

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2015-404-002070
[2015] NZHC 2474**

BETWEEN	RICHARDSON ROAD MEDICAL CENTRE PHARMACY LIMITED Plaintiff
AND	MT ROSKILL JOINT VENTURE LIMITED First Defendant
AND	MT ROSKILL MEDICAL CENTRE PHARMACY LIMITED Second Defendant
AND	KHOOBSURAT COLLECTIONS LIMITED Third Defendant

Hearing: 1 October 2015

Appearances: J Goodall and A Mitra for the Plaintiff
N R Hall for the Defendant

Judgment: 9 October 2015

JUDGMENT OF NATION J

Introduction

[1] The plaintiff, Richardson Road Medical Centre Pharmacy Limited (Mr Gaur's Company) has, for nearly 10 years, operated a pharmacy closely associated with the Mt Roskill Medical Centre at 443 Richardson Road, Mt Roskill. The Medical Centre and the Pharmacy occupy parts of the commercial premises built in 2006 at the corner of Richardson Road and White Swan Road. That building (the Centre) was built in 2006 by the Sharma family. Mr Gaur's Company was one of the founding tenants.

[2] In 2012, the Sharmas sold the Centre to the first defendant, the Mt Roskill Joint Venture Limited (the Joint Venture Company). The Joint Venture Company is a new company. Fifty one per cent of the shares in the company are owned by another company in which doctors associated with the Mt Roskill Medical Centre hold approximately half of the shares. The Patel family own the remaining shares in the subsidiary company so that doctors associated with the Medical Practice and the Patel family each have an approximate 25 per cent indirect interest in the Joint Venture Company. The company associated with the Sharma family continues to hold the remaining 49 per cent of shares in the Joint Venture Company. The directors of the Joint Venture Company are Dr Vinod Sharma and Mr Kantilal Patel.

[3] In 2012, associated with the sale of the Centre to the Joint Venture Company, Mr Gaur's Company signed a new lease for its pharmacy premises. The lease is for a term of 15 years with two rights of renewal of 10 years each. Obligations under the lease are guaranteed by Mr Gaur. He is the pharmacist whose family owns shares in Mr Gaur's Company and who operates the pharmacy business.

[4] In 2015, the Joint Venture Company agreed to the second defendant, the Mt Roskill Medical Centre Pharmacy Limited (Mr Pan's Company), taking over part of what had been a retail shop in the Centre. These retail premises had been leased to the third defendant (Khoobsurat). Khoobsurat's business had failed. It had vacated the premises. The Joint Venture Company agreed to a sub-lease of the Khoobsurat lease to Mr Pan's Company and to a change of use for the premises under the lease from that of a retail clothing store to a pharmacy. Fit out of the premises for a pharmacy has been completed by Mr Pan's Company. I refer to the part of the Centre leased to Khoobsurat as "the Khoobsurat site". Khoobsurat is now in liquidation.

[5] In these proceedings, Mr Gaur's Company seeks an injunction to prevent both the Joint Venture Company and Mr Pan's Company from operating what would be a second pharmacy at the Centre. I am now dealing with Mr Gaur's application for an interim injunction.

Prospects of success

[6] I must first decide whether there is a serious question to be tried in the proceeding. Associated with that, I need to decide if Mr Gaur's Company has a real prospect of succeeding in its claim for a permanent injunction at the trial.¹

[7] There is no written clause in the lease providing for Mr Gaur's Company to have the sole and exclusive pharmacy in the Centre. It is in the standard ADLS lease form. Clause 17.1 states:

THE tenancy shall relate only to the premises and the car parks (if any) and the Landlord shall at all times be entitled to use occupy and deal with the remainder of the property without reference to the Tenant and the Tenant shall have no rights in relation thereto other than the rights of use herein provided.

[8] Mr Gaur's Company nevertheless contends that with the lease arrangements it entered into with the Joint Venture Company there was an agreement that it would be the sole pharmacy allowed to operate from the Centre. Mr Gaur's Company thus has to rely for the remedy it seeks on the principle of non-derogation of grant.

[9] The principle that a grantor should not derogate from his grant was explained by Younger LJ in the English Court of Appeal.² He said it was:

... a principle which merely embodies in a legal maxim a rule of common honesty. "A grantor having given a thing with one hand, ... is not to take away the means of enjoying it with the other." "If A. lets a plot of land to B., ... he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired." The rule is clear but the difficulty is, as always, in its application. For the obligation laid upon the grantor is not unqualified. If it were, that which was imposed in the interest of fair dealing might, in unscrupulous hands, become a justification for oppression, or an instrument of extortion. The obligation therefore must in every case be construed fairly, even strictly, if not narrowly. It must be such as, in view of the surrounding circumstances, was within the reasonable contemplation of the parties at the time when the transaction was entered into, and was at that time within the grantor's power to fulfil. But so limited, the obligation imposed may, I think, be infinitely varied in kind, regard being had to the paramount purpose to serve which it is imposed.

¹ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); *Re Lord Cable (dec'd)* [1977] 1 WLR 7 (Ch) per Slade J.

² *Harmer v Jumbil (Nigeria) Tin Areas, Ltd* [1921] 1 Ch 200 (CA) at 225-226.

[10] That statement of a principle was cited and approved by North P and Woodhouse J in the New Zealand Court of Appeal.³

[11] The judgment of the Court of Appeal was applied by Elias J in *Nordern v Blueport Enterprises Ltd*.⁴ She also referred with approval to the statement of Younger LJ.

[12] Elias J referred to the principle this way:⁵

I accept that a lessee who wishes to restrict a landlord's ability to use or let the premises remaining for any purpose, will need to make explicit provision in the contract in most circumstances. Where, however, the use adopted so substantially affects the purpose for which the lease is granted as to amount to derogation from the grant, then in my view the ordinary approach is displaced.

[13] The English judgments of *Port v Griffith* and *Romulus Trading Co Ltd v Comet Properties Ltd* stand for the proposition that:⁶

Merely granting a lease of a nearby premises to a competing business, and thus reducing the profitability of the (first) lessee's enterprise, is not a derogation from grant.

[14] Those authorities have been qualified in subsequent judgments. In *Petra Investments Ltd v Jeffrey Rogers*, the tenant leased a mall unit and operated a clothing store.⁷ It alleged the landlord's lease of units in the mall to a large record store, and display of that store's signage reduced its trade and derogated from the grant by changing the character of the mall. The Court did not grant relief because it found the tenant had accepted the change that was made. However, Hart J stated that the approach in *Port v Griffith* needed to be qualified when premises were designed for a particular use:⁸

The narrow point decided in *Port v Griffith* was that, if premises are let for a particular trade, there is nothing to prevent the lessor from letting adjoining premises for the same purpose. The reasoning that led to that conclusion

³ *Mount Cook National Park Board v Mount Cook Motels Ltd* [1972] NZLR 481 (CA) at 489.

⁴ *Nordern v Blueport Enterprises Ltd* [1996] 3 NZLR 450 (HC).

⁵ At 456.

⁶ *Port v Griffith* [1938] 1 All ER 295 (Ch); *Romulus Trading Co Ltd v Comet Properties Ltd* [1996] 48 EG 157 (QB), cited in John Burrows (ed) *Brookers Land Law* (online loose-leaf ed, Thomson Reuters) at [11.8.02(3)].

