IN THE COURT OF APPEAL OF NEW ZEALAND 22/4 C.A.22/93

BETWEEN BANK OF NEW ZEALAND

Appellant

399

AND SCOTTWOOD CHARITABLE TRUST

Respondent

BETWEEN BANK OF NEW ZEALAND

Appellant

ROBIN FRANCIS MURRAY and RAEWYN MARGARET MURRAY as Trustees of the R F MURRAY FAMILY TRUST

Respondents

Coram: Gault J
McKay J
Fisher J

Hearing: 18 and 19 April 1994

Counsel: C S Chapman and J O'Dea for Appellant
A L Hassall QC for Respondents

Judgment: 19 April 1994

JUDGMENT OF THE COURT DELIVERED BY GAULT J

The Bank appeals against the grant of interim injunctions restraining its sale as mortgagee of two tavern properties. It is the Bank's case that in 1984 it agreed to finance the purchase by the Scottwood Charitable Trust of the Glenbyre Tavern in Christchurch and the purchase of the Golden Mile Tavern also in Christchurch by

the R F Murray Family Trust. The financing was by way of off shore loans of sums yielding respectively $NZ600,000 and $NZ500,000. Mortgages were executed in favour of the Bank as security. The Bank agreed to manage the currency risks but after a period the borrowers retained the services of a separate foreign exchange management company.

By May of 1987 the liability of the borrowers to the Bank was said to have increased substantially due to adverse currency movements. There were three other enterprises with which Mr R M Murray was associated in similar positions and the total indebtedness claimed by the Bank was $NZ2.7 million. By re-arrangement the debts to the Bank were consolidated through a shelf company John Stuart Ltd to which the Bank made available a commercial bill facility for an amount of $NZ2.7 million which was applied in repayment of the off shore loans to the separate borrowers. The Bank required joint and several guarantees from the property owning entities and continued to hold the mortgages as security. A guarantee in the Bank's standard form was signed by Messrs Murray, Steele and Boyd who were members of the board of trustees of the Scottwood Charitable Trust and the only trustees of the R F Murray Family Trust. The seal of the charitable trust was not affixed. The document referred to the capacity of the signatories as trustees of the Scottwood Charitable Trust and the Robin Murray Family Trust. In due course John Stuart Limited defaulted under the terms of the commercial bill facility. Interest has continued to accrue. The appellant Bank is said to have served, or failed properly to serve, in June 1991 notices under s 92 of the Property Law Act 1952 of intention to exercise the powers of sale under the mortgages.

The extra-ordinary situation with which the Court has been presented arises in this way. In the separate proceedings commenced in August 1992 the respondents sought the assistance of the High Court by applications for interlocutory injunctions to restrain the Bank from selling the properties. In each proceeding the

original statement of claim alleged five causes of action raising what rightly have been referred to as technical points as to the enforceability of the security documents. But on the Thursday before the hearing of the injunction application fixed for Monday 30 November 1992 an amended statement of claim was filed alleging no fewer than 16 causes of action. On the same day the injunction application was supported by a further affidavit running to 25 pages directed to the new allegations (inter alia) of fraud, oppressiveness, breaches of the Fair Trading Act 1986, misrepresentations, breach of fiduciary duties and breaches of contract. The factual base for these allegations is to be found in one short sentence in para 49 on p 17 of the affidavit of Mr Murray one of the three trustees. It reads:

> However recently I have come to believe that the loan arranged by the defendant for the Trust was not an off shore loan or foreign currency loan.

A substantial part of the affidavit and a further affidavit from a Mr Connell, who does not qualify himself as an expert save to aver that he was from 1980 a foreign currency borrower who lost a substantial amount, describe enquiries made from which the deponents have ascertained information (on which they express opinions) on the practices of banks in conducting foreign exchange loan transactions. But they yield no information directly related to the particular loan transactions conducted by the particular bank to which the proceedings relate. Plainly this hearsay material was intended to provide the basis for an inference as to what the Bank of New Zealand did in these cases and to support the statement of belief of Mr Murray.

