arrangement, [was] binding" – (all emphasis is Mr Thwaite's).

[25] With respect to Mr Thwaite, all these arguments are specious. They are contrary to the plain words of the document. We asked Mr Thwaite how Mr Henry could have made his position clearer, had he wished Drive not to be contractually bound until the formal agreement and variation of lease were prepared and signed. We got no satisfactory answer to that question. The document is not ambiguous. The use of the words "proposal" and "without prejudice", especially in conjunction with the express reference to the document "not [being] legally binding", irresistibly leads to the conclusion that signing the document would not contractually bind the party so signing.

[26] In addition, Mr Thwaite's submission completely ignores the pattern of the parties' negotiations up to 20 November 2003 and the caveats which Mr Henry had consistently stressed. Mr Thwaite's argument also ignores the parties' stances after 20 September, stances which showed beyond any doubt that neither considered itself contractually bound on the signing of this proposal.

[27] Further, under this alleged agreement, the new lease would have started on 1 October 2003 and terminated on 30 September 2009. This is not the lease which Mr Musuku has sought to have enforced since he first alleged in February 2005 that the parties had reached an agreement. What Mission Bay then sought was specific performance of a lease due to commence on 1 May 2005 and due to expire on 30 April 2011. Such a lease is also what Mission Bay sought in its unsuccessful cross-application for summary judgment.

[28] We have no hesitation in rejecting Mr Thwaite's submissions on this topic. The proposal was no more than an attempt by Mr Henry to get something definitive

on paper which he could then take to the Lessor Leasing Committee; if approved by them, the proposal could then move to a formal drafting phase. Cooper J was right in his view that the document did not constitute a legally binding agreement. Our reasons for rejecting the contention that the document constituted an agreement are the same as the judge's.

16 August 2004

[29] We find it unnecessary to detail everything that happened between 20 November 2003 and 16 August 2004, the next date on which Mr Thwaite relies for an agreement to lease. Those who are interested can read the details in Cooper J's reasons for judgment. Suffice it to say that, despite both parties signing the 20 November proposal, no formal documentation was ever signed and negotiations continued. What is significant about the negotiations in this period is that neither side at any point contended to the other that an agreement to lease was already in place. During this period Mr Musuku made a number of proposals which were inconsistent with the 20 November proposal; of course, such proposals would not have been made (at least in the form they were) if the parties were already contractually committed to each other.

[30] Before we get to 16 August itself, there are two relevant events which happened shortly before. On 30 July 2004, a resource consent application was lodged with the Auckland City Council, seeking consent to convert two residential units at 9 Patteson Avenue, Mission Bay to an activity described in the application as "health care services including doctors' surgeries and a pharmacy". Mr Musuku, according to his affidavit of 31 March 2005 had owned 9 Patteson Avenue for approximately two years. 9 Patteson Avenue adjoins the premises Mission Bay leased from Drive. At the date of application, Mr Musuku said nothing to Drive personnel about the resource consent application. It seems clear, however, that it was Mr Musuku's intention to move his pharmacy into his own building, if he could get resource consent to permit a pharmacy to be operated from it. Later that year, Mission Bay's counsel, in attempting to explain why Drive was opposing the

resource consent application, addressed Auckland City's commissioners in the following terms:

> Furthermore, the applicant is seeking to relocate out of the building owned by Drive Holdings and into its own building. So one could expect a degree of annoyance on the part of Drive Holdings to be losing a tenant.

[31] It is certainly of great significance that Mission Bay's assertions that it had entered into an agreement to lease with Drive surfaced only after the commissioners turned down the resource consent application. We confidently draw the inference that, had the resource consent been granted, there would have been no suggestion on Mission Bay's part that it was already contractually committed to rent Drive's premises until 2011.

[32] The second pre-16 August matter of significance was Mr Musuku's letter to Mr Henry, dated 3 August 2004. That letter contained the following passages:

> I have been keen for some time to bring matters to a conclusion. …
>
> I do not want it overlooked that the state of the premises has affected my business. The unavailability of basic conveniences to the staff breached the City's regulations and the Pharmaceutical Society regulations. The longer we need for settlement, the larger the loss to me.
>
> The start date for the lease needs mutual agreement, and links with the date of settlement of our current lease.
>
> From my perspective, the various changes that you have wanted at different stages have slowed down negotiations, and caused expense and time. …
>
> I am looking for a final conclusion in the next fortnight. …
>
> I'm happy to sit with you and discuss how we can reach a fair position between us. That is my understanding of the discussions that we had last year.

