

In the District Court of New Zealand, Auckland Registry

IN THE MATTER OF THE Contractual Remedies Act 1979, Property Law Act 2007,
Criminal Procedure Act 2011



Tomachi Corporation versus First CBD Limited

Tomachi Corporation versus Barfoot & Thompson

BETWEEN

Thomas Bieder Atkinson, of Auckland, Professional
Drummer, Website Consultant, Law Enthusiast
Complainant Prosecutor

AND

Paul Chen, First CBD, **Defendant**
Breach of Contractual Remedies Act 1979

AND

Steve Sampson, of Auckland, Head of Asset Management,
Barfoot & Thompson, **Defendant**
Application for relief against cancellation, Section 253
Property Law Act 2007

Proposed Charges

Paul Chen

**Misrepresentation of facts in a contract, and seeking damages for
misrepresentation of the bond required**

(Section 6 Contractual Remedies Act 2007)

Private Prosecution

Private Prosecution

Between:

Thomas Bieder Atkinson - Complainant and Private Prosecutor

International Drummer, Recording Artist, Web Designer, Cannabis Law Reform Enthusiast

tom@funk.co.nz

0212576422

Suite 6734, PO Box 83000, Johnsonville, Wellington 6440

And:

Paul Chen - Defendant

Landlord and owner - 26 Wyndham St, CBD, Auckland. Licensed under the REAA 2008

paul@parnellrealestate.co.nz

0212945508

Parnell Real Estate, Shop 2/99 Parnell Road, Parnell, Auckland

Steve Sampson - Defendant

Head of Asset Management, Barfoot and Thompsons Commercial property management division, property manager for 26 Wyndham St.

s.sampson@barfoot.co.nz

09 3062080

3/50 Kitchener Street, Auckland Central

Rachel Beer - Defendant

Asset manager, Barfoot and Thompsons Commercial property management division

r.beer@barfoot.co.nz

022 639 0181

3/50 Kitchener Street, Auckland Central

Witness

Chris New – Witness

Recording engineer, landlord liason and person we nominate to sign the lease

chrisnew.muso@gmail.com

021 132 1162

The L@b, Level 2, 26 Wyndham St, Auckland

Statement of Fact – Regarding Paul Chen

[1] I, Tom Atkinson, on my own volition did first visit the 26 Wyndham st address and meet with Paul Chen at 26 Wyndham st on Wednesday 7th September. I discussed with him the possibility of setting up a virtual reality lounge, and other potential uses for the office, such as recording studio and offices. This fact could be proven from phone records, and is included to draw attention to the large time period involved, and the fact the building was empty for a long period.

[2] Later over September, October and November, I met with and formed a team of creative people built up from photographers, designers, audio engineers and producers, a sales person who all planned to lease the space together and create a startup company to be called Raven Arts Ltd. We kept in contact with Paul, and it is my understanding that on many occasions we were able to tell him we were very keen and checked to see if the space was still available. This process took considerable time for all involved but it resulted in the framework for a very cool startup idea we'd call Raven Arts Ltd. Logos, websites, and process diagrams were drawn up.

[3] On 28 September, Chris New, already a tenant of the building trading as "The L@b" recording studio, was chosen as the landlord liason who would put his name on the lease on behalf of the group. Chris informed Paul of our desire to take the 1 year lease.

[4] On 29 September, a PDF file called "Agreement to Lease - suite 5 - 26 Wyndham st.pdf" which was to be our draft copy of the lease agreement was created using a TOSHIBA e-STUDIO3555C. This shows some acknowledgement by Paul Chen and First CBD as they moved to transact the lease.¹

[5] On 30 September I was able to borrow Chris New's set of keys in order to begin to move some items into the building early – as I understand it this was done with the landlords permission and knowledge aiming for a 1 December start date on the lease, via verbal agreement. This would be one or two days early before the first payment.

[6] On 1 December Our group paid the deposit of \$3,189.33 in full. A panaramic image show was taken.²

[7] On 2 December the payment was somehow unexpectedly returned in full.³

[8] On 3 December Chris met with Paul to sign the lease. Only one copy was signed before it was ripped away, without a chance to photograph or make a second copy. I believe it is the same contract as that included with this document, with the same \$3,189.33 deposit amount and it being a 1 year lease etc.

[9] Hours later Chris became aware that Paul now wanted \$10K since our company was not fully formed yet, and as we had no legal entity, intended to sign as a personal liability. It is my position that this is a breach of contract.