⁷ *Petra Investments Ltd v Jeffrey Rogers Plc* [2000] 3 EGLR 120 (Ch).

⁸ At 127.

was essentially based upon the unreasonableness of attributing to the parties a common intention that the landlord should have been under any such restrictive obligation. Such an obligation must be bargained for if it is to be imposed.

In my judgment, the approach taken in *Port v Griffith* and *Romulus Trading Co Ltd v Comet Properties Ltd* requires some qualification in a case involving a letting in a purpose-built centre such as the present. In such a case, it is not so obviously unreasonable to suppose that the parties contemplated that the landlord was to be subject to obligations that had not been expressly bargained for, but that were implicit in the use for which the landlord had designed the centre and for which the defendant had taken the lease of its unit.

[15] The point arose again in *Oceanic Village Ltd v Shirayma Shokussan Co Ltd*.⁹ The tenant in that case sold souvenirs in a gift shop located in the same building as the London Aquarium. The landlord sought to set up two nearby kiosks selling similar items, which would have caused economic detriment to the tenant. The lease expressly prohibited the landlord from permitting another gift shop within the building, but did not prohibit the proposed kiosks because they were to be located outside.

[16] The Court held that the landlord would be derogating from its grant by operating the kiosks. That would undermine the purpose of the lease, which was that the tenant would be the aquarium gift shop. The Court rejected the landlord's arguments based on *Port v Griffith* and *Romulus*:¹⁰

Whether or not what Hart J [in *Petra Investments*] said is *obiter* or not, I respectfully agree with it. In my judgment, it is not inconsistent with the principle stated in *Port* and affirmed in *Romulus Trading*.

... in cases which involve only economic detriment as a result of a lease to a competitor, application of the general principle will lead inevitably to the conclusion that no term is to be implied. I do not overlook the remarks of Garland J [in *Romulus*] about the problems of uncertainty; and in cases of uncertainty, that may be a good reason for refusing to imply any term. But where the position is certain, as in the present case in relation to aquarium-related products, the court should go on to consider what can properly be said to be in the reasonable contemplation of the parties at the time of the lease. In my judgment, the purpose for which the lease was granted to OVL was to run *the* aquarium gift shop; a purpose which carried with it an exclusivity over the sales of aquarium-related products.

⁹ *Oceanic Village Ltd v Shirayma Shokussan Co Ltd* [2001] L&TR 35 (Ch).
¹⁰ At [46]-[47].

[17] The principle of non-derogation was also applied in the subsequent decision of the Supreme Court of Victoria (Court of Appeal) in *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd*.¹¹ The tenant in that case leased premises in a hospital where it had the exclusive right to provide pathology services. The hospitals were sold. The new landlord then began providing pathology services from nearby premises. The new landlord encouraged doctors to refer patients to its pathology business to the detriment of the tenant.

[18] In discussing the cases, the Court made the following observations on the principle of non-derogation in the context of competing businesses:

[112] The general rule is that, in itself, the grant of a lease of land for a particular purpose will not prevent a landlord from establishing or permitting a competing use in adjacent premises retained by it.

...

[114] The position may be different where a shop is leased for a particular purpose within a self-contained shopping centre. The landlord may market the shop not just as a retail unit but as a shop in its place with a particular role in the centre. It may be that the parties contemplate that the landlord will be subject to obligations which have not been expressly bargained for, *but which are implicit in the use for which the landlord has designed the centre and for which the defendant has taken the lease of its unit.*

(Emphasis added)

[19] The Supreme Court of Victoria (Court of Appeal) referred to a judgment of Street J in *Gordon v Lidcombe Developments Pty* where he had refused an injunction where a landlord had built a wall subsequent to completion of the leased premises.¹² The wall partially obscured the visibility of the shop. The Court said:

[130] We do not take his Honour to have held that proof of derogation from grant will always require demonstration that the use of the premises has been rendered uneconomic. A distinction is to be drawn between cases where it cannot be concluded that the parties mutually contemplated the continuation of specific circumstances (such as *Gordon* ...) and cases such as the present case where that conclusion may be able to be drawn. In the latter category at least substantial interference with an aspect of the tenant's enjoyment of occupancy may be sufficient.

¹¹ *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd* [2012] VSCA 175, (2012) 41 VR 1.

¹² At [126], citing *Gordon v Lidcombe Developments Pty* [1966] 2 NSW 9 (NSWSC).

[20] The tenant in *Specialist Diagnostic* did not succeed in establishing non-derogation as a result of the competition per se. This was because the competing business was being operated outside the hospital. However, the Court did find that the landlord had derogated from the grant by installing a tubular vacuum system that enabled samples to be delivered directly from the hospital to its pathology business:¹³

The installation of the tubular vacuum delivery system materially altered the circumstances within which the parties had contemplated the tenant would utilise the premises. It constituted a substantial interference with the tenant's enjoyment of the benefits granted to it under the lease. It rendered the premises materially less fit for the purpose of enjoyment in accordance with the provisions of [the lease].

[21] In *Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd*, the landlord of a shopping mall sought to install free child playcentres in common areas of the mall.¹⁴ The tenant leased premises in the mall and operated similar play centres for paying customers. It sought an interim injunction preventing installation of the free centres on the ground this would be a derogation from the grant. It put forward evidence that the proposed play centres would cause it economic detriment. The Court granted the injunction. It held the principle of derogation from grant could include “non-physical acts of a landlord – acts of economic significance”.¹⁵ While the parties' lease expressly allowed the landlord to let space in the mall to the tenant's competitors, the Court considered that “having one's landlord supply competing facilities free of charge” could constitute derogation from grant.¹⁶

[22] Ms Hall, in her submissions for the Joint Venture Company and Mr Pan's Company, made the point that in the *Oceanic Village* and *Specialist Diagnostic* cases, there were express exclusivity provisions in the leases.

[23] These clauses were not so extensive as to expressly preclude the lessor's actions which the lessees were objecting to. The existence of those clauses did, however, help the tenant prove the purpose of the grant which was the subject of the claimed derogation. There was some force in Mr Goodall's submission that the

¹³ At [135].

¹⁴ *Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd* [2002] NSWSC 1059.

¹⁵ At [8].

¹⁶ At [10].

judgments referred to should be seen as more strongly endorsing the availability of non-derogation from grant principles given the Judges considered the principles could be applied even though it was apparent from the lease documents that the parties had considered the extent to which there should be exclusivity protection and had provided for this in the leases.

[24] Ms Hall submitted cl 17.1 in the lease would be significant in my assessing whether or not the parties did contemplate the Gaur Pharmacy would be the only pharmacy to operate in the Centre. She did not suggest that clause effectively precluded application of the non-derogation from grant principle.

[25] In *Nordern v Blueport Enterprises Ltd*, Elias J stated “a covenant will not be construed to give a lessor power to derogate from his grant if the words are fairly capable of another construction”.¹⁷

[26] Clause 17.1 in the lease does limit Mr Gaur’s Company’s ability to dictate how the Joint Venture Company might deal with the balance of the premises it owns except in relation to his company’s “rights of use herein provided”. If the rights provided for in the lease carried with them, in the contemplation of both parties, the right to be the only pharmacy in the premises then, as in *Nordern v Blueport Enterprises Ltd*, that clause should not be construed to give the Joint Venture Company power to derogate from their grant.