[33] The terms of that letter are quite inconsistent with any suggestion that the parties were already contractually committed to each other.

[34] There was a further meeting between Messrs Musuku and Henry on 10 August 2004. At that meeting a number of matters were discussed that Mr Henry said he would discuss in turn with the Retail Holdings' Lessor Leasing Committee.

Mr Henry told Mr Musuku that, having done that, he would come back to Mr Musuku with a further proposal.

[35] He did that by email dated 16 August 2004. It is this email which constitutes, Mr Thwaite submits, the third possible agreement to lease. Mr Henry's email began:

> Further to our meeting last week I have discussed your request with the Leasing Committee and can advise that the following changes would be acceptable to us.

[36] There then followed a number of changes to the draft lease which had earlier been submitted to Mr Musuku for his consideration. Mr Henry ended the email:

> I will have Victoria prepare revised documentation that reflects the above and forward it to you for your consideration.

[37] Mr Musuku responded the next day:

> Thanks for the mail. I will go through them and reply to you in a day or two, then you could send it to Victoria.

[38] Cooper J concluded that "the only possible interpretation of the exchange of emails that took place on 16 and 17 August [was] that Mr Musuku was reserving [Mission Bay's] position": at [82]. His Honour noted that Mr Musuku had specifically advised Mr Henry not to have the draft lease documentation prepared until he received Mr Musuku's reply.

[39] The possibility that the sending of the 16 August email constituted an agreement to lease needs little discussion. The judge was clearly right to reject this argument, for the reasons he gave. This was no more than a proposal by Mr Henry. It was not an acceptance of something Mr Musuku had offered; that is clear on the face of the document. That is also reflected in Mr Musuku's response to it. And, in any event, there is nothing in the email to suggest that Mr Henry was deviating in any way from his earlier oft-repeated stance that nothing would be binding until formal documentation was completed. Indeed, the email itself specifically referred to the formal documentation – "revised documentation" – that would need to be prepared and forwarded for Mr Musuku's consideration. It should be remembered

too that the new lease was to be guaranteed by Mr Musuku: the parties would have known that such guarantee had to be in writing and signed by him.

1 September 2004

[40] Mr Thwaite's fourth attempt to locate an agreement to lease rests on what happened in a discussion between Mr Musuku and Mr Henry on 1 September 2004. Interestingly, this discussion and the fact that an agreement had allegedly been reached during it were not referred to in Mission Bay's notice of opposition to the summary judgment application. Nor did Mr Musuku refer to this discussion at all in his principal affidavit. Indeed, the first reference to this discussion emerged in Mr Musuku's *third* affidavit (dated 19 April 2005), the last affidavit filed before the High Court hearing. As to this discussion, Mr Musuku said only this:

> I then had a discussion with [Mr Henry] on 1 September 2004 in which he and I both confirmed that all terms were agreed between us and all that was required was for those terms to be placed in a revised draft lease which Victoria [Drive's solicitor] would prepare.

[41] On this point, Cooper J found as follows at [87]:

> That meeting had not been mentioned in any earlier affidavit and was raised effectively in reply to a reply. Nevertheless, even if one accepts Mr Musuku's evidence an oral agreement concluded on 1 September would not, of course, be sufficient for the purpose of the Contracts Enforcement Act. What was needed was some written agreement, memorandum or note thereof signed by [Drive] as "the party to be charged therewith" providing for the new lease (Contracts Enforcement Act s2(2)). On the view I take there never was such a document.

[42] We view the matter somewhat more boldly than the judge. It is well established that a court determining a summary judgment application is not bound to accept uncritically every assertion made in a defendant's affidavit. This court has on several occasions (*Pemberton v Chappell* [1987] 1 NZLR 1 at 4 and *Bilbie Dymock Corporation Limited v Patel* (1987) 1 PRNZ 84 at 86) adopted "the familiar words" of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC):

> Although in the normal way it is not appropriate for a judge to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a disputed fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in

> precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[43] We do not accept Mr Musuku's assertion that an agreement was reached on 1 September. We reject that assertion for the following reasons, taken cumulatively:

(a) It is highly significant that this agreement had not been referred to in Mission Bay's notice of opposition and was not mentioned by Mr Musuku until his third affidavit, just prior to the High Court hearing.