¹ 6. Agreement to Lease - suite 5 - 26 Wyndham st.pdf – written by Paul Chen

² 5d. IMG_1877 studio wideshot thursday 1 dec 12.12pm.JPG

³ 8. 38-9018-0186297-00_06Dec Raven Arts Bank Ac.xlsx.pdf – Kiwibank

[10] Section 4 of the Contractual Remedies act relates to statements made during negotiations for a contract, and it states: “whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or whether, if it was so made or given, it constituted a representation or a term of the contract; or whether, if it was a representation, it was relied on”. My position is that – yes – we did rely on such statements (affirming the likelihood of signing) and such promises during negotiations, in regards to actually moving in and acquiring copies of the keys.

[11] Section 5 of the same act states: “A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.”. My position is the Paul did affirm the contract, and that my group Raven Arts did not make any misrepresentation about our company structure and intended use of the building in our dealings with First CBD.

At the time our website carried a description of our intended use of the building as:

Raven Arts Is A Cutting Edge Full Service New Media Creative Agency And Production House In Auckland. Audio, Video, Events, Games, Augmented Reality, Animation & CGI, Home Automation, Still Photography, Network Security, Business Mentoring, Artistic Consulting, Network Marketing, Equipment Hire & Sales, Talent, Website Design Build, Mobile App Dev, Interactive Installations, And Generally Speaking, Stuff That Is Super Awesome Fun Stuff. ⁴

[12] If any misrepresentation can ever be shown somehow, then it would need to be put to the test set out in section (4)(b)(i) which states: “a party may exercise the right to cancel if, and only if,— the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,— (i) substantially to reduce the benefit of the contract to the cancelling party; or (ii) substantially to increase the burden of the cancelling party under the contract; or (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for. In order to pass this test surely the landlord would need to provide somewhat greater detail than the following vague statement via email:

- a. *“The reason the original lease did not proceed was the uncertainty of whom the landlord was dealing with , in that there was no legal entity to take the lease and a lot of uncertainty as to who were the actual lessees”*
– Steve Sampson via email **5 December** ⁵

[13] Any uncertainty about who the lessees are, was unfounded. A core of about 4 to 6 directors would be stable and unlikely to change in the first year.

[14] The office vacancy being filled by Raven Arts is unlikely to have reduced the land owners benefit from the tenancy, if anything I argue that it would increase the value of the tenancy for the following reasons:

- a. I really like the space. Paul first showed it to me on 7 September – a long time ago. It’s very good to have tenants that appreciate the space because they will be very well behaved and look after it and always pay the rent on time. My last tenancy lasted 18 years and I never once missed

⁴ 11. RavenArtsStockOptionsContract.docx

⁵ 1. Email full headers – written by Steve Sampson

a rent payment, in total putting through over \$390,000 over the 18 year period from 1998.

- b. Having a tenant that is often in the office during the evenings is good for security and reduces fire risk
- c. The location synergises with my interests and is noisy and vibrant at night time.
- d. Would other tenants be able to accept the night time noise?
- e. Considerable sound pollution already exists in the area, as two bars also occupy the building with Ding Dong bar in the basement, and Eight bar right underneath us at level 1. Bars are intensely noisy businesses – with drunken bar goers often sitting on the steps to the office. This is no concern for me and in fact makes me feel at home, in theory I would be willing to pay a higher price rental for this office if I can make sound after hours.
- f. I plan to upgrade security. I have my own fully wireless GSM alarm system + motion sensors + distributed webcam software etc.
- g. I run a web consultancy: <https://tomachi.co/> – this business use is in line with the business use on the lease agreement i have, and may eventually employ others.
- h. I plan to run some small training seminars on how to code at some stage.

[15] This may be a breach of Section 5: A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract. It is my position that whether or not Paul Chen had any idea of the nature of our group, it would have been reasonable to have honoured his stated intention to sign or provide in written form a detailed description the basis for the decision.

[16] Under section 8 - Rules applying to cancellation, the 24 hours I was provided to move my belongings out of the building was unreasonable. The rules state: (1) The cancellation of a contract by a party shall not take effect— (a) before the time at which the cancellation is made known to the other party; or (b) before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, an intention to cancel the contract, if— (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or (ii) the other party cannot reasonably expect to receive notice of the cancellation because of that party's conduct in relation to the contract.

Statement of Fact – Regarding Barfoot & Thompson

[17] On 6 December, while not fully aware of her intention to cancel the contract, I receive a call from Rachel Beer who wishes to meet with me at 2pm to discuss the lease. I am hopeful some kind of amicable agreement can be reached, whether it be to take on the one year lease myself, or pay for a two week grace period, but instead am greeted with full-

on non-negotiable eviction without basis given verbally. An audio recording of this warning exists, supplied on USB key. ⁶

[18] On 7 December, at 05:38 am, I point out via email to Steve that Under the Property Law Act 2007 (the Act) a lease can be cancelled if the rent has been in arrears for not less than 10 working days or if the tenant has breached some other covenant or condition of the lease. However neither conditions appeared to have been met.