In essence the allegations were that the Bank had purported to make off shore loans in foreign currency to each of the trusts and to have debited them with foreign exchange losses though no sale of foreign currency to the trusts in fact occurred. It is alleged that the Bank either did not incur a debt in foreign currency

or, if it did, it was such that the Bank carried no foreign exchange exposure. The so called off shore loans therefore were fictional shams and the losses claimed by the Bank to have been suffered by the borrowers were not incurred. In that situation the refinancing was required on a false basis.

When the matter came before Doogue J in the High Court at Hamilton counsel for the Bank, we were told, protested at the late arrival of these new allegations and evidence. That is hardly surprising. However when asked by the Judge if he wanted an adjournment counsel declined and elected to proceed. So there was not before the Court any evidence as to what actually occurred in the particular transactions.

In his judgment delivered the same day Doogue J held that there were serious questions to be tried as to whether there were true foreign exchange transactions (after expressly admitting the hearsay evidence under rule 252), as to whether the form of guarantee said to have been given by Scottwood Charitable Trust was properly executed and as to whether the R F Murray Family Trust is a party to the guarantee. The Judge did not need to deal with the other allegations and expressly left them at large. He held that the balance of convenience favoured the plaintiffs and granted interim injunctions restraining the Bank from exercising its powers of sale until further order of the Court.

That was more than 16 months ago.

The duty of a plaintiff after obtaining an interim injunction diligently to prosecute the substantive proceeding notwithstanding, we were told that there remain unresolved disputes between the parties as to discovery and interrogatories and that a second amended statement of claim is to be filed. It is clear the respondents are not entirely blameless.

The Bank, restrained by the injunctions and claiming prejudice, has taken no specific steps to have the substantive proceedings advanced more quickly and, long after prospective sales of the properties have evaporated, has brought on this appeal for hearing over a year after it was filed. This Court is obliged to consider the appeal on the same basis as the Judge, without evidence of what actually occurred.

Without doubt the proper course was for the parties to go to trial on the substantive issues so that the real dispute might be resolved.

Mr Hassall applied in this court to have read additional affidavits sworn a week ago. Mr Chapman sought to reply to that evidence with two affidavits with extensive exhibits. Mr Hassall acknowledged that if his affidavits were admitted he could not resist the admission of the Bank's evidence by way of reply, yet he insisted he could not deal with it without an adjournment. He therefore withdrew his application to read his further affidavits. Mr Chapman then sought leave to have his affidavits admitted even though no longer by way of reply. This was refused as the evidence was not fresh having been available at the time of the hearing in the High Court when counsel declined an adjournment to obtain just such evidence.

To describe this state of affairs as unsatisfactory is considerably to understate the position. Of the Bank it must be said that if it was dissatisfied with the grant of the injunctions and wanted review on appeal it should have acted consistently with the urgent nature of the remedy. If it wanted the injunctions reviewed in the light of full evidence or because of lack of diligence of the plaintiff in the substantive proceedings it could have applied at any time in the High Court to rescind. It places this Court in a difficult position to have to consider such a stale appeal. The circumstances prevailing today may be very different from those presented to the High Court. For example the strength of an undertaking as to damages may be

significantly different. The allegations as to sale at under value no longer are relevant. The point that is unchanged however is that the respondents appear to be no better placed than they were 16 months ago to provide direct evidential support for the serious allegations they have made.

In the meantime the claimed indebtedness to the Bank, if it is found to exist, is escalating with penal interest rates to far beyond the value of the alleged securities and, it seems, the ability of the respondents to pay. The situation brings no credit to the parties or their advisers.

We were encouraged to proceed with the appeal by Mr Chapman's submission that he could readily demonstrate that the injunctions should not have been granted because there was, and is, on the evidence no serious question to be tried. That hinges first upon whether Mr Murray's statement of belief crosses that threshold.