(b) The lack of detail as to what was allegedly said during the discussion. Mr Musuku's account is entirely conclusory.

(c) The assertion that an agreement was reached is made in a context where Mr Musuku *now* alleges agreements were made on various dates.

(d) It is inherently improbable that any agreement was or could be reached orally, given the history of the negotiations, where both parties, and in particular Drive, had insisted they would not be bound until the formal documentation was signed.

(e) It is also inherently improbable that Mr Musuku at this time would have agreed to a lease of which the sole permitted use was "the business of a pharmacy". Further, the lessee was to be prevented from operating any similar business within a 5 kilometre radius. It is extremely unlikely that Mr Musuku would have committed to such a lease at a time when he was actively pursuing an option to move his pharmacy into his own premises next door.

[44] The alleged agreement is also inconsistent with what the parties did immediately after this discussion. The following day Mr Musuku sent an email to Mr Henry. It made no reference to an agreement having been concluded the previous day. It simply referred to "our discussion regarding the construction of new toilets in the pharmacy". It also raised a question as to when the compensation

should be payable. If there were an agreement as Mr Musuku now alleges, there would have been no question about when the compensation was payable. Mr Henry's response to Mr Musuku's email is also instructive:

> We will not pay the compensation amount until such time as all the documentation is concluded. I expect to provide you with a further revision of the documentation for consideration next week.

[45] That statement is, of course, inconsistent with an agreement to lease having already been concluded. Mr Henry's reply is entirely consistent with the stance he had always adopted during these negotiations.

[46] While there is no contemporary evidence to support the contention Mr Musuku now makes that an oral agreement was reached, there is contemporary evidence (quite apart from the emails just referred to) which support the contention that the parties were still negotiating. On 10 September, Mr Henry sent Mr Musuku "revised draft documentation for [his] consideration". He asked him to "consider and advise whether the documentation [was] acceptable to [him]". The documentation comprised the suggested new lease and a draft deed resolving all other outstanding disputes, including Mission Bay's claim for compensation for loss suffered during the building works.

[47] Mr Musuku did not respond to that letter. Neither the form of Mr Henry's letter of 10 September nor Mr Musuku's lack of response to it is consistent with a binding agreement being already in place. Mr Henry in an affidavit said that Mr Musuku's failure to respond did not surprise him as by this time Drive knew about the application for resource consent to establish doctors' rooms and a pharmacy in Mr Musuku's adjoining property. Mr Henry reported to Retail Holdings' board later that month in these terms:

> I have now provided Bhaskar [Musuku] with revised Lease documentation which reflects our discussions and negotiations to date. However, given that Bhaskar has applied for Resource Consent for Doctor's Rooms and a Pharmacy in the adjoining residential property, I am not at all hopeful that he will conclude this documentation. Ross is arranging for submissions in opposition to be lodged against a proposal.

6 October 2004

[48] Mr Thwaite's final attempt to find an agreement to lease rests on what happened in a discussion between Mr Musuku and Mr Henry on 6 October 2004. Mr Musuku, again in his *third* affidavit, said:

> When I next saw Mr Henry, on 6 October 2004, I confirmed that the lease documentation that had been sent to me was fine. He did not make any comment to me at the time and I therefore fully expected that a new lease would be forwarded to me in due course for execution.

[49] Mr Thwaite's argument now is that Mr Musuku on 6 October orally accepted the offer contained in Mr Henry's 10 September letter, to which we referred at [46] above.

[50] Cooper J did not deal with this argument as then counsel for Mission Bay accepted that an agreement to lease had not been entered into on 6 October: at [78]. Counsel had apparently contended that "events on that day were relevant [only] to whether agreements had been entered into earlier". Messrs Galbraith QC and Gilbert, for Drive, contended before us that we should not consider this fifth possibility, since it had not been advanced in the High Court. They further pointed out that this alleged agreement, like the agreement of 1 September, was first referred to only in Mr Musuku's third affidavit.

[51] Regardless of whether technically Mission Bay can now raise this argument, we deal with it. The inherent improbability of an agreement being made orally remains: see the reasons advanced at [43] above. But even if Mr Musuku said on 6 October what he now says he said, it could not have created a binding agreement to lease. That is because Mr Henry's letter did not constitute an offer capable of acceptance. All Mr Henry had indicated was that, if Mr Musuku considered the documentation to be acceptable, then execution copies would be forwarded. He had made it clear in his 10 September letter that the two deeds sent had to be "executed contemporaneously" before they would be binding on Drive.