[19] On 7 December, regardless of 10 days or notice of breach of covenant, a trespass notice was issued at 12 pm midday – seemingly as a knee-jerk reaction – which has utterly prevented me from executing an orderly pack down, which at that stage I had not even begun yet. It is unclear what purpose this trespass notice could serve, my guess is to “send a message”. Frankly there are better ways, and I was always keen to talk about the situation, mostly paying for a grace period. Normally it takes 90 days to cancel a lease so 90 days would seem to be a suitable resolution, and more lucrative for the landlord.

[20] I was present when this trespass notice was activated, and called 111 emergency to report the unreasonable notice period, generating Q80 reference ID TFBZ22 and speaking with officer CLER89.

[21] On 7 December, at 3:07pm I send an email with subject *Re: An offer of resolution* which is an offer of resolution in good faith, where I suggest that my company Tomachi Corporation take the lease and pay triple rate (\$4,160.01) for the first three months, or alternatively whether I could please have 2 weeks to pack out. No response was received to this offer. This offer is included. ⁷

[22] Out of desperation to get access to some musical equipment for a paid performance on Friday 9 December, I began to violate the what I considered to be a potentially invalid trespass notice in order to attempt to get the equipment I need for the job. I was not successful and you can see this evidentially in the video supplied on USB key. ⁸

[23] I received bruising to my arms after being arrested twice on Friday. ⁹

⁶ 2. Audio-Recording-of-Rachel-Beer-r.beer@barfoot.co.nz-6-December-2016.m4a (m4a Audio recording supplied on USB key)

⁷ 7. An offer of resolution.pdf – written by Tom Atkinson

⁸ 4. MOV no crash setup CPO Fri 9.mov
(mov Video Recording supplied on USB key)

⁹ e. IMG_1947 fresh bruises.JPG

Proposed Damages or Remedy

Application for Relief against cancellation of lease when lacking basis of for breach of covenant or condition under Section 253 Property Law Act 2007

[24] I simply wish to be treated with respect, which means to: a) most fully and thoroughly know and understand completely the reasons for this lease cancellation, b) to have the trespass notice removed, and c) be fairly permitted reasonable access to pack up and remove my equipment in my own time.

[25] I understand the damage that I did at Ding Dong bar may not be considered reasonable damages to transfer from myself to the defendant, however in light of the needless trespass notice status feel it appropriate response to an illogical ban on access to the building.

[26] If this respect that I ask for in points 24 and 25 above is not possible then I wish to have my costs covered:

- a. \$450 for moving trucks;
- b. \$1,500 in lost income over 21 days;
- c. \$50 destroyed black Versace shirt, and;
- d. \$250 court costs.
- e. \$120 confiscated medical cannabis
- f. **TOTAL DAMAGES: \$2,370**

Application for relief against cancellation of lease

Under section 253 I can apply for relief against cancellation of lease for breach of covenant or condition. I ask for approximately 10 days.

(1) All or any of the following persons may apply to a court for relief against the cancellation, or proposed cancellation, of a lease on the ground of a breach of a covenant or condition of the lease: (a) the lessee: (b) a mortgagee of the leasehold estate or interest: (c) a receiver appointed in respect of the leasehold estate or interest: (d) if 2 or more persons are entitled to the leasehold estate or interest as joint tenants, 1 or more of those persons on behalf of the other joint tenants.

(2) If an application made in accordance with subsection (1)(d) is not made by all of the joint tenants, the application must be served on every joint tenant who is not already a party, unless the court orders otherwise.

(3) Relief may be sought in— (a) a proceeding brought by the lessor for an order for possession of the land; or (b) a proceeding brought for the purpose of seeking the relief.

(4) A proceeding referred to in subsection (3)(b) must be brought— (a) before an order for possession of the land is made in a proceeding referred to in subsection (3)(a); or (b) if the lessor has peaceably re-entered the land, not later than 3 months after the date on which the lessor peaceably re-entered the land.

(5) Subsection (4)(b) is subject to section 254.

254 Mortgagee or receiver may apply for extension of time for bringing proceedings

(1) This section applies to a mortgagee of a leasehold estate or interest, or a receiver appointed in respect of that estate or interest, who has been prejudiced— (a) by not being served under section 249 with a copy of a notice of intention to cancel the lease that is required to be given under section 245 or 246; or (b) by not being served at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with the relevant section).