Mr Hassall sought to draw inferences adverse to the Bank from the absence of evidence in response to the statement of belief and its supporting hearsay. But given the late emergence of the relevant allegations, the election of counsel for the Bank to proceed in the High Court rather than ask for an adjournment is equally consistent with a belief that the evidence against his client did not reach the required threshold. We prefer therefore to approach the matter on the evidence that is before the Court rather than draw inferences as to what is not and why. It must be considered in the light of the fact that much of the information as to the true nature of the Bank's role in the transactions is wholly within its knowledge. It should not be overlooked however that discovery necessary to formulate a claim is available before a proceeding is brought under rule 299. There was ample time for this to be sought between the service of the notices in June 1991 and the commencement of the proceedings in August 1992.

Although it is not suggested that the Judge proceeded on any wrong basis, it is appropriate to note that although this Court has steered away from any rigid formulation of principles the approach adopted in recent judgments and in particular ***Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*** [1985] 2 NZLR 129 and, in a mortgagee sale context, ***Pasquarella v National Australia Finance Ltd*** [1987] 1 NZLR 312 has been by reference to the major enquiries as to a serious question to be tried and the balance of convenience with the residual discretion by reference to the overall justice of the case. The requirement of a serious question to be tried is not as stringent as demonstrating a prima facie case. It does however call for the plaintiff to lay an evidential foundation upon which the Court can be satisfied that the allegations are of more substance than mere assertions and reasonably will call for determination after all necessary interlocutory procedures have been availed of.

Mr Murray's stated belief that the initial bank loans, although referred to as off shore loans were not foreign currency loans appears to rest in part on the results of the enquiries made by Mr Connell. Those enquiries were wide ranging and the results are expressed as follows:

> From the above personnel I have sought and received confirmation that Banks operating in New Zealand during the period 1980 to 1992 have -
>
> (a) Arranged bulk facilities off shore.
>
> (b) Brought the bulk facilities into New Zealand fully swapped into New Zealand dollars.
>
> (c) Used counter parties to achieve the swap of the bulk facility into New Zealand dollars.
>
> (d) Utilised the "swaps" technique setting the exchange rate for the period of the loan.

(e) Utilised the swaps technique that incorporated taking forward positions for-

i) The currency exchange swap.

ii) The interest rate swap.

iii) The interest roll over period.

(f) Utilised the swaps technique so that on completion of the loan period when the loan was repaid by the borrower the technique incorporated a reversal of the whole draw down procedure. The net effect of the technique was that the swap transformed the facility to create a domestic fully converted domestic loan facility. In one swap transaction the facility was perfectly hedged as to the foreign currency exposure possibly up to the full term of the loan and interest payments for the period of the roll over and possibly for the period of the loan term.

As an alternative technique I have ascertained that in the market place that Government Banks were able to obtain funds from Banks in Japan with the lending Bank in Japan taking the responsibility for the exchange risk. The borrowing Bank in New Zealand would not require the use of counter parties to exchange by medium of Swaps the bulk facility into New Zealand domestic dollars. It is obvious that no hedging of the exchange risk was necessary.

What banks operating in New Zealand have done or were able to do throws little light on what the Bank of New Zealand did in particular transactions. There is not excluded the type of transaction that those we are concerned with on their face appear to have been.

Mr Murray relied upon discussions he is said to have had with former officers of other banks, bank auditors with different banks and dealers. Few names are given and the information retailed is generalised. The strongest support for his stated belief is perhaps in para 52 of his affidavit of 26 November 1992 in which he states:

Mr Connell and I had another meeting with a former Director of the Defendant and two senior former executives of the Defendant. All

> agreed that the Defendant never had any risk or exposure to adverse foreign currency movements. They explained that by the use of swaps and other techniques the Bank was able to avoid such exposure. The Bank simply had a position in the market (often swaps transactions, they explained, do not involve the transfer of principal, but involve only a notional entry such as in the case of single currency swaps). The customers of the Bank seldom, if ever, had an off shore account. Those that did were normally major institutions. These three former members of the Defendant expressed the belief that the Defendant and other Banks similarly involved should address the issue of their entitlement to claim for the supposed off shore loan losses and settle up claims on the basis that there never was a foreign exchange risk to the Bank and such losses had not in fact been incurred.