[27] The Court construed the final words in a similar clause in this way in the *Oceanic Village* case. The words in that clause gave the tenant no rights in relation to the way the landlord dealt with the balance of the building. The Court held that the words at the end of the clause “but so that the use of the demised premises by the tenant is not materially affected, interfered with or prejudiced” qualified the entirety of what went before.¹⁸ The Court held that the actions on the part of the landlord which materially affected the economic performance of the gift shop operated by the tenant materially affected the tenant’s use of the gift shop so as to fall within the closing words of the particular clause.

¹⁷ *Nordern v Blueport Enterprises Ltd*, above n 4, at 455.

¹⁸ *Oceanic Village Ltd v Shirayma Shokussan Co Ltd*, above n 9, at [55].

[28] If, at trial, the Court concludes the parties did contemplate that Mr Gaur's Company would have the right to operate the only pharmacy in the Centre, cl 17.1 would be in the nature of an exclusion clause limiting the obligation on the Joint Venture Company not to derogate from the grant. The contract is also to be construed having regard to the intention of the parties. There is nothing to suggest in the evidence before the Court that the parties paid particular regard to cl 17.1 or that it was included in the lease as a result of any particular discussions between the parties. It is simply in the lease in its standard form. In these circumstances, it is appropriate to apply the contra proferentem rule so as to adopt an interpretation for the clause that correlates with the presumed mutual intention of the parties.¹⁹ That approach favours the interpretation I have arrived at.

[29] Ms Hall submitted that it would only be in extreme cases or where the act of the lessor makes the premises substantially less fit for the purposes for which they were let that the principle will be applied. She said that this was consistent with the result in *Nordern v Blueport Enterprises Ltd* where the lessor was intending to permit a brothel to be operated in commercial premises.²⁰ In this instance, Mr Gaur's Company is contending that the opening of a new pharmacy in the Centre would have a significant impact on its business.

[30] There is thus authority for the proposition that derogation from grant principles can apply where there is no physical interference with the tenant's premises. They can be applied where the detriment to the tenant is purely economic. They can apply where the detriment to the tenant is significant, even if the original purpose is not wholly frustrated. Whether or not what has happened does amount to derogation from grant in the final analysis is a question of fact and degree.²¹

[31] Depending on what the Court makes of all the circumstances and the particular facts of the case, I consider it would be consistent with the application of that principle for the High Court to grant an injunction if the Court finds that the

¹⁹ *Trustees Executors Ltd v QBE Insurance (International) Limited* [2010] NZCA 608 at [39] per Glasebrook J.

²⁰ *Nordern v Blueport Enterprises Ltd*, above n 4, at 455.

²¹ At 456, citing *Mount Cook National Park Board v Mount Cook Motels Ltd*, above n 3, at 496.

pharmacy premises were let to Mr Gaur's Company on the basis that it would be the only pharmacy in the Centre.

The evidence

[32] My assessment of whether or not Mr Gaur's Company will ultimately obtain the injunction it seeks must necessarily be made without my making findings of credibility in relation to relevant witnesses. Nevertheless, I do not have to accept critically every assertion made on oath in the affidavits. I can reject evidence if I am satisfied there is no credible basis for it when that credibility can be assessed against documents or circumstances which are not in dispute.

Oral representation as to exclusivity

[33] Mr Gaur's Company asserts an agreed right for Mr Gaur's Company to be the only pharmacy in the Centre, firstly on the basis of oral representations made to Mr Gaur when Mr Gaur's Company first became a tenant under the original lease and around the time the new lease was entered into. It is appropriate to look at both situations because all the circumstances relating to the first lease were part of the context in which the current lease was entered into.

[34] Dr Vinod Sharma has also had a central role in key aspects of the commercial arrangements. He was the doctor who established and developed the Mt Roskill Medical Practice, developed the Centre, arranged for his expanded Medical Practice to transfer to that Centre and obtained the tenants who were closely associated with that Medical Practice when it was completed around 2006. Although his family sold an approximately equal share in the Centre to the Patel Family and Consortium through the establishment of the Joint Venture Company in 2012, he retained an indirect interest in it through his involvement with the continuing Medical Practice and as a director of the Joint Venture Company. As a director, he signed the current lease with Mr Gaur's Company.

[35] It is also apparent from undisputed evidence that he was active in promoting to Mr Gaur a proposal for Mr Gaur to be involved in a pharmacy on the Khoobsurat site with one Nikita Mahendra. Mr Pan says that Ms Mahendra introduced him to Dr

Sharma. Mr Pan discussed terms for the sub-lease of the new pharmacy with Dr Sharma. Dr Sharma established the company which is now Mr Pan's Company.

[36] In an affidavit, Mr Gaur says that he and a then partner, Mr Neeten Bhikha who was also a pharmacist, had discussions with Dr Sharma in 2006 when they first considered leasing the pharmacy premises which were to be associated with the new Medical Centre. He says that in those discussions Dr Sharma said theirs would be the only pharmacy in the Centre. Mr Gaur said it was with this assurance that they entered into the lease agreeing to pay rent at \$115,000 per annum plus GST.

[37] Mr Gaur says that Dr Sharma told him in 2012 that his family trust was considering a sale of the Centre and they were looking at a restructuring involving a new organisation acquiring an interest in both the Medical Practice and the Centre. He was told that the new purchaser could be an organisation, East Tamaki Healthcare. The principal of that organisation was Dr Kantilal Patel. Mr Gaur said he shared with Dr Sharma his concern about the sale and the way it might affect the pharmacy because he knew that Dr Kantilal Patel and his son controlled over 20 pharmacies in Auckland. Mr Gaur said he wanted to be sure that his pharmacy was not at risk of having to compete with another pharmacy in the medical centre. He says he raised this concern in the context of being asked to sign a new lease to assist in the sale to the Joint Venture Company. Mr Gaur says he was assured by Dr Sharma and Dr Sharma's brother (who managed the Centre) that the new lease was to give him security, that the pharmacy belonged to Mr Gaur and it would be the only one.

[38] The evidence as to these conversations is strongly denied, firstly by Dr Vinod Sharma. Dr Sharma says that neither Mr Gaur nor Mr Bhikha ever raised the issue of whether they would be the only pharmacy tenant in the Centre. He denied having any conversations with Mr Gaur when the new lease was being discussed and says he left discussions about the new lease to his brother Rakesh Sharma who was the property manager for the Centre. Mr Rakesh Sharma denies ever giving Mr Gaur such an assurance.

[39] Mr Gaur's credibility in relation to these assertions will be an issue which has to be dealt with at trial. It was his evidence that, faced with the threat of another pharmacy on the Khoobsurat site during 2014, he discussed with the Sharmas proposals for him to be involved in a new or extended pharmacy business on the Khoobsurat site.

[40] Mr Gaur says he raised his concerns and objections about there being another pharmacy in the Centre during 2014, in later correspondence and a meeting which took place in December 2014 when Mr Gaur and his lawyer met with Dr Kantilal Patel and his son Mr Rakesh Patel. There is no evidence that, in that correspondence or in meetings, Mr Gaur asserted there had been oral representations that his would be the only pharmacy.