(2) A person to whom this section applies may apply to a court for an extension of— (a) the time specified in section 253(4)(b) for the bringing of a proceeding for relief against the cancellation, or proposed cancellation, of the lease; or (b) the time within which to make an application for relief in the lessor's proceeding for an order for possession of the land.

(3) The court may grant the application for an extension of time on any conditions that it thinks fit.

Signature:



Date: **13/12/16**

Tom Atkinson, **Complainant Prosecutor**

To the Respondant

This document notifies you that you must file in this registry of the court a statement of defence to the plaintiff's claim (a copy of which is served with this notice). You must do this within 25 working days after the date on which you have been served with this notice. If you do not, the plaintiff may at once proceed to judgment on the plaintiff's claim, and judgment may be given in your absence.

If a trial of the proceeding is necessary, it will be held in this court at Auckland at a time to be fixed by the court.



Signature:

Date: **13/12/16**

Tom Atkinson, **Complainant Prosecutor**

If you file a statement of defence in the court, you must also provide the applicants with initial disclosure of documents in accordance with rule 8.4.

If you file a statement of defence in the court, you will be notified of the date and time of the first case management conference.

The purpose of the conference is to assist the parties in the just, speedy, and inexpensive determination of the proceeding, to make directions as to the conduct of the proceeding, and, where practicable, to make interlocutory orders. The parties will also be assisted to identify, define, and refine the issues in dispute.

You must prepare for and attend the first case management conference. You will be expected to have discussed with the applicant the matters set out in Schedule 5 of the High Court Rules. You or your solicitor must file a memorandum relating to the procedural matters set out in rule 7.3 of the High Court Rules.

Date: / /
(Registrar/Deputy Registrar*)

*Select one.

Note: Please carefully read the memorandum attached to this notice.

Memorandum to the Respondant

Advice

Although you do not have to employ a solicitor for the purpose of this proceeding, it is recommended that you consult a solicitor about this matter immediately. However, a company or other corporation that wants to defend this proceeding or appear at any hearing must consult a solicitor immediately because—

- (a) it can only carry on a proceeding in the court by a solicitor; and
- (b) it cannot appear to conduct a proceeding except by counsel (unless there are exceptional circumstances).

Legal aid

If you cannot afford to meet the cost of the proceeding, you may be entitled to assistance under the Legal Services Act 2011.

The plaintiff has applied for legal aid for the purpose of this proceeding.

Statement of defence

If the last day for filing your statement of defence falls on a day on which the registry of the court is closed, you may file your statement of defence on the next day on which that registry is open.

In calculating the time for filing your statement of defence you must disregard the period that commences with 25 December and ends with 15 January.

If you file a statement of defence, you must serve a copy of it on the applicants who have given an address for service. This must be done within the same period of time you have for filing the statement of defence.

Counterclaim

If you have a counterclaim against the plaintiff, you must file a statement of that counterclaim in the registry of the court, and serve it on the applicant and on any other person against whom the same claim is made. This must be done within the same period of time you have for filing a statement of defence.

Witnesses

Summonses for the attendance of witnesses will be issued on application at the registry of the court.

Registry hours

The registry hours of the court are from 9 am to 5 pm, except on court holidays.

Disclosure

List of Documents Relied On

1. **Email** full headers – written by Steve Sampson
2. Audio-Recording-of-Rachel-Beer-r.beer@barfoot.co.nz-6-December-2016.m4a
(**m4a** Audio recording supplied on USB key)
3. MOV Tom Atkinson shows the space on 6-12-16 at 5.43 PM.mov
(**mov** Video Recording supplied on USB key)
4. MOV no crash setup CPO Fri 9.mov
(**mov** Video Recording supplied on USB key)
5. Gallery of images of S5 space after occupation.
(**JPEG** Images supplied on USB key)
 - a. IMG rotototom.png
 - b. IMG_1791 3 rack interface.JPG
 - c. IMG_1796 mic breifcase.JPG
 - d. IMG_1877 studio wideshot thursday 1 dec 12.12pm.JPG
 - e. IMG_1947 fresh bruises.JPG
 - f. IMG_1964 bruise arrest.JPG
 - g. IMG_1966 ripped shirt.JPG
6. Agreement to Lease - suite 5 - 26 Wyndham st.**pdf** – written by Paul Chen
7. An offer of resolution.**pdf** – written by Tom Atkinson
8. 38-9018-0186297-00_06Dec Raven Arts Bank Ac.xlsx.**pdf** – written by Kiwibank
9. charging-document-20161212-Paul-Chen.**doc**
10. charging-document-20161212-Steve-Sampson.**doc**
11. RavenArtsStockOptionsContract.**docx**