Again the persons are not named. No reason is given as to why affidavits were not obtained from them. That the defendant bank had no exposure to adverse foreign currency movements would be so even if funds were borrowed in foreign currency so long as there was in place a further loan from the Bank also in foreign currency. The Bank's risk then would only be as to the borrowers' ability to repay. The further comments are as to the alleged consequences of the use of swaps and other techniques without providing any indication as to whether those techniques were used exclusively or in connection with the transactions in issue.

Even accepting the exercise of the Judge's discretion to admit the hearsay evidence, with which we would not interfere on appeal, the totality of the available evidence is no more than speculation as to the true nature of the transactions. Mr Murray and his associated enterprises were parties to the transactions and from August 1986 had the assistance of an experienced specialist foreign exchange management company. They were in a position to know or ascertain the true nature of the transactions which lay behind the exposure they believed they were accepting. Mere speculation emerging only a few days before the hearing in November 1992 can carry little weight. We find it unconvincing as evidence that the Bank, and by inference most other banks in the country, in respect of these and presumably many other foreign currency loan transactions were perpetrating fraud on their customers.

When analysed much of the evidence reporting discussions with those knowledgeable in the banking industry is extremely vague and to a considerable extent is quite consistent with conventional foreign exchange loan transactions in which by borrowing and lending on in foreign currencies banks themselves are unexposed to currency fluctuations.

In the present state of the evidence we do not have copies of the contracts governing the loans so it is not possible to determine precisely what the lenders and borrowers agreed to. There is no basis therefore for determining whether the borrowers contracted for something not provided.

Accordingly, on the evidence before us, we are not satisfied that there are demonstrated arguable cases that the Bank engaged only in notional foreign currency transactions in these cases. We are not finding that on further evidence a different result would not be open. That will be a matter to be determined in the substantive proceedings.

The stated belief that they were not genuine foreign currency transactions was the cornerstone of many of the pleaded causes of action. That includes those under the Fair Trading Act, the Contractual Remedies Act, breach of fiduciary duty and unconscionability. It is necessary however to consider whether in respect of any of the other causes of action not resting on that belief the evidence demonstrates a serious question to be tried. It is convenient to deal first with those found by the Judge to be seriously arguable.

Each of the respondents claims that the manner in which the form of guarantee was executed means it is not binding and, if that is right it must follow that since the mortgages were repaid out of the proceeds of the 1987 refinancing nothing remains owing under them. In the case of the Scottwood Charitable Trust,

it is incorporated under the Charitable Trusts Act 1957. It was contended that the guarantee was in the form of a deed and required to be executed under seal so that the signatures of the three members of the board of trustees were insufficient. Reliance was placed on ss 13 and 19 of the Act.

The guarantee does not on its face purport to be a deed. There is no requirement of law or of the rules of the trust that a guarantee must be in the form of a deed. It is where there is such a requirement that s 19(1)(a) referred to by the Judge applies. Section 13 merely states that every board shall have a seal but that does not mean that the trust can be bound only by executing under seal. Indeed s 19(1)(b) reads:

> Contracts on behalf of a Board may be made as follows:
>
> (b) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the Board in writing signed by any person acting under its authority, express or implied.

We cannot accept there is any arguable case for the Scottwood Charitable Trust on this point.

The issue relating to the execution by the other respondent is more complicated. On a sheet inserted in the document the capacities in which the signatories were said to enter into the guarantee were specified as Mr Murray "personally and as trustee of the Robin Murray Family Trust (which trust was settled by deed dated the 7th day of May 1978)", Mr Steele "as trustee of the Robin Murray Family Trust" (with no deed or date referred to) and Mr Boyd in the same terms as for Mr Steele.

It has emerged that the Robin Murray Family Trust deed is dated 31 May 1978. There is a separate family trust referred to as the R F Murray Family Trust which was settled by deed dated 19 July 1977. The trustees were the same. It is the trustees of this second trust that own the Golden Mile Tavern, were parties to the off shore loan from the Bank to finance its purchase and executed the mortgage. It was in that capacity that they were required to enter into the guarantee on the refinancing in 1987. Mr Boyd in his affidavit has said so.