[41] At trial, the Court will also be interested as to why Mr Gaur did consider proposals for being involved in a new pharmacy on the Khoobsurat site if he honestly believed the Joint Venture Company had expressly agreed to his being the only pharmacy in the Centre.

[42] Those issues, in relation to Mr Gaur's evidence, do not provide a sufficient basis on which I can dismiss what he is now saying about oral representations as having no credibility. The history of his dealings with the defendants over the lease of the pharmacy, as described by both sides, suggests he is neither sophisticated nor experienced in dealings over property. He says he did not take legal advice over either of the leases his company entered into. Dr Sharma and Mr Bhikha both apparently did not hold him in high regard because he was not sufficiently "entrepreneurial". The circumstances relating to his lease and the pharmacy were such that one would have expected him to be concerned and to be discussing with the owners his concern about a second pharmacy coming into the Centre. The way he acknowledges he dealt with the situation is not so inconsistent with what he says about the oral representations that I must dismiss the evidence he has given in his affidavits in that regard.

[43] There will also be questions as to Dr Vinod Sharma's credibility on key issues.

[44] Dr Sharma, in his affidavit, says he would never have given Mr Gaur the assurances he describes because he would never give any tenant in the Centre exclusivity and, from a commercial perspective, he needed to obtain the best return he could on his investment as there needed to be flexibility to lease the Centre as he saw fit. He said:

For that reason, none of the leases in the centre have ever contained any exclusivity arrangements. For the same reason, I have also never agreed to any exclusivity arrangements in any of the other commercial properties I have been involved in.

[45] In an affidavit in reply for Mr Gaur's Company, Mr Dev Kant Bhardwaj referred to tentative discussions he had with the Sharma family for a Wellness Centre in part of the Khoobsurat site. In the affidavit he said he had discussions with Dr Sharma's brother in which Mr Rakesh Sharma indicated he would like to be a partner in the potential venture. Mr Rakesh Sharma provided him with a letter summarising the terms on which this new business could take an assignment of the Khoobsurat lease from 1 February 2015. In that letter he said the landlord, in principle, approved the assignment on various conditions. The first of these, in a document annexed to his affidavit, was "[the] business use of the premises will be limited to health, beauty and wellness services that are not in competition with any current tenancies in the building".

[46] When Mr Gaur said he was looking at being involved in a new pharmacy as a way of avoiding the risk of competing with another pharmacy on the premises, he had discussions with Mr Rakesh Sharma over his being involved in that new pharmacy. He received a memorandum of understanding for the opening of a new pharmacy in the Khoobsurat premises. It was clear from the affidavits that Mr Rakesh Sharma was discussing the terms in collaboration with Dr Vinod Sharma.

[47] The first term of the proposed memorandum of understanding was:

- a) A new company will be formed with 50% shareholding owned by Mr Ashok Gaur and 50% by owned by Mr Rakesh Sharma. But since the requirement for opening a pharmacy is that a pharmacist needs to own 51% in the new company, we have agreed that for the official purposes we will allot 51% to Ashok Gaur but we will have a company constitution where it will be very clearly defined that the controlling rights will be retained by Mr Rakesh Sharma. We will create a

company constitution where it will be clearly defined in whatever manner possible that Mr Rakesh Sharma has all rights to control the company even though he holds only 49% shares.

[48] In his affidavit in opposition, Dr Vinod Sharma referred to his receiving an approach from another pharmacist, Mr Shyam Amarsee, around November 2014 about the possibility of opening a pharmacy at the Khoobsurat site. Dr Sharma said he had been told that Mr Gaur had made threats against Mr Amarsee and that Mr Amarsee had given Dr Sharma a letter referring to the threats he had received. The letter was annexed to Dr Sharma's affidavit. What purports to be Mr Gaur's signature is on the copy of the letter annexed to the affidavit. Mr Gaur, in his affidavit in reply, says the letter was not his and he knew nothing of it. He says it was a forgery. To an inexperienced eye, the signature on the letter does appear to be different from that on a lease of 19 July 2012 which everyone agrees Mr Gaur did sign.

[49] I also refer later to the particular arrangements that Dr Vinod Sharma has made with Mr Pan for the new pharmacy. They are so unusual as to raise concerns as to whether Dr Sharma has been honest and forthcoming as to how those arrangements came to be made and just what they are.

[50] An affidavit was filed in response from Rakesh Patel. He confirmed it was his father, Dr Kantilal Patel, who was a director of the Joint Venture Company. Mr Rakesh Patel said that he was the managing director of a company which owns and operates medical centres throughout Auckland and which acquired a 51 per cent shareholding in the Medical Practice known as Mt Roskill Medical Centre through a new entity, Mt Roskill Healthcare Limited. In his affidavit, he says that he and his father did meet with Mr Gaur in about December 2014. He does not say just how Mr Gaur expressed his concerns although he does refer to Mr Gaur telephoning him about the possibility of a new pharmacy opening up on the Khoobsurat site. He says that he was:

... not unsympathetic to Mr Gaur but I explained to him and Mr Parshotam [Mr Gaur's lawyer] that the Joint Venture Company landlord (the first defendant) could not prevent another pharmacy from setting up in the Centre.

[51] That acknowledged response from Mr Rakesh Patel to Mr Gaur was misleading. The Joint Venture Company in this case was in a position to ensure there was no second pharmacy within the Centre. The original lease for Khoobsurat allowed the Khoobsurat premises to be used only for the purpose of a clothing store. The owners could thus have declined consent to a sub-lease of those premises for a different use. The Joint Venture Company could have refused to lease the premises to a new tenant for use as a pharmacy.

[52] Rakesh Patel confirmed that he was contacted by Barfoot and Thompson after it had received a letter from Mr Gaur's lawyer dated 24 July 2015. Mr Parshotam had been corresponding with Barfoot and Thompson since 4 December 2014, indicating Mr Gaur was concerned at the possibility of a pharmacy being set up on the Khoobsurat site and asking for information as to what use was proposed for the site. In his letter of 24 July 2015, Mr Parshotam had referred to Mr Gaur's belief that the Joint Venture Company was proceeding with a pharmacy on the Khoobsurat site, that there had been a recent change of shareholding and directorship in the company Mt Roskill Medical Centre Pharmacy Limited, and a resumption of fit out works within the premises. The letter repeated previous warnings that the Joint Venture Company would be in breach of its obligations under the lease if it proceeded with the lease of these premises for a pharmacy. The letter asked the manager to advise "whether or not the premises are being leased to Mt Roskill Medical Centre Pharmacy Limited".

[53] Mr Rakesh Patel confirms in his affidavit that he instructed Barfoot and Thompson to respond in the way they did. Barfoot and Thompson's response was:

Thank you for your letter of 24 July 2015. As property managers for the Mt Roskill Joint Venture Limited, the owners of the property, we can advise that our client, Mt Roskill Joint Venture Limited, has no knowledge of any pharmacy being established in the current vacant ex-Khoobsurat premises. These premises are subject to an existing lease and the tenants of these premises have not sought any consents from the building owners for any building works or change of use of the premises. We will therefore follow this enquiry through, but as far as the building owners are concerned, there has been no consent for any works or changes to the approved use under the original lease.