[52] Further, it is surely noteworthy that Mr Musuku did not follow up on this alleged agreement. It is common ground that execution copies were never sent to

him. (Mr Henry's account of the 6 October meeting is not available, because it had never been referred to prior to his filing his affidavit in reply.) If there had been an agreement, as Mr Musuku now alleges, one would have expected him to chase Mr Henry up with respect to the execution copies. We infer that the reason he did not was that he did not want to commit to a new lease until he knew whether the council would permit him to operate his pharmacy from his own property next door.

[53] In December 2004, Drive reached the point where it recognised that negotiations with Mr Musuku were not going to reach finality; the Drive people assumed that Mr Musuku would move the pharmacy to his own property if his resource consent application was successful. Drive realised that it would need to seek a new tenant for the premises following the expiry of Mission Bay's lease in April 2005. On 15 December, Mr Henry wrote to Mr Musuku advising that Drive was withdrawing from all negotiations with Mission Bay for a new lease. Significantly, Mr Musuku did not challenge that stance. The first time he ever suggested he had an entitlement to occupy the premises beyond April 2005 was on 10 February 2005. By then Mr Musuku knew that his resource consent application had been refused. But he had left his run too late: by that time, Drive had already committed to a new tenancy with a company called Bay Pharmacy 2004 Limited.

Overview

[54] For the above reasons, we have no doubt that Mission Bay did not establish a fairly arguable case that it had entered into an agreement to lease. Mr Musuku's assertions of various agreements are simply not credible in light of the contemporary documentation. In so far as Mission Bay's case is based on alleged written agreements, the documents concerned simply cannot bear the construction which Mr Thwaite attempts to place on them. The alleged oral agreements are inconsistent with the contemporary documentation and, in any event, inherently improbable, given the parties' negotiating stances, and in particular Drive's insistence throughout that it would not be bound until the formal documentation had been signed. Further, the alleged 6 October 2004 oral agreement is based on the acceptance of a written

document which was, by its terms, not open to oral acceptance so as to create a binding contract.

[55] We consider Cooper J was entirely correct in finding there was no fairly arguable case that an agreement to lease had been entered into.

[56] We find it unnecessary to consider the alternative argument advanced by Drive based on the Contracts Enforcement Act.

Result

[57] Cooper J was correct to order summary judgment. Mission Bay was bound to vacate the premises on 30 April 2005, that being the expiry date of its lease.

[58] Accordingly, we dismiss the appeal.

[59] Drive sought indemnity costs pursuant to clause 11.01(b) of the lease. That clause provides that Mission Bay must pay:

> All costs charges and expenses for which the Lessor shall become liable in consequence of or in connection with any breach or default by the Lessee in the performance or observance of any of the terms covenants and conditions of this Lease.

[60] In the High Court, Cooper J held that Drive was entitled to costs "on a solicitor/client basis", subject only " to the reasonableness of the costs charged by [Drive's] solicitors": at [108]. Mr Thwaite did not challenge that order, should his other arguments be unsuccessful, save, belatedly, in one respect. He orally submitted to us during the course of his reply that Drive should have brought its proceeding in the District Court. So far as we can see, this argument had never previously been run or even signalled. Given that indemnity costs were properly ordered, we cannot see what difference it would have made even if proceedings had been commenced in the District Court. Court fees would have been marginally lower, but that could be the only distinction. In any event, we are doubtful whether

this proceeding would have been within the District Court's jurisdiction: District Courts Act 1947, s 31. Even if it would have been, we are satisfied that Drive acted reasonably in commencing the claim in the High Court.

[61] We are satisfied that Drive should also receive costs in this court on an indemnity basis in accordance with clause 11.01(b). We are less certain as to the appropriate course in the event that the parties cannot agree on the quantum of costs so calculated. In the High Court, Cooper J said that he would resolve any dispute as to the reasonableness of Drive's costs: at [108]. We note, however, that the lease contains an arbitration clause (clause 11.06), which applies to "all differences and disputes which may arise between the parties hereto touching or concerning these presents or any act or thing to be done suffered or omitted in pursuance hereof or touching or concerning the construction of these presents". We heard no argument as to whether any dispute as to quantum would come within the terms of that arbitration clause. The safest course is simply to give liberty to apply should there be dispute about quantum and should the parties not agree on who should resolve it.

Solicitors:
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