The matter might be approached in various ways such as by resort to mistake or rectification, but the most straight forward would seem to be by way of construction of the document. There is no Robin Murray Family Trust settled by deed dated 7 May 1978 as the document states in the case of Mr Murray and implies in the case of the other two trustees. It is necessary then, properly to resolve the ambiguity, to have regard to the facts against which the document was signed. We have no doubt that the inevitable result will be that the trustees in their capacities as owners of the mortgaged property will be held to be bound to the guarantee. The technical argument to the contrary, on analysis, is untenable.

On the views we have reached as to the execution of the guarantee no issue under the Contracts Enforcement Act arises.

A related matter was raised by Doogue J in his judgment though it was not a matter pleaded or argued before him. Mr Hassall supported the judgment on this point. The relevant passage reads:

> There is, in my view, a question which must arise in these proceedings, despite the language of the particular trust deed, as to whether the charitable trust had a right to enter into the form of guarantee which the defendant relies upon and under which the defendant seeks to have the charitable trust meet losses of approximately $3 million in respect of advances not only to the

> charitable trust but to other entities when the extent of the borrowing of the charitable trust in 1985 was $600,000 and when, despite repayments of principal of something of the order of $90,000 by 1987, $675,000 or thereabouts was said by the defendant to be then owing by the trust.

As is acknowledged by the Judge, the powers in the trust deed are clearly quite wide enough to cover the transaction. Mr Hassall acknowledged that there really is no evidence that the transaction was not perceived by the Board generally as in the interests of the trust. Indeed Mr Boyd in his affidavit deposed to the contrary. On this point, with respect to the Judge, we do not find a sufficient evidential foundation on which to find this issue should support an interim injunction.

One of the causes of action in each proceeding seeks relief from the terms of the guarantee and mortgage on the ground of oppressiveness under the Credit Contracts Act 1981. This calls for separate consideration only insofar as it does not rest on the alleged fictional nature of the foreign currency loans. If those loans were genuine and the losses truly incurred there can be no oppressiveness in the Bank exercising its rights under the loan documents requiring the indebtedness to be brought on shore and to be rationalised in the manner of the refinancing transaction. We can see no arguable outcome under the Credit Contracts Act which would see the Bank with no indebtedness secured by the mortgages and without a right to enforce its security over the tavern properties.

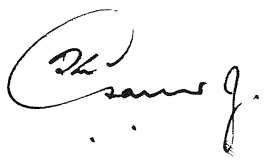
There also are allegations of negligence in contract and in tort directed to the management by the Bank of the foreign currency loans over the period it was contracted in that role. These allegations too suffer from lack of evidential support. The only evidence is that over the period the exposure was managed by Marshall Corporate Finance Ltd the overall cost of the loans to the borrowers was very much less than over the earlier period during which the Bank was responsible. That is not

evidence of negligence by the Bank. Without more, and presently there is no more, it cannot be said there is a serious question of negligence.

In each proceeding there are allegations of lack of service of the notices of demand and the Property Law Act notices. There is an allegation of insufficiency of one of the notices in the Scottwood Trust proceeding. The Judge made no finding on these allegations and nor do we. Clearly it is open to the Bank to re-serve any notices and, in view of the lapse of time, that would be appropriate. These grounds do not by themselves now justify injunctions against the exercise of the powers of sale. The same applies to the allegations of imminent breach by the Bank of its duty to sell at market value. There is no current evidence of any likelihood of that. In any event breach of such duty would not go to the right to exercise the powers of sale and would be adequately remedied in damages.

Accordingly in spite of the extensive and helpful submissions by Mr Hassall we are satisfied that the evidence available to us does not justify findings of serious questions to be tried.

The appeal is allowed. The injunctions are discharged. The appellant is entitled to costs which we fix at $7,000 together with disbursements including the costs of preparing the cases on appeal as approved by the Registrar.



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