[54] In his affidavit, Mr Rakesh Patel says that at that time both his father Dr Kantilal Patel and Dr Vinod Sharma were overseas and he was not aware the Joint Venture Company was in the process of establishing a pharmacy in the ex-Khoobsurat site because the Joint Venture Company had not received any formal request to consent to a sub-lease of the site. On the face of it, this explanation is implausible. Mr Parshotam's letter to Barfoot and Thompson had sufficient information in it to put anyone who received that letter on notice of what was happening. If Mr Rakesh Patel was going to be responsible for responding to it, at the very least he should have checked as to what was happening before telling Barfoot and Thompson how to respond. On present evidence, the more likely inference is that Mr Rakesh Patel instructed Barfoot and Thompson to respond to Mr Gaur in a way that was deliberately misleading

[55] There was also an affidavit in opposition from Mr Bhikha, the pharmacist who had been Mr Gaur's partner when they first began leasing the pharmacy premises in the centre. Mr Bhikha said that he was the managing director-pharmacy services for the Nirvana Healthcare Group of which Rakesh Patel is the managing director. He said that he currently owns or is involved in the management of numerous pharmacies throughout Auckland. Through his involvement with the Nirvana Healthcare Group, Mr Bhikha now has a close association with the Patel family interests who are now partners in the Joint Venture Company. In his affidavit, Mr Bhikha contradicts Mr Gaur's evidence as to what Mr Gaur claims Dr Sharma said to him during discussions over the initial lease of the pharmacy premises.

[56] Mr Bhikha said that when the initial lease was entered into, there were no discussions about exclusivity for the pharmacy. He said he would not have been concerned about exclusivity because it was the location of the pharmacy adjacent to the Medical Practice which would give it an economic advantage.

[57] Having considered all the evidence available through the affidavits and the documents presented with those affidavits, I cannot, at this stage, discount Mr Gaur's evidence that he was told by Dr Vinod Sharma in both 2006 and 2012 that his would be the only pharmacy at the Centre.

Other evidence as to what the parties contemplated

[58] Even if the Court at trial does not accept the evidence of Mr Gaur as to oral representations having been made to him both in 2006 and in 2012, there would still be evidence on which, at trial, the Court could conclude that both the Joint Venture Company and Mr Gaur's Company entered into the lease arrangements contemplating that Mr Gaur's Company would be the only pharmacy operating in the Centre.

[59] Dr Vinod Sharma says that when he established the centre he appreciated the pharmacy's association with the Medical Practice would enable him to obtain a premium rental from the pharmacy. He accordingly decided to invite tenders from pharmacists as to the terms in which they would lease the premises. He indicated there was a strong demand with a number of offers at a level which ensured he would receive a significant premium.

[60] In his affidavit, Mr Bhikha referred to the attractions of the potential pharmacy site associated with the Mt Roskill Medical Practice and Centre. Mr Bhikha says he was well aware from the outset that the new pharmacy would command a rental premium over and above normal market rent "to secure the advantage that the medical centre location provides in terms of the opportunity to secure the prescription and other business of medical centre patients". He said that, following extensive discussions with Mr Gaur, he had offered Dr Sharma to lease the premises at \$115,000 per annum plus GST, the rate at which they initially entered into a lease.

[61] The pharmacy premises were shown on plans attached as a schedule to the original lease and to the new lease. Those plans show the balance of the Centre taken up for non-pharmacy or non-medical related uses. The plans refer to the area occupied by the Khoobsurat site as being for a garment shop. A larger area next to that was shown on the plans as for "Blockbuster Video". At the time the 2006 and 2012 leases were finalised, there was an Indian restaurant in that area.

[62] The plans and the actual structure of the building show the pharmacy as being immediately adjacent to the waiting rooms for the Medical Practice without any wall

or doorway between the premises so that the pharmacy is physically associated with the Medical Practice.

[63] In his affidavit, Mr Bhikha referred to doctors being unable to dictate where a patient takes his or her prescription but said “although, because of its proximity within the medical centre, the new medical centre pharmacy would likely be an obvious choice for patients”. He also said “while pharmacy location is a highly relevant factor in a patient’s choice, matters such as produce range and customer service also affect the customer’s decision-making”.

[64] The new lease negotiated in 2012 is for 15 years. No one disagreed with the evidence from the valuer, Mr Colcord, that the normal term for a lease such as this was six to nine years. At trial, the Court may well conclude that both Mr Gaur and the Joint Venture Company must have known that Mr Gaur would not enter into a 15 year lease or that Mr Gaur would personally guarantee that lease if there was any prospect of a competing pharmacy in the Centre.

[65] Mr Bhikha said in his affidavit that none of the 30 plus leases for the pharmacies that he is currently involved with contain any protection for exclusivity or guarantee that the pharmacy will be the sole pharmacy in their various locations.

[66] Mr Colcord said he had experience in valuing a large number of medical premises across Auckland over quite some years. He was not aware of any purpose built medical centre of this type that included more than one pharmacy.

[67] On Mr Colcord’s evidence, it is rare for there to be more than one pharmacy in a purpose-built medical facility. On Mr Bhikha’s evidence, it is rare for there to be exclusion clauses where landlords expressly agree to there being only one pharmacy on the premises. In combination, their evidence suggests:

- landlords can obtain a premium rental from a pharmacy which is associated closely with a medical practice;

- landlords and tenants recognise that that rental premium is received and paid because of the benefits of the symbiotic relationship that usually exists between the medical practice and the associated pharmacy; and
- in nearly all such situations, the landlord and tenant recognise the true basis and purpose of the contractual relationship and commit to that relationship without there being any express clause in the lease providing for exclusivity.

[68] The Courts have referred to the way the non-derogation principle is applied to ensure there is basic honesty between parties to contractual arrangements. The Court could ultimately conclude that the evidence of Mr Bhikha and Mr Colcord suggests that common honesty, as between landlord and tenant, is usually enough to ensure that when a landlord is obtaining a premium rental from a pharmacy because of its association with a medical practice which is also a tenant, that landlord will not, having obtained that premium rental, then lease other premises in the building to another pharmacy so as to reduce the benefit which the existing pharmacy obtains from its association with the medical practice.

[69] Neither Mr Bhikha nor any other witness for the defendants took any issue with the evidence of Mr Colcord. Mr Colcord gave evidence as to what the current market rental would be for Mr Gaur's Company premises in accordance with the current business use as a pharmacy and, secondly, on the basis of a non-pharmacy use.

[70] He considered market rentals for comparable pharmacy premises within a purpose built medical centre, on a main road location or adjoining a specific GP clinic, were around \$480 per square metre. He considered a current market rate for Mr Gaur's Company would be \$475 per square metre inclusive of onsite car parking, a total of \$55,350 per annum plus GST. That compared to the current contract rental of \$115,000 per annum or \$986.87 per square metre. He said medical uses that are established in these purpose built centres generally have commencing lease terms of six to nine years plus renewals. It was his opinion, given the premises had little or no profile to Richardson Road, it would be difficult to lease them for some use other

than one which could be considered an extension of the existing GP clinic, for example medical rooms for a clinical psychologist, a dermatologist or dental practice. On that basis, he considered a current market rental for non-pharmacy use for the premises would be \$40,790 per annum plus GST.

[71] The uncontested valuation evidence indicates that a very high premium rental is being paid for the pharmacy premises. The Court may well conclude at trial that neither the Joint Venture Company's directors nor Mr Gaur would have thought that there would have been agreement to such a lease term or to the level of rent if it was going to be possible for another pharmacy to be in the Centre competing for scripts from the Medical Practice.

[72] There is thus a strong evidential basis, independent of any discussions which took place between Mr Gaur and Dr Sharma, which could lead a Judge at trial to accept that it was implicit in the lease arrangements between Mr Gaur's Company and the Joint Venture Company that Mr Gaur's Company would be *the* pharmacy operator in the Centre. If the Court accepts that, then for the Joint Venture Company to allow competition within the Centre would derogate from the purpose of the lease in a significant way. That could well lead the Court to grant an injunction when these proceedings go to trial.

[73] Ms Hall submitted that precedent suggests the principle would be applied and an injunction would issue only if the derogation from the purpose of the lease was extreme. She submitted, consistent with the evidence of Mr Bhikha, that in this case the establishment of a competing pharmacy in the Centre would not be extreme because Mr Gaur's Company's lease ensured it would have the right to occupy premises immediately adjacent to the Medical Practice. She was not able or willing to acknowledge or concede that, given the plans, the landlord would be obliged to ensure there was physical access from the Medical Practice's waiting room directly to the pharmacy. It was however apparent from the plans that patients wanting to take a script to the new pharmacy would have to exit the medical rooms, walk across a small car parking area to Richardson Road, briefly walk along that road and just around the corner to the entrance to the new pharmacy on the Khoobsurat site, a total of approximately 80 metres.

[74] At this stage, I am not willing to accept the location of the new pharmacy will detract from the application of derogation from grant principles. It is within the Centre. The new pharmacy would still be closely associated with the existing Medical Practice. I note that it is still physically proximate. It also seeks to be associated closely by name. The medical centre promotes itself as the Mt Roskill Medical and Surgical Centre. The new practice seeks to align itself with the medical centre. The company's name is Mt Roskill Medical Centre Pharmacy Ltd.

[75] The physical proximity of the new medical pharmacy is likely to be a greater threat if patients of the Medical Practice choose to park on either Richardson Road or White Swan Road, so that they necessarily walk past the Khoobsurat site to reach the medical rooms or if they have to walk past the site to reach their vehicle after leaving the medical rooms. It would seem that is quite likely given the evidence of the valuer, Mr Colcord. He says there are limited car parks available directly outside the premises, with the majority of car parks within the basement which was off the White Swan Road frontage.

[76] It was also submitted the new pharmacy is likely to have little impact, because only a proportion of patients who use the Medical Practice presently choose to take their scripts to the existing pharmacy.

[77] Dr Vinod Sharma said in his affidavit that, having seen Mr Gaur's evidence as to the number of scripts which come to the pharmacy from the Medical Practice, it would appear that only one-third of all scripts it issues are presented to Mr Gaur's Company.

[78] I am not willing to accept that bald assertion on the evidence as it currently stands. Dr Sharma has provided no information in his affidavit as to how he arrived at that proportion, to what extent he established the total number of scripts issued by the Mt Roskill Medical Centre and the period to which it relates.

[79] In contrast with Dr Sharma's affidavit, Mr Gaur provided the complete annual accounts for his company, accounts prepared by reputable chartered accountants who are known as specialising in pharmacy accounting work, Moore

Stephens Markhams. Accounts for the year ended 31 March 2015 showed that 95 per cent of the company's income was from script funding. Mr Gaur said, of those scripts, nearly all were generated from the doctors at the Medical Practice. By way of example, he printed a summary of all scripts filled during August 2015. It showed 7,903 new scripts were filled that month, of which over 95 per cent came from doctors at the Mt Roskill Medical Centre.

[80] In a reply affidavit, Mr Gaur noted that Moore Stephens Markhams, in a report for the new pharmacy, had used its specialist knowledge to estimate what the total script output from the Mt Roskill Medical Centre would be, at around 320 scripts per day or 7,000 scripts per month. Mr Gaur asserted that, based on those figures, his pharmacy was currently filling most of the scripts written at the Medical Practice. In August 2015, 7,520 scripts had come to his pharmacy from the Medical Practice.

[81] The pharmacist associated with Mr Pan's Company, Mr Tzong-Horng Pan, has sworn an affidavit in opposition to the application. He asserts that he did not see himself as being in competition with Mr Gaur's Company.

[82] Accompanying Mr Pan's affidavit were financial forecasts prepared by Moore Stephens Markhams for the year ending 30 June 2016. With the report was a statement of assumptions. These included:

The projections have been based on the anticipated financial performance of the pharmacy, relevant information provided by the owners and other information we have been able to gather from industry-related data. We note that the pharmacy will be situated in a competitive area.

...

The pharmacy is located in a medical centre. There are 5 fulltime equivalent (FTE) doctors. Assuming the doctors each write 28 scripts of an average of 2.25 line items per day, potential annual line output from the doctors is 100,000. If the pharmacy obtains 50% of the client base, script numbers per day would be 160 maximum.

...

The rent free period of four months has been taken into account with the first regular monthly rent payment of \$2,750 excl. (\$30,000 p.a. plus 15% of OPEX) made in November 2015.

[83] The information in the accountant's report raises significant issues as to Mr Pan's credibility in relation to his assertion that he is not intending to compete for scripts from the Medical Practice patients. The information also suggests that those specialist pharmacy accountants consider there is some significant advantage to the new pharmacy in being situated, as they describe it, "in a medical centre". The accountants assume the new pharmacy will obtain 50 per cent of the scripts from the Medical Practice.

[84] The accounts for Mr Gaur's Company showed that it operates with a small margin of profit. For the 2015 year, after allowing for salaries and wages (at \$203,137), there was a deficit before income tax of \$15,288. In the 2014 and 2013 years, with wages and salaries around \$185,000, the net surplus had been \$28,000 and \$77,000 approximately.

[85] On the evidence as it stands, it is likely the opening of a second pharmacy would have a significant financial impact on the profitability of Mr Gaur's Company and his existing pharmacy.

[86] Mr Pan says that neither the Sharma Family nor the Patel Family have any involvement in the new pharmacy or his company. He said the intended lease of the premises is on strictly commercial terms. He also said in his affidavit that he had no knowledge Mr Gaur was asserting a right to have the sole and exclusive pharmacy in the centre until his company was served with the current proceedings in September 2015.

[87] Mr Pan and his company were going to acquire their lease of the Khoobsurat premises by way of a sub-lease. The terms of that sub-lease were set out in a deed of sub-lease which had been signed by a director of Khoobsurat Collections Ltd, with his signature witnessed by Mr Rakesh Sharma, and by Mr Pan as director of Mt Roskill Medical Centre Pharmacy Ltd and as guarantor. Dr Vinod Sharma's brother, Mr Ashok Sharma, signed for the Joint Venture Company. It was a term of the deed of sub-lease that the premises would be used for a pharmacy, which constituted a change of the business use of the leased premises. Clause 2.2 of the sub-lease agreement states:

The parties agree and acknowledge that the Head Landlord reserves the right to withdraw for any reason its consent to the sub-lease and to the change of business at any time. In the event the Head Landlord exercises this right, neither the sub lessee nor the sub lessor shall have any claim against the head landlord.

[88] The sub-lease was for one half of the Khoobsurat premises. The term was otherwise for just one year with a right of renewal for a further year. The annual rental was \$30,000 plus GST.

[89] There is also an issue as to Mr Pan's credibility given he did not refer in his affidavit to his business having a four month rental holiday, and to Moore Stephens Markhams assuming with its report that "the owners" would be contributing \$90,000 towards start-up costs. Mr Pan has referred to his borrowing \$40,000. The terms of the consent to a sublease, which would effectively enable the Joint Venture Company to terminate the use of the premises for a pharmacy at any time and for the lease to be for an initial period of just one year, seem to be highly unusual. They have understandably created a suspicion in Mr Gaur's mind as to just who is behind these arrangements and who is ultimately going to benefit from them.

[90] On the undisputed evidence of Mr Gaur, Dr Vinod Sharma established the company Mt Roskill Medical Centre Pharmacy Limited. A pharmacist associated with Dr Vinod Sharma, Ms Nikita Mahendra, was named as director and shareholder. Mr Pan says that she had introduced him to Dr Sharma in April 2015. He says that she is one of the people to whom the Moore Stephens Markhams report is addressed. Mr Pan says this was because she attended an initial meeting with him because of her earlier involvement. If that is so, it is somewhat surprising that after that meeting Moore Stephens Markhams still assumed that "the owners" would be contributing \$90,000 towards the business and addressed their report to Ms Mahendra and Mr Pan.

[91] It is also significant that Mr Pan claims to have been unaware of Mr Gaur's assertions that he was entitled to be the only pharmacy in the Centre. If this is true, the directors of the Joint Venture Company must have concealed from him the correspondence that Mr Gaur's solicitors had sent to the property managers, Barfoot and Thompson, putting them on notice that Mr Gaur claimed they could not allow

another pharmacy to operated in the centre and threatening to obtain an injunction restraining them if they attempted to do so. If Mr Pan's evidence is to be believed, Dr Sharma has induced him to take up this lease and put money and effort into establishing a new pharmacy through a misrepresentation by omission. At the same time, it would appear the Joint Venture Company has done that while reserving for itself the right to withdraw at any time its consent to Mr Pan's use of the Khoobsurat site as a pharmacy.

[92] All this evidence provides a sufficient evidential basis for me to conclude that the Court could well conclude, after a trial, that the opening of a new pharmacy, as permitted by the Joint Venture Company, would significantly derogate from the purpose of the lease between the Joint Venture Company and Mr Gaur's Company to an extent which would justify the grant of an injunction.

Balance of convenience

[93] I accept that the evidence is sufficient to establish that the opening of the pharmacy would be likely to have an immediate and significant financial impact on the income which would be generated from scripts out of the Medical Practice. That is likely because of its location in the Centre. It is also likely because of the way patients may associate the new pharmacy closely by name with the Medical Practice. There must be a real prospect of this given that Mr Pan's Company's name is Mt Roskill Medical Centre Pharmacy Ltd.

[94] Any promotion of the new pharmacy under that company's name is likely to suggest to patients that the Medical Practice is no longer committed to a close association with Mr Gaur's Company in the way it promoted in the past, partly through its physical proximity and access from the waiting room to his pharmacy but also through the way it referred to the pharmacy on its website. A printout from the website for the Mt Roskill Medical Centre attached to Mr Gaur's evidence of 2 September 2015 includes the statement:

As well as our six GPs, we provide accident and emergency care, surgical procedures, blood testing facilities, x-ray facilities, and our own in-house pharmacy, plus a host of high qualified specialists.

[95] I consider that if the new pharmacy were to open there would be real potential for a significant loss in terms of income to the existing pharmacy and significant damage to that company's reputation, damage which would be difficult to compensate by way of damages.

[96] Dr Pan has provided evidence in his affidavit as to the income he has lost from locum work that would otherwise have been available to him through personally working on the fit out of the new pharmacy since May 2015. He says he has spent approximately \$40,000 in setting up the pharmacy, funds which he has borrowed. He has entered into certain contracts for the ongoing supply of telephone and internet services, an EFTPOS machine and paper towels. He should, however, be able to take advantage of this investment of time and money if ultimately his company and the Joint Venture Company are successful in these proceedings and Mr Gaur's Company fails to obtain the injunction which it will be seeking.

[97] Given the Joint Venture Company also reserved for itself the right to terminate the use of the premises as a pharmacy at any time, it would appear Mr Pan was willing to assume the risk that he may not be able to use these premises as a pharmacy for the whole of the first year of the lease. If the Joint Venture Company induced him to enter into the lease concealing from him the correspondence it had received from Mr Gaur's solicitor, Mr Pan and his company might be able to recover whatever losses they do ultimately suffer through their investment in the new pharmacy in a claim for misrepresentation against the Joint Venture Company. If Mr Pan did know of the protests that were being made on behalf of Mr Gaur, then he must have been willing to assume the risk that, despite his initial investment, he might ultimately not be able to operate a pharmacy in the premises. It also appears from the Markhams report that he will be entitled to a four month rent holiday. It is not clear when that holiday will begin. Mr Pan has not asserted that, if an injunction is granted, he will still have to pay rent on his lease.

[98] Ms Hall acknowledged that the consequences for the Joint Venture Company if an interim injunction is granted would not be as serious as for the new pharmacy company and Mr Pan. Although there could be a loss of income, it is not clear what that would be.

[99] Ms Hall suggested there would be a continuing detriment to the Joint Venture Company in that the reputation of the whole site suffers through the Khoobsurat corner site of the centre being left vacant. That, however, has been the situation since April 2014 when the previous business failed. It would also appear not to have been of major concern given I was told, that the Joint Venture Company anticipates keeping the balance of the Khoobsurat site available for the new pharmacy if Mr Pan wants it. It would thus appear there is no immediate prospect of that part of the premises being leased to anyone else in the short term.

[100] It was submitted for the defendants that it would be easier to compensate Mr Gaur's Company for any loss if an interim injunction is refused but Mr Gaur's Company is ultimately successful in obtaining an injunction. It was submitted that, given the plaintiff's level of income has been reasonably stable, it would be relatively easy to calculate any loss that has eventuated with the competition from the new pharmacy so that such a loss could then be compensated for through an appropriate award of damages. As already stated, I reject that submission because I consider there would also be damage to the plaintiff's reputation and an ongoing impact on its business even if the new pharmacy were to be closed down.

Overall justice

[101] It was also submitted that the overall interests of justice militated against the grant of an interim injunction. Ms Hall submitted that Mr Gaur had known since July 2014 that the Joint Venture Company was looking to establish a second pharmacy in the Khoobsurat premises, had effectively accepted it was entitled to do that through involving himself in potential proposals to develop a pharmacy on the Khoobsurat site, knew the Joint Venture Company had partitioned off half the Khoobsurat site in November 2014 with a plan to have a pharmacy developed on the site and had delayed in effectively raising his opposition to the proposals until July 2015. By that time the Joint Venture Company had agreed to Mr Pan developing a pharmacy on the site and he had begun the work and investment associated with this.

[102] Mr Gaur said that in July 2014 Dr Vinod Sharma told Mr Gaur he was wanting to find another tenant for the Khoobsurat space and suggested he should set

up another pharmacy there with Dr Sharma's friend, Ms Mahendra. Mr Gaur says he told Dr Sharma he was not interested. Dr Sharma then said that if Mr Gaur did not take the space, Dr Sharma would do so and another pharmacy might be opened in this space. Mr Gaur said that, under pressure, he told Dr Sharma he would consider the possibility. A few days later, Dr Vinod Sharma told him he had set up a company, the same name as Mr Pan's Company (Mt Roskill Medical Centre Pharmacy Ltd). Ms Nikita Mahendra was then to be the sole director and shareholder. Mr Gaur was told he would have a 40 per cent share in the company. That was unacceptable to Mr Gaur, as was the proposal put to him by Rakesh Sharma for them to be involved in another pharmacy on the Khoobsurat site, as referred to in the draft memorandum of understanding which I have already discussed.

[103] I do not find Mr Gaur's consideration of a potential involvement in a new pharmacy business on the Khoobsurat site good reason to deny his company the interim relief it seeks. I am not able to discount his evidence that he only considered this option because of Dr Vinod Sharma's threat that, if he did not take the space, it would be made available to another pharmacy tenant. If, as I have found is a reasonable prospect, the Court finds the use of the Khoobsurat premises as a pharmacy would have involved an unlawful derogation of grant, this pressure was effectively to do something which was in breach of the contractual arrangements between the Joint Venture Company and Mr Gaur's Company.

[104] Dr Sharma denies applying pressure to Mr Gaur in this way but the application of such pressure would be consistent with the terms set out in the proposed memorandum of understanding which Mr Rakesh Sharma presented to Mr Gaur.

[105] That memorandum of understanding would have required Mr Gaur to be in a 49/51 per cent partnership with the Sharmas in a new pharmacy, Mr Gaur to financially guarantee the liabilities of the new pharmacy company, and that company to refund the Sharmas \$87,000 paid out on their guarantee of the Khoobsurat lease.

[106] There is also a plausible explanation for such pressure being applied. At the time the Sharma family sold a half interest in the Centre to the Patel consortium, another of Dr Sharma's brothers, Mr Ashok Sharma, guaranteed the Khoobsurat lease. I infer this would have been done to set a higher value for the Centre on its sale. Khoobsurat had failed and vacated the premises. Dr Sharma's brother, or more probably the Sharma family, was thus liable to the Joint Venture Company for arrears of rent and for continuing rental losses if the Khoobsurat premises could not be re-let.

[107] Dr Patel said that some partitioning work was done in the Khoobsurat premises in November 2014 in the hope that it might be easier to let two smaller spaces. Mr Gaur said he was concerned this work could be associated with a new pharmacy but it cannot be said he stood by and simply accepted the situation.

[108] According to Dr Sharma, Mr Gaur wrote to the prospective pharmacy tenant and told him that he had an assurance from Dr Patel that he would never let another pharmacy open at the address. In letters of 4 and 11 December 2014, Mr Gaur's lawyer wrote to the property managers expressing concern as to the possibility of a new pharmacy operating from the site and inquiring as to the Joint Venture Company's intentions. Barfoot and Thompson responded in a letter of 12 December 2014. They said they had referred the correspondence received to the owners but "have not had a formal response from the joint venture partnership". They then referred to the way Khoobsurat had vacated the premises, its long term lease for use of the site for a clothing shop, its standard rights of assignment and sub-letting, subject to the landlord's approval. They said there had been no request for consent to a change in use or assignment and "that is the current situation". They confirmed they had passed on the correspondence to the Joint Venture Company advising of Mr Gaur's concerns.

[109] With an email of 13 February 2013, Mr Rakesh Sharma sent Mr Gaur a letter addressed to his company, giving him until Wednesday 18 February 2015 to sub-lease the premises, failing which he indicated the Joint Venture Company's landlord would be consenting to a sub-lease of the Khoobsurat premises for use as a pharmacy. The letter states, as part of the background:

As you are aware, the landlord is under an immense amount of pressure to obtain rent from the abovementioned tenant and to keep the building properly leased.

...

We understand that you do not wish the landlord to consent to the business use of the Khoobsurat lease changing to include a pharmacy operation and have threatened us with legal action if such consent is granted.

[110] In a letter of 17 February 2015, in response, Mr Gaur's lawyer stated:

Our client maintains its position that it will oppose the premises being leased to a pharmacy business. Our client has substantial grounds to obtain an injunction if the matter progresses any further.

[111] Mr Gaur says, from that point, matters appeared to calm down and he was told by Rakesh Sharma that the Joint Venture Company had given up the idea of a pharmacy on the site.

[112] There was then correspondence from Mr Gaur's lawyer to the property managers on 24 July expressing concern at the resumption of a fit-out on the premises and Mr Gaur's belief that a new pharmacy was to occupy the site. Mr Gaur's lawyer advised that the Joint Venture Company was still on notice that this would be considered a breach of obligations under the lease. Barfoot and Thompson then responded in the misleading letter of 27 July 2015 in which they stated the owners of the property had "no knowledge of any pharmacy being established in the current vacant ex-Khoobsurat premises."

[113] In a letter of 31 July 2015, Mr Gaur's lawyer advised that he had received information indicating the fit-out was for a pharmacy, the work being carried out on the instructions of Ms Mahendra, and asking for an explanation. Again, there was no response.

[114] The application for an interim injunction was filed on 2 September 2015.

[115] Such delay as may have occurred does not provide sufficient reason to decline relief. The fact the Joint Venture Company consented to the change of use for the premises and actively facilitated the leasing of the premises for a pharmacy,

knowing this was strongly objected to by Mr Gaur's Company, and provided misleading information in response to inquiries that were properly made as to what was happening, favour the grant of interim relief.

[116] Ms Hall also submitted that there was inadequate information provided in the affidavit to indicate Mr Gaur's Company's undertaking as to damages would be of sufficient value. I reject this. Mr Gaur has provided the 2015 accounts for Mr Gaur's Company. Given the income which is taken from the business to pay a salary for Mr Gaur and others, the company should have the means to meet any likely liability it might have as a result of the undertaking it has given. The investment which Mr Pan has made in fitting out the premises will not be lost if ultimately the Court finds he is able to proceed with the lease. The company should be able to meet any liability arising from its undertaking if it is required to do so.

Conclusion

[117] I find the plaintiff is entitled to the interim injunction it seeks. Because the third defendant is now in liquidation, the injunction is sought as against only the first and second defendants. Mr Goodall advised that he was not seeking an interim injunction which would restrain the first defendant from sub-letting the Khoobsurat premises to any party for use as a pharmacy, given that it was only an interim injunction that was being sought at this stage. He accepted the Court should deal solely with the specific situation which is presently before it. I accordingly make orders in terms of the draft orders dated 1 October 2015 filed and provided to the Court. In accordance with the draft orders, costs are reserved